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**A SUPPLIER REVIEW SYSTEM AS PART OF THE
GOVERNMENT PROCUREMENT SYSTEM FOR CHINA**

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**Thesis submitted to the University of Nottingham
for the degree of Doctor of Philosophy**

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Abstract:

A supplier review system can play a significant role in ensuring the enforcement of procurement rules through its deterrent and redress effects. This thesis aims at providing a critical analysis of the current Chinese supplier review system and identifying and evaluating options for improvement of the Chinese system, based on the analysis of provisions on supplier review contained in the UNCITRAL Model Law on Procurement, the GPA, the EU Remedies Directives and APEC Non-Binding Principles on Government Procurement.

This thesis first discusses key characteristics of national supplier review system, concerning forum for review, standing and procedures, and the remedies, provided in the Model Law and the other three international instruments; and then examines these main aspects of the current Chinese supplier review system. After critically analysing the current Chinese system, it has been found there are a number of important deficiencies in this system, in particular, there is uncertainty over the forum for review, the whole dispute resolution process can be quite lengthy and the available remedies are ineffective. These problems have hampered the effectiveness of the system and made it inconsistent with the international standards which may soon apply or currently actually apply to China, namely the GPA and APEC NBPs.

To make the Chinese supplier review system truly effective and also comply with the existing/forthcoming international obligations, the author recommend reforms that aim to be effective yet capable of realistic achievement and also workable in the particular context of Chinese circumstances and the existing position in China. These include providing a unified supplier review system to all complaints regarding government procurement process, improving the current sequential tiered review system, revising the current provisions on standing and the time limit for initiation, offering clear rules on remedies and deleting unreasonable sanctions on the complaining supplier.

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List of Contents

Chapter 1 Introduction	1
1. An introduction to supplier review system	1
2. Research questions.....	6
3. Methodology.....	6
4. Outline of the thesis.....	8
Chapter 2 Supplier review in government procurement	11
1. Introduction.....	11
2. Advantages and disadvantages of a supplier review system in achieving the objectives of government procurement policy.....	13
2.1 Advantages of a supplier review system.....	13
2.1.1 <i>The value of supplier review in achieving enforcement</i>	13
2.1.2 <i>Advantages of supplier review as a means of ensuring suppliers' confidence in government procurement</i>	14
2.2 Problems that may affect or result from supplier review.....	16
2.2.1 <i>A reluctance to use legal remedies</i>	16
2.2.2 <i>Overdeterrence</i>	20
2.2.3 <i>Inappropriate compromise</i>	20
2.2.4 <i>Disruption to the procurement process</i>	22
2.2.5 <i>The cost of damages</i>	22
2.3 Taking account of the aforesaid problems in designing a supplier review system.....	23
3. Other methods for enforcing government procurement rules.....	25
3.1 Criminal, administrative and disciplinary sanctions.....	25
3.1.1 <i>The reasons why sanctions may be considered necessary for implementing procurement rules</i>	25
3.1.2 <i>Sanctions and their application</i>	26
3.1.3 <i>The role of sanctions</i>	26
3.1.4 <i>The limitations of this enforcement mechanism</i>	26
3.2 Review by external enforcement authorities.....	27

3.2.1 <i>The reasons for empowering external authorities to monitor procurement activities</i>	27
3.2.2 <i>Functions of external enforcement authorities</i>	28
3.2.3 <i>Advantages of enforcing procurement rules by this mechanism</i>	29
3.2.4 <i>Disadvantages of enforcing procurement rules by this mechanism</i>	30
3.3 Intergovernmental dispute-settlement procedures.....	30
3.3.1 <i>The main features of intergovernmental dispute-settlement Procedures</i>	31
3.3.2 <i>The shortcomings of using this mechanism to enforce procurement rules</i> ...32	
4. Conclusions.....	34
Chapter 3 Models for designing a supplier review system	36
1. Introduction.....	36
2. UNCITRAL Model Law on Procurement.....	36
2.1 Overview of the Model Law.....	36
2.1.1 <i>Nature of the Model Law</i>	37
2.1.2 <i>Main Characteristics of the Model Law – flexibility and internationalism</i> ...37	
2.1.3 <i>Limitations of the Model Law</i>	40
2.2 Reasons for studying the Model Law and choosing it as the starting point.....	42
2.3 Review under the Model Law.....	44
2.3.1 <i>Flexibility in the area of review</i>	44
2.3.2 <i>Internationalism in the area of review</i>	46
2.3.3 <i>Limitations in the area of review</i>	47
3. APEC Non-Binding Principles on Government Procurement (APEC NBPs).....	49
3.1 Introduction to APEC NBPs.....	49
3.2 Reasons for studying APEC NBPs.....	50
3.3 APEC NBPs on supplier review.....	50
4. The EU regime.....	51
4.1 Overview of the EU procurement regime.....	51
4.2 Reasons for studying the EU regime.....	53
4.3 Supplier review system under the EU regime.....	54
5. The GPA of the WTO.....	56
5.1 Introduction to the GPA.....	56

5.2 Reasons for studying the GPA.....	57
5.3 Supplier review system under the GPA.....	58
Chapter 4 Key characteristics of national supplier review system (I)	
-- Forum for review.....	61
1. Introduction.....	61
2. Forum and avenues for review.....	62
2.1 Procuring entity review.....	64
2.1.1 Provisions on procuring entity review in each model.....	64
2.1.2 Assessment of procuring entity review as a forum for review.....	67
2.2 Administrative review.....	69
2.2.1 Provisions on administrative review in each model.....	69
2.2.2 Assessment of administrative review as a forum for review.....	78
2.3 Judicial review.....	82
2.3.1 Provisions on judicial review in each model.....	82
2.3.2 Assessment of judicial review as a forum for review.....	85
2.4 Further comments	86
3. The extent of review powers.....	88
4. Legal effect of decisions.....	91
Chapter 5 Key characteristics of national supplier review system (II)	
-- Standing and procedures.....	95
1. Introduction.....	95
2. Standing.....	95
2.1 Standing to bring proceedings.....	95
2.1.1 Position of main contractors.....	97
2.1.2 Position of subcontractors.....	100
2.1.3 Position of others.....	101
2.1.4 Further comments.....	102
2.2 Restrictions on the right to review.....	103
3. Procedural arrangements – time limits and publication of the decision.....	106
3.1 Time limits.....	106
3.1.1 Suggestions of the Model Law.....	107

3.1.2 Provisions of the EU Remedies Directives.....	109
3.1.3 Provisions of the GPA.....	110
3.1.4 Provisions of APEC NBPs.....	111
3.1.5 Further comments.....	112
3.2 Publication of the decision.....	114
Chapter 6 Key characteristics of national supplier review system (III) –Remedies..	116
1. Introduction.....	116
2. An overview of remedies stipulated in each model.....	116
2.1 The Model Law.....	116
2.2 The EU regime.....	118
2.3 The GPA.....	119
2.4 APEC NBPs.....	120
3. Suspension.....	121
3.1 The importance of suspension and conditions for suspension.....	121
3.2 The Model Law.....	124
3.3 The EU regime.....	126
3.4 The GPA.....	130
3.5 APEC NBPs.....	132
3.6 Further comments.....	132
4. Setting aside unlawful decisions.....	134
4.1 The importance of annulment and issues on the annulment of concluded contracts.....	134
4.2 The Model Law.....	135
4.3 The EU regime.....	135
4.4 The GPA.....	139
4.5 APEC Rules.....	139
4.6 Further comments.....	140
5. Damages.....	141
5.1 The role of damages and two key issues related to it.....	141
5.2 The Model Law.....	144
5.3 The EU regime.....	145
5.4 The GPA.....	148

5.5 APEC NBPs.....	149
5.6 Further comments.....	150
Chapter 7 Chinese government procurement regulation	152
1. Introduction.....	152
2. The development of government procurement regulations.....	153
2.1 Stage I: Development of a tendering system and enactment of the Tendering Law.....	153
2.2 Stage II: Development of the government procurement system and enactment of Government Procurement Law.....	156
2.3 Stage III: Enactment of implementing regulations after the entry-into-force of the GPL.....	161
3. Main characteristics of China’s legal framework on government procurement.....	165
3.1 A dual system of government procurement law.....	165
3.2 The existence of numerous supplementary regulations.....	166
3.3 The enforcement of rules heavily relies on administrative measures.....	166
3.4 The lack of a unified supervisory body.....	167
3.5 The existence of many overlaps ambiguities and clashes in regulations.....	169
4. Existing rules regulating supplier review.....	170
4.1 Rules on handling complaints arising from government procurement of works	171
4.2 Rules on handling complaints arising from government procurement of goods and services.....	173
4.2.1 Rules on handling complaints arising from government procurement of <i>general goods and services</i>	173
4.2.2 Rules on handling complaints arising from government procurement of <i>works-related goods and services</i>	174
4.2.3 Rules on handling complaints arising from government procurement of <i>mechanical and electrical goods</i>	176
4.3 Summary.....	177
Chapter 8 The current Chinese supplier review system (I) - forum for review.....	180
1. Introduction.....	180
2. Forum and avenue for review.....	181
2.1 Procuring entity review.....	182

2.2 Administrative review.....	183
2.2.1 <i>The first instance administrative review</i>	184
2.2.2 <i>Administrative reconsideration</i>	186
2.3 Judicial review	188
2.3.1 <i>Judicial review: administrative litigation</i>	189
2.3.2 <i>Judicial review: civil litigation</i>	190
2.4 Summary	192
3. The extent of review powers.....	193
3.1 Powers possessed by administrative review bodies as the appeal body.....	194
3.1.1 <i>Powers possessed by the first instance administrative review body</i>	194
3.1.2 <i>Powers possessed by the administrative reconsideration organ</i>	194
3.2. Powers possessed by the courts in administrative litigation as the appeal body....	196
4. Legal effect of decisions.....	198
4.1 Legal effect of the first instance administrative review body’s decisions.....	198
4.2 Legal effect of the administrative reconsideration organ’s decisions.....	199
4.3 Legal effect of decisions of the courts.....	200
Chapter 9 The current Chinese supplier review system (II)	
- Standing and Procedures	203
1. Introduction.....	203
2. Standing.....	203
2.1 The issue of standing in administrative procedures.....	204
2.1.1 <i>Position of main contractors</i>	205
2.1.2 <i>Positions of subcontractors</i>	208
2.1.3 <i>Position of others</i>	209
2.2 The issue of standing in civil procedures.....	211
2.3 Further discussion.....	212
3. Procedural arrangements.....	212
3.1 Time limits.....	212
3.1.1 <i>Time limits for procuring entity review</i>	214
3.1.2 <i>Time limits for administrative review</i>	215
3.1.3 <i>Time limits for judicial review</i>	217

3.2 Publication of the decision.....	220
3.2.1 <i>Publication of the administrative review bodies' decisions</i>	220
3.2.2 <i>Publication of judicial review bodies' decisions</i>	222
Chapter 10 The current Chinese supplier review system (III) – remedies	223
1. Introduction.....	223
2. An overview of remedies provided in every review stage.....	223
2.1 Remedies available in procuring entity review.....	223
2.2 Remedies available in administrative review – the first instance administrative review and administrative reconsideration.....	224
2.2.1 <i>Remedies available in the first instance administrative review</i>	224
2.2.2 <i>Remedies available in administrative reconsideration</i>	227
2.3 Remedies available in judicial review.....	229
2.3.1 <i>Remedies available in administrative litigation</i>	229
2.3.2 <i>Remedies available in civil litigation</i>	232
3. Suspension.....	232
4. Setting aside unlawful decisions.....	235
4.1 Setting aside unlawful decision under the GPL and the <i>MOF Review Measures</i> ...236	
4.2 Setting aside unlawful decision under the TL.....	238
5. Damages.....	239
5.1 Provisions on damages in the first instance administrative review.....	240
5.2 Provisions on damages in civil litigation.....	242
Chapter 11 Critical analysis of the current Chinese supplier review system	244
1. Introduction.....	244
2. Uncertainty regarding the application of legal rules on supplier review.....	244
3. Problems related to forum and avenue for review.....	251
3.1 Inconsistency and uncertainty on the nature of procuring entity review and ineffectiveness of compulsory procuring entity review.....	251
3.2 Lack of independence of administrative and judicial review bodies.....	253
3.2.1 <i>Lack of independence: administrative review bodies</i>	253
3.2.2 <i>Lack of independence: judicial review bodies</i>	255
3.2.3 <i>Further analysis</i>	259

3.3 Limitation of the power of administrative reconsideration organ and administrative division of the court.....	260
3.4 Ambiguity in seeking civil remedies.....	263
4. Problems related to standing and procedures.....	264
4.1 Problems related to standing – inconsistency and narrow scope of the complainants.....	264
4.2 Problems related to procedures –time limits and publication of review decisions..	265
4.2.1 <i>Problems related to time limits</i>	265
4.2.2 <i>Problems related to publication of review decisions</i>	268
5. Problems related to remedies.....	270
5.1 Problems on suspension.....	270
5.2 Problems on setting aside remedy.....	272
5.3 Problems on damages.....	274
6. Overly-strict sanctions on the complaining supplier.....	275
7. Conclusion.....	278
Chapter 12 Proposals for improving the current Chinese supplier review system...	279
1. Introduction.....	279
2. Applying unified rules on supplier review to all government procurement disputes....	280
2.1 To apply unified rules on supplier review to all government procurement disputes by unifying the two primary laws.....	281
2.2 To apply the GPL rules on supplier review to all government procurement disputes.	283
3. Reforming the current forum for review.....	286
3.1 Reforming procuring entity review – changing it from compulsory to optional.....	290
3.2 Two options for reforming administrative review – not providing it as the prerequisite of seeking judicial review and unifying the administrative review body.....	290
3.2.1 <i>Not providing administrative review as the prerequisite of judicial review</i> ...	290
3.2.2 <i>Unifying the administrative review body</i>	291
3.3 Reforming judicial review – empowering the administrative division of the court to directly handle suppliers’ complaint against the procuring entity.....	299
3.3.1 <i>Options on empowering the administrative division of the court to handle the disputes between suppliers and the procuring entities</i>	300
3.3.2 <i>Benefits of settling suppliers’ complaints through administrative litigation</i>	303

4. Revising provisions on standing and the time limit for raising complaints.....	305
4.1 Giving standing not only to actual suppliers but also potential suppliers.....	305
4.2 Changing the time limit for raising complaints.....	306
5. Providing more detailed and clear rules on the grant of remedies.....	307
5.1 Suggestions for improving the suspension remedy	308
5.1.1A <i>semi-automatic suspension and conditions for use</i>	308
5.1.2 <i>Benefits and problems of adopting a semi-automatic suspension</i>	311
5.2 Suggestions for improving the remedy of setting aside.....	312
5.3 Suggestions for improving the damages remedy.....	315
5.3.1 <i>Suggestions on the extent of compensation</i>	315
5.3.2 <i>Suggestions on the conditions for awarding damages</i>	318
6 Deleting unreasonable sanctions on the complaining supplier.....	319
Chapter 13 Conclusions	321

Bibliography

Table of Cases

Chapter I Introduction

The area covered in this research project is that of the supplier review system in Chinese government procurement law. In this first chapter, a brief introduction to the concept of a supplier review system in the field of government procurement law is first presented. Then, research questions of this thesis are highlighted, followed by an explanation of the methodology and an outline of the thesis.

1. An introduction to supplier review system

In most countries of this world, government procurement¹ plays a substantial role in the national economies, as governments and their subsidiary agencies are significant purchasers of various goods, works and services and their purchases account for a considerable percentage of many States' Gross Domestic Product (GDP).² Because of its importance, in order to ensure the proper operation of government procurement, many States have promulgated government procurement laws or regulations to regulate government procurement activities, under which government procurement is usually required to be conducted by open tendering³ or other appropriate procurement methods⁴ and follow the relevant procedural rules.

At the same time, the huge size of government procurement markets also represents huge

¹ Government procurement, also known as public procurement, "refers to the acquisition by public bodies, such as government departments and municipalities, of the various goods and services they need for their activities." See Arrowsmith, S. Linarelli, J. and Wallace, D., *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000) p1.

² See OECD report: *The Size of Government Procurement Markets*, 11 February 2002, available at <http://www.oecd.org/dataoecd/34/14/1845927.pdf> According to this report, the main estimates of the size of government procurement markets, expressed as a percentage of 1998 GDP data and in Billions of USD are: for 28 OECD countries as a whole, the ratio of total procurement (consumption and investment expenditure) for all levels of government is estimated at 19.96% or USD 4733 billion; for 106 non-OECD countries, it is estimated at 14.48% or USD 816 billion. See pp7-8.

³ It is usually a preferred procurement method used in most cases. See further Arrowsmith, *et al*, fn.1 above, ch.8.

⁴ Other procurement methods mainly include selective tendering, two-stage tendering, request for proposal, competitive negotiation, request for quotation and single source procurement. See *ibid*.

opportunities for international trade. Government purchasing would play a significant role in international trade if foreign suppliers could access new national procurement markets.⁵ Therefore, some international organisations, notably the World Trade Organisation (WTO), the European Union (EU), the United Nations Commission on International Trade Law (UNCITRAL), Asia-Pacific Economic Cooperation (APEC), North American Free Trade Area (NAFTA), Common Market of the Southern Cone (MERCOSOR) and Common Market for Eastern and South Africa (COMESA), have adopted international instruments on government procurement. They aim at encouraging the opening up of procurement market to foreign suppliers to promote international trade by regulating government procurement activities at international level.⁶

For systems that rely on legal rules to achieve their objectives, to clearly define, in the procurement legislation, the objectives and principles of government procurement and clarify procurement methods and their conditions for use and the corresponding procedural rules are often considered to be only basic requirements for an effective government procurement system and its healthy development. In addition, an effective enforcement and remedies mechanism is often considered to be needed to ensure those procurement rules are strictly followed, since violation may occur during procurement process in practice, even if appropriate rules have been put in place. For example, a procuring entity may choose a

⁵ According to the OECD report mentioned in fn. 2 above, the value of potentially contestable government procurement markets worldwide is estimated at USD 2083 billion, which is equivalent to 7.1% of world GDP in 1998. However, in many States, governments tend to procure goods or services from domestic suppliers to support the development of the domestic industry or increase local employment, etc.. These domestic preference policies are regarded as a significant barrier to international trade because of their discriminatory nature. See Reich, A., *International Public Procurement Law: The Evolution of International Regime on Public Purchasing* (London: Kluwer Law International, 1999) Ch.1.

⁶ The instruments adopted by these organisations include the WTO Agreement on Government Procurement (GPA), the EU Public Procurement Directives, UNCITRAL Model Law on Procurement of Goods, Construction and Services, APEC Non-Binding Principles on Government Procurement, North American Free Trade Agreement (Chapter 10 deals with procurement), the MERCOSUR Public Procurement Protocol and The COMESA Directives on Public Procurement. Details of the first four instruments and the reasons for studying them in this research will be explained in 1.2.

less-competitive procurement method rather than open tendering required by law to favor certain suppliers; or it may exclude certain suppliers by not publishing a required procurement notice or merely publishing it in local media when national advertising is required. These can prejudice some suppliers' interests. Furthermore, such infringements are detrimental to the objectives of government procurement, such as value for money or fair treatment for firms.⁷ If there is no an enforcement and remedies mechanism available, the procuring entity's wrongful decisions cannot be reviewed and corrected. The existence of an enforcement and remedies system, on the one hand, can provide an important deterrent to breaches of the rules; on the other hand, it can offer remedies to the affected suppliers to protect the public interest and possibly to protect their own interests once violation of rules occurs.

To enforce government procurement rules, one way is to provide legal remedies for those affected suppliers. To grant an external government agency, such as an audit department, authority to review the procuring entity's procurement decisions may be another useful enforcement mechanism. Also, it may be helpful for enforcing procurement rules to supervise and regulate individual procurement officers' behaviors by imposing criminal, administrative and disciplinary sanctions on them. In addition, an intergovernmental dispute-settlement procedure may be available in international agreements on government procurement to settle disputes concerning the enforcement of the relevant rules between Member States.⁸ This thesis will focus on studying the first method – a supplier review system⁹ - rather than the

⁷ The primary objective of national government procurement law is often to seek to achieve value for money; other objectives may concern efficiency in the procurement process, competition and fair treatment, probity and accountability, and support of industry, social and environmental policies. These objectives are interrelated. However, unlike national legislators, international organisations pay more attention on the opening up government procurement markets by requiring procuring entities covered to conduct procurement without discrimination to foreign firms. See Arrowsmith, *et al*, fn.1 above, chapter 2; Neumayr, F., "Value for money v. equal treatment: the relationship between the seemingly overriding national rationale for regulating public procurement and the fundamental E.C. principle of equal treatment" (2002) 4 *P.P.L.R.* p215; Arrowsmith, S., "Public procurement as an instrument of policy and the impact of market liberalization" (1995) 111(April) *L.Q.R.* p235.

⁸ See Arrowsmith, *et al*, fn.1 above, p750. These mechanisms will be further discussed in Chapter 2.

⁹ For further explanation on the term "supplier review system", see chapter 2.

other three mechanisms mentioned above.

Among the above enforcement mechanisms, the supplier review system can be an important and effective way to ensure compliance with the rules, as suppliers are in the best position to identify breaches and they have incentives to make a complaint for review and ask for remedies to protect their interests. The risk of being challenged by suppliers can provide a deterrent to breaches of the rules; and remedies for suppliers can ensure suppliers keep their confidence in participating in government procurement. Ultimately, it would be helpful for the achievement of the objectives of procurement and promote the development of government procurement. Thus, provisions on the supplier review system are an important component part of some government procurement legislation and have been included in many States' procurement laws and international instruments on government procurement, such as the GPA of the WTO. This is also the case in China.

In China, government procurement is playing an increasingly important role in the country's economic development, although there was no government procurement practices and regulation until 1980s.¹⁰ Since the launching of the pilot project of government procurement in 1996, government procurement has been widely accepted and used in practice in China and its market size has grown rapidly in the last decade.¹¹ In order to regulate government procurement activities and promote the healthy development of government procurement, the Chinese government has promulgated the *Tendering Law* (TL), the

¹⁰ See further Wang, Ping, "China's Evolving Legal Framework on Public Procurement" (2004) 6 *P.P.L.R.* p285; Kong, Qingjiang, "Chinese Law and Practice on Government Procurement in the Context of China's WTO Accession" (2002) 11 *P.P.L.R.* p201; Tian, Jianbin, "Public Procurement in China: The Way Forward" (2001) 10 *P.P.L.R.* p207. This issue will be further discussed in Chapter 7.

¹¹ OECD estimated that China's final consumption expenditure of government service already accounted for 12.84% of GDP in 1998. See OECD report, fn.2 above, p43. Statistics provided by the Chinese government show that total expenditure of government procurement has increased from only 3.1 billion Yuan in 1998 to 368.16 billion Yuan in 2006; the scale of government procurement accounts for 14.9% of annual fiscal expenditure and 1.8% of China's GDP in 2006. See Treasury Department of the Ministry of Finance, "Statistical Analysis of National Government Procurement Information of 2006" (2007) 9 *China Government Procurement*, p72. As pointed out by Wang, it did not fully reflect the real market size in China, which should be larger. See Wang, fn.10 above, p285.

Government Procurement Law (GPL) and a set of implementing regulations in recent years.

The TL, enacted on 30 August 1999 and came into force on 1 January 2000, is the first Chinese law concerning government procurement. However, this law only regulates tender activities and does not deal with other issues usually contained in modern government procurement legislation.¹² Furthermore, this law applies to “tender activities in the territory of the People’s Republic of China”, which means, unlike those developed western procurement laws, it also applies to private tendering when this is undertaken.¹³ Also, it fails to provide for a challenge system for the aggrieved suppliers.¹⁴

On 29 June 2002 the GPL was enacted, which entered into effect on 1 January 2003. This law “marked another milestone for the development of Chinese public procurement regime,”¹⁵ as it provides a comprehensive regulatory framework for government procurement as explained further in chapter 7. One of its contributions is its new challenge system, under which aggrieved suppliers can file a complaint and seek redress once violation of rules occurs. It is a big step forward in respect of the establishment of an enforcement and remedies mechanism in the field of government procurement, although it still lacks detailed procedural rules on supplier review.

In June and August 2004, the National Development and Reform Committee (NDRC) together with other six central government departments and the Ministry of Finance (MOF) respectively adopted the supplementing regulation on the supplier review,¹⁶ which provide

¹² Modern government procurement law usually provides several procurement methods, including not only tendering procedures but also other alternative methods, such as competitive negotiation or single-source procurement, to suit the needs of procurement in various circumstances.

¹³ See the TL Article 2. Western procurement rules mainly regulate the procurement of public bodies of a non-commercial nature, for example, procurement of a government department. See Arrowsmith, S., “The Entity Coverage of the EC Procurement Directives and UK regulations: A Review” (2004) 2 *P.P.L.R.* p59.

¹⁴ See further Tian, Jianbin., “The New Bidding Law of the People’s Republic of China” (2000) 1 *P.P.L.R.* pCS5; Wang, fn.10 above. Detailed analysis of the TL will be made in chapter 7.

¹⁵ See Wang, fn.10 above, p298. See further Wang, Ping & Cao, Fuguo, “The new Chinese Government Procurement Law” (2002) 6 *P.P.L.R.* pNA133.

¹⁶ The NDRC together with other six central government departments issued the *Measures on the Handling of Complaints on Tendering Proceedings in Construction Projects* and the MOF adopted the *Measures on the Handling Complaints of the Government Procurement Suppliers*, as elaborated in Chapter 7.

more detailed rules concerning the initiation of a complaint and its examination, dealing with complaints and decision-making and legal liabilities.

2. Research questions

The objective of this thesis is to provide a critical analysis of the current Chinese supplier review system, informed by an analysis of the approach of other systems to this question, and to identify and evaluate options for improvement of the Chinese system.

To examine the current Chinese supplier review system, it is proper to first identify different options and possibilities that are widely recognised as setting a variety of possible standards for establishing review regimes in government procurement, and then to assess the advantages and disadvantages of these various approaches. Thus, provisions on the supplier review system contained in the GPA of the WTO, the APEC Non-Binding Principles on Government Procurement (APEC NBPs), the EU Remedies Directives and the UNCITRAL Model Law on Procurement will be studied in this thesis because of their importance and influences in the field of government procurement and/or – in the case of APEC NBPs and the GPA - their current or potential relevance to China directly. The reasons for choosing these particular regimes are explained in detail in chapter 3.

3. Methodology

The method that will be used to do this research is mainly doctrinal legal analysis, based on reviewing different sources of law on review and on China, the relevant international documents and literature on all of them.

Different sources of law, including statutes, treaties and case law, will be used while discussing the GPA, the EU regime and the current Chinese rules to this issue. This is because it is essential for understanding the current Chinese rules on supplier review and the relevant

provisions provided in other regimes to introduce and analyse the text of relevant legislation. Also, it is necessary to examine the text of the provisions on supplier review contained in the primary UNCITRAL and APEC documents for understanding their options on the issue of supplier review. In addition, literature concerning the supplier review system in different regime, will be used to help comparing and analysing the virtues and defects of different options to this issue, and to construct a critique of the current Chinese supplier review system.

One point worth noting here is that the present research will not undertake any empirical work based on qualitative and/or quantitative research methods. However, it will use the existing empirical information related to this research, which is relatively limited. This mainly includes statistics from international organisations, such as the OECD and the WTO, and qualitative academic research on the use and effect of supplier review.¹⁷

In this thesis, it is assumed that an effective supplier review system can make an important contribution to the development of government procurement law in China. This is because many advantages can plausibly be identified in this system, as further discussed in chapter 2. For example, as pointed out above, direct and timely supervision from suppliers can play important role in ensuring the compliance with procurement rules. Another reason why the aforesaid assumption is made is because of the fact that the supplier review system has been widely adopted in many States that have enacted government procurement legislation. This indicates the importance of such a system in government procurement law. In addition, international organisations, including the WTO, APEC, EU and UNCITRAL, support this system through requiring or suggesting the establishment of the supplier review system in

¹⁷ This mainly includes Pachnou, D., “The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece”, PhD thesis (Nottingham, 2003) and Braun, P., “Strict Compliance versus Commercial Reality: The Practical Application of EC Public Procurement Law to the UK’s Private Finance Initiative” (2003) Vol. 9, No.5 December *E.L.J.* p575.

national procurement legislation as further explained in chapter 3, which indicates that this system can be an effective way to ensure the enforcement of government procurement rules.

4. Outline of the thesis

This thesis will be divided into 13 chapters. Following chapter 1, the introduction, in chapter 2, supplier review in government procurement will be introduced, in which the advantages and disadvantages of a supplier review system as a means of achieving the objectives of government procurement policy will be mainly considered. Also, other methods for enforcing government procurement rules will be briefly explained. The purpose is to draw a full picture of compliance with government procurement rules and further set supplier review, one of useful enforcement mechanisms, in the context of the overall issue of enforcement of procurement rules.

Chapter 3 deals with models for designing a supplier review system, which concerns the supplier review system adopted in the UNCITRAL Model Law, the GPA, the EU Remedies Directives and APEC NBPs. This chapter will provide the context of these systems needed for understanding the detailed features of the supplier review system of each that will be discussed in the next three chapters.

Chapters 4-6 will discuss key characteristics of national supplier review system. Based on the UNCITRAL Model Law as a starting point, and taking into account the other regimes noted above, key features of the supplier review system, concerning forum for review, standing and procedures, and the remedies, will be set out respectively in these three chapters. The purpose is to identify which elements should be included in a supplier review system and

which options and possibilities are available to the relevant issue.

From chapter 7, discussion will focus on Chinese supplier review system. Chapter 7 will first give an overview of government procurement regulation in China, in which the main developments and rules of Chinese government procurement regulation will be outlined; in particular, the existing rules regulating supplier review will be introduced to facilitate further discussion on the main aspects of the current Chinese supplier review system made in chapters 8-10.

Corresponding to chapters 4-6 considering key features of the national supplier review system, chapters 8-10 focus on discussing main aspects of the current Chinese supplier review system, concerning forum for review (in chapter 8), standing and procedures (in chapter 9) and available remedies (in chapter 10) respectively.

In chapter 11, critique on the current Chinese supplier review system will be made, in which problems existing in the current system will be analysed in detail.

Chapter 12 will consider how to improve the current Chinese supplier review system. In this chapter, proposals for improving the current system will be put forward, on the basis of the analysis of those possible standards set by WTO, APEC, EU and UNCITRAL and the consideration of specific features of China.

The last chapter, chapter 13, will highlight problems existed in the current Chinese supplier review system and proposals for improvement of the current system.

It will be argued that there are a number of important deficiencies in the current Chinese system, which both hamper the effectiveness of the system and impose unnecessary costs and also fall short of the international standards which apply, or may soon apply, to China. In

particular, there is uncertainty over the forum for review, the whole dispute resolution process can be quite lengthy and the available remedies are ineffective.

To resolve these problems in a manner that builds on the foundations of the current system and offers a realistic chance of realisation, it is proposed to provide a unified supplier review system to all complaints regarding government procurement process, improve the current sequential tiered review system, revise the current provisions on standing and the time limit for initiation, offer more detailed and clear rules on available remedies and delete unreasonable sanctions on the complaining supplier. These reforms, which can make the Chinese supplier review system more effective, can help China in its efforts to move forwards towards a truly modern and effective procurement system.

Chapter 2 Supplier review in government procurement

1. Introduction

A system of supplier review¹ refers to a system under which a supplier has the right to seek review of the procuring entity's decisions by resorting to competent review bodies to obtain redress or relief, when it considers the procuring entity's activities in the award process are inconsistent with relevant procurement rules. The term "supplier" used here refers to any individual or firm who has participated in any type of government procurement procedure – procurement of goods, services or works - or who seeks to participate but is prevented from doing so due to the procuring entity's decision. The supplier review system discussed here covers remedies given through any channel, including review by the procuring entity itself and review by an external administrative body and judicial review.

As introduced in chapter 1, since procuring entities may not strictly follow the procurement rules and thus make improper decisions, a supplier review system is often thought to be needed to ensure compliance with the rules. It can ensure compliance by, first, deterring violation and, second, correcting illegal procurement practice.

Regarding the first aspect, a supplier review system can encourage procuring entities to adhere to the procurement rules, to avoid possible protests from suppliers. This is especially so when strong remedies are provided. For example, as explained further in chapter 6, a damages remedy is one of the effective remedies available to the aggrieved supplier in many states.² It may be set at a high level – including compensation of lost profits –, which would

¹ It is also called "challenge procedures" (in the GPA of the WTO), "review procedures" (in UNCITRAL Model Law on Procurement) or "bid protest" procedures (in the United States).

² See further Arrowsmith, S., Linarelli, J. and Wallace, .D., *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000) , pp795-803 and Arrowsmith, S., *The law of public and utilities procurement*, (2nd ed) (London: Sweet & Maxwell, 2005) pp1421-1439.

exercise pressure on procuring entities and make them more cautious in complying with their legal obligations, since they fear potential substantial claims.³

In addition, the existence of the supplier review system has an important influence on government procurement officers by deterring them from engaging in illegal activities; as, at least, their careers such as the possibility of promotion might be seriously affected by suppliers' complaints, as further discussed in 3.1. Moreover, the procurement officials may be more solicitous of a supplier having a reputation as a protester; this would further strengthen the deterrent effect of a supplier review system.⁴ This deterrent effect has been indicated by a survey conducted in 1991 among procurement officers of the Department of Supply and Services of Canada.⁵ This survey examined "the extent to which the existence of an independent bid-protest tribunal influences their procurement decisions" and found the existence of the bid-protest tribunal did have a general deterrent effect on procurement officers.⁶

Regarding the second aspect, legal remedies available in the supplier review system can be used to correct unlawful procurement decisions and restore normal procurement process and compensate the aggrieved supplier's loss once violations have been made. This would be helpful for protecting the suppliers' interest and the public interest behind the procurement rules which is inevitably affected by the violation of rules.

This chapter considers the supplier review system in the context of the enforcement of government procurement rules. The ensuing section elaborates advantages and disadvantages of a supplier review system as a means of achieving the objectives of government

³ See Fernández Martín, J. M., *The EU Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press, 1996), p213.

⁴ See Marshall, R., Meurer, M.J. and Richard, J-F., "The private attorney general meets public contract law: Procurement oversight by protest" (1991) 20 *Hofstral L. Rev.* p1 at p24, footnote 77.

⁵ See Reich, A., "On Procurement, Protectionism and Protest: A survey among Canadian procurement officers" (1994) Vol. 23, No.1 *Canadian Business Law Journal* p107.

⁶ *Ibid.*, pp117-118.

procurement policy. Then, other methods for enforcing procurement rules are briefly introduced to depict a full picture of the enforcement of government procurement rules and set the supplier review in the context of the overall structure for enforcing procurement rules. Finally, section 4 concludes.

2. Advantages and disadvantages of a supplier review system in achieving the objectives of government procurement policy

2.1 Advantages of a supplier review system

The advantages of a supplier review system as a means of accomplishing the objectives of government procurement policy are first analysed by discussing how this system achieves the enforcement of the procurement rules well and then by considering how the system is also valuable in securing suppliers' confidence in the procurement system.

2.1.1 The value of supplier review in achieving enforcement

A supplier review system can be a good way of enforcing the procurement rules through its deterrent and redress effect, because of the following two reasons:

First, the supplier concerned has the strongest incentive to monitor the government procurement process. To be chosen as the winning supplier of a procurement contract, many suppliers interested in the competition will have to compete in the procurement process. If this process could not be properly conducted, some suppliers would be unfairly treated and thus suffer losses. For example, if the procuring entity takes into account a factor not indicated to suppliers in advance as required by law, such as after-sale service, in evaluating bids, those suppliers not mentioning after-sale service in their bids would lose their opportunities to win the contract and make profits. In addition, they would also lose an opportunity to accumulate experience and reputation in the market that might be valuable for future contract opportunities. It is clear that the operation of the procurement process is often closely

related to some suppliers' interests. Thus, they have the strongest incentive to supervise whether the actions of procuring entities comply with the law for protecting their interests.

Next, the supplier concerned is able to detect breaches in a timely manner. "Bidders are better placed than anyone else to know a breach occurred."⁷ Indeed, suppliers, as participants, are directly involved in the procurement process and they are thus more likely to be timely aware of violations occurred. In many cases, the supplier concerned is possibly the first one who can detect the infringement. For instance, if the solicitation documents state to award the contract to the bidder with the lowest bid price, this bidder is able to immediately aware of the breach if another bidder is announced as the winner if it is present at the opening of tenders. In contrast, other agencies or individuals who may supervise the procurement process, such as the audit department and the public, are all outsiders. They may detect breaches of law only long after they occur, as further discussed in 3.2.

Consequently, "the very availability of challenge procedures to those with the strongest motivation to enforce the rules and the best opportunities to spot breaches increases the risk of non-compliance for procuring entities and thus improves deterrence."⁸ Also, remedies available in the supplier review system to these very positive supervisors can ensure the enforcement of rules by correcting violations in the event of occurrence, as analysed earlier.

2.1.2 Advantages of a supplier review as a means of ensuring suppliers' confidence in government procurement.

A particular advantage of a supplier review system as a way of enforcing the procurement rules is that this system can build suppliers' confidence in procurement. The participation of suppliers in the procurement process is vital for the achievement of government procurement

⁷ See Pachnou, D., *The effectiveness of bidder remedies for enforcing the EC public Procurement rules: a case study of the public works section in the United Kingdom and Greece* PhD thesis (Nottingham University, 2003), p64.

⁸ Arrowsmith, S., *Government Procurement in the WTO*, (The Hague: Kluwer Law International, 2003), p402.

objectives; without this there will not be sufficient competition and best value for money, in particular, cannot be achieved. Whether suppliers can actively participate in the procurement process depends on whether they have confidence in it. Their confidence derives from the enactment of a set of sound procurement rules and the existence of effective enforcement mechanisms; in particular, a supplier review system. Obviously, if a supplier is unable to seek review and obtain redress when it is unfairly treated in the procurement process, it may lose confidence in procurement, and thus may be unwilling to participate in future competitions.

An effective mechanism for hearing suppliers' complaints can improve their confidence in the procurement system and attract them to participate in the procurement competition, as it would not only deter the occurrence of breaches but also provide an avenue for the affected supplier to protect its interest once it has been injured. A survey of suppliers by the American Bar Association in 1989 showed that "a large majority of respondents said they believed the existence of the Board protest forum provides a deterrent to improper or illegal agency activities."⁹ With such a belief, suppliers are more likely to participate in procurement competitions.

A review system by suppliers themselves is particularly valuable for ensuring suppliers' confidence in the procurement system since the use of this system is under the control of suppliers, as elaborated below.

First, the dissatisfied supplier itself can decide whether and when to use its right to seek review. The supplier can determine itself to take an action directly against the procuring entity, if it believes that the procuring entity has infringed the relevant rules and harmed its interest, regardless of whether the violation is serious or not. This is quite different from other enforcement mechanisms discussed in section 3, such as the intergovernmental enforcement mechanisms, under which the decision to take proceedings is very largely outside the control

⁹ This is taken from Marshall, R., Meurer, M.J., and Richard, J-F., "Curbing Agency Problems in the Procurement Process by Protest Oversight" (1994) 25(2) Summer *RAND Journal of Economics* p297 at p300.

of the supplier.

With a supplier review mechanism, the supplier can also decide when to start proceedings; thus it is able to file a complaint quickly and so secure timely correction of the breach. For example, if a supplier brings a complaint before the procuring entity as soon as it finds specifications are defective, the procuring entity, at this early stage of the procurement, may be quite willing to correct it by simply deleting or correcting those inappropriate requirements. Consequently, the supplier can participate in the competition and thus maintain its confidence in the procurement system.

Next, the supplier can decide whether to withdraw the complaint or resolve it through negotiation with the procuring entity after initiating a complaint. However, it is impossible for the supplier to do so when other enforcement mechanisms are employed. For instance, the European Commission may bring proceedings against a Member State before the ECJ, if an institution of this Member State were complained by the supplier to have infringed the relevant European procurement rules.¹⁰ However, once the procedure has been initiated, it cannot be stopped by the supplier. This means it is impossible for the supplier to reach an agreement with the procuring entity, which may benefit it in certain circumstances, as discussed in 2.2.3. Pachnou's research shows, in the UK, one "basic reason for firms not soliciting the intervention of the Commission is that 'they are nervous losing control over their case.'"¹¹

2.2 Problems that may affect or result from supplier review

There are, however, some possible problems or difficulties that may affect supplier review or may result from this system. The following problems need to be considered in deciding whether to establish a supplier review system and making provisions if it is decided to have such a system.

¹⁰ See Arrowsmith, fn.2 above, pp1444-1445.

¹¹ Pachnou, D., "Factors influencing Bidders' recourse to the European Commission to enforce EC Procurement Law", (2005) 2 *P.P.L.R.* p91 at p97.

2.2.1 A reluctance to use legal remedies

Suppliers may sometimes be reluctant to use the supplier review mechanism, mainly because of the following reasons.

2.2.1.1 Fear of retaliation

As Arrowsmith points out, “however effective the system, firms that are genuine competitors for contracts may be reluctant to use it for genuine reasons for fear of being unfavourably treated in the procedure in dispute, or in future award procedures.”¹² Indeed, the first concern of the supplier may be fear of retaliation. This problem has been discussed by many academics and practitioners¹³ who consider that suppliers are reluctant to “bite the hand that feeds” by taking the procuring entity to court.¹⁴ Suppliers may worry about that they will be being blacklisted by the procuring entity and subsequently lose the future contract opportunities if they challenge against the procuring entity; and even if they can win and be awarded the contract, the procuring entity would deliberately make things difficult for them during performance.

Research findings have proved that their worries are not ill-founded. An important research in this respect is Pachnou’s empirical research examining the factors influencing bidders’ use of remedies to enforce the EC procurement rules.¹⁵ By analysing empirical data collected through interviewing both bidders and procuring entities involved in public works contracts awards governed by the EC law, and their legal advisers, in the UK and Greece, the author found that fear of being blacklisted or retaliated is the third most significant deterrent factor to litigation in both states.¹⁶ Five interviewed British authorities (out of 10) indicated that they would try to exclude firms that have sued them or other authorities, as they believe

¹² See Arrowsmith, fn.2 above, p1435.

¹³ See Brown, A., “Effectiveness of Remedies at National Level in the Field of Public Procurement” (1998) 4 *P.P.L.R.* p89 at p93; Arrowsmith, *et al*, fn.2 above, p760 and Braun, P., “Strict Compliance versus Commercial Reality: The Practical Application of EC Public Procurement Law to the UK’s Private Finance Initiative” 92003) Vol. 9 No.5 *E.L.J.* p575 at p590.

¹⁴ See Brown, *ibid*; Fernández Martín , fn.3 above, p212.

¹⁵ Pachnou, fn.7 above.

¹⁶ *Ibid*, p318 and p384; Pachnou, D., “Bidder’s use of mechanisms to enforce EC procurement law”, (2005) 5 *P.P.L.R.* p256 at pp258-259.

those firms are litigation prone and likely to cause trouble.¹⁷ Three Greek interviewees mentioned that some procuring entities even informed suppliers that they had been blacklisted to prevent them from bidding in the future.¹⁸ It should be noted that this research is limited to the above two EU Member States; to what extent that this factor influences bidder's use of legal remedies in other States may vary greatly. This is dependent upon various factors, such as the existence of the sound procurement rules, the availability of trained and responsible procurement officials.

More seriously, it is even allowed in some problematic national procurement legislation to blacklist a complaining supplier under certain circumstances.¹⁹ No doubt, this will, to a great extent, discourage the supplier from seeking remedies.

2.2.1.2 Procedural difficulties

Another key consideration affecting suppliers' willingness to use legal remedies concerns procedural difficulties. Suppliers may not be willing to take an action against the procuring entity if they do not think they have good prospect of winning, especially because of the adverse consequences of challenges, such as the risk of retaliation.

To win a case and obtain remedies, the complaining supplier needs to first prove that the procuring entity has violated the rules. However, although suppliers are best placed to supervise the procurement process, it is still difficult for them to prove some breaches, for example, to prove that the procuring entity has been motivated by unlawful considerations in making a discretionary decision, such as an assessment of a supplier's qualification.²⁰ Next, the complaining supplier may experience some procedural difficulties while seeking certain legal remedies. For example, to claim damages, first, the supplier may be required to prove it would have won the contract if there were no breach in the procurement process. This is

¹⁷ Pachnou, fn.7 above, p298.

¹⁸ Ibid, p356.

¹⁹ This is the case in China, which will be further discussed in chapter 11.

²⁰ See Arrowsmith, *et al*, fn.2 above, p760.

difficult for the supplier, especially when the selection criteria of the winner are comprehensive, as further explained in chapter 6. Sometimes, it is even impossible to prove it has a chance to win the contract, for example, in the case that a procuring entity fails to advertise the contract.²¹

Because of these procedural difficulties, the chance of winning the case for the supplier may be low, which can discourage it from litigation. Pachnou's research indicates that this problem is the first deterrent factor to litigation in Greece and; and in the UK, it is the second important disincentive for bidders.²²

2.2.1.3 Absence of sufficient incentives

For suppliers, whether they can benefit from a complaint is a crucial element in most cases while deciding whether to challenge the procuring entity. As Fernández Martín points out, “[i]n economic terms, it is not an efficient decision for an undertaking which acts according to commercial principles to bring an action unless the eventual remedies available compensate the risk of, first, not winning the contract and second, being blacklisted.”²³ However, it is difficult for the supplier to obtain a remedy that compensates for this, because of the procedural difficulties mentioned above, or limited compensation explained further in chapter 6. Thus, the supplier may think that it would be very difficult or even impossible to be given satisfactory compensation and thus have no incentive to seek review.

2.2.1.4 Legal costs

It is inevitable that expenses will be incurred, if proceedings against the procuring entity are initiated. This is often paid in advance by the complainant and might be ultimately undertaken by the losing side of the case. Because the facts of procurement and the law involved can be complicated (for example, the procurement for a high technical equipment can be relatively

²¹ See Leffler, H., “Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions” (2003) 4 *P.P.L.R.* p151 at p166.

²² Pachnou, fn.16 above, pp258-259.

²³ Fernández Martín, fn.3 above, p212.

complex) and some adverse outcomes discussed above may be caused by a complaint, suppliers usually need to seek legal advice from expert lawyers before deciding to take an action. However, lawyer's fee in many states is expensive,²⁴ which is a heavy burden for the complaining supplier, in particular for small suppliers. As explained earlier, in most cases, the prospect of the case or the amount of damage is difficult to predict before the case is handled; thus the supplier knows that costs may be incurred, but relief is beset with uncertainty. Under such circumstances, suppliers are likely more hesitate to bring actions. Pachnou's research indicates that the most important cause of litigation avoidance in the UK lies in the very high level of legal costs, whereas low legal costs are regarded as the main factor encouraging bidders to litigate in Greece. Thus, whether the legal costs are affordable for suppliers seems to be a major factor discouraging suppliers from litigating.²⁵

2.2.2 Overdeterrence

The second problem that may be caused by supplier review is overdeterrence. As discussed earlier, the existence of the supplier review system can deter procuring entities from infringing the procurement rules. However, fear of legal action may lead to "over compliance" – procuring entities use a cautious approach to follow the procurement rules – to avoid being protested. This would result in bureaucratic procedures which affects not only efficient procurement but also suppliers' interest.²⁶ This can be illustrated by a research on the efficacy of the protest oversight in deterring and correcting decisions by procurement officials to run sole-source when it is consistent with the purpose of the government.²⁷ This research indicates that the procurement officials "may respond to the threat of protest by choosing a competitive procurement in the first place" and this may change appropriate sole sourcing to an inappropriate competitive procurement method.²⁸ If such situation happened, the procuring

²⁴ See Pachnou, fn. 7 above, pp152-156.

²⁵ See Pachnou, fn.16 above, pp257-258.

²⁶ See European Commission, *The Single Market Review; Sub-series III: Dismantling of Barriers; Volume 2, Public Procurement (1997)* p147.

²⁷ See Marshall, *et al*, fn.9 above, pp297-317.

²⁸ *Ibid*, p314.

entity would have to spend more time and more management costs to evaluate bidders and select the suitable bidder.

2.2.3 Inappropriate compromise

The next problem concerns an inappropriate settlement that may be reached between the procuring entity and the complaining supplier. Because of the threat of legal action, both the procuring entities who have really violated the procurement rules and those that have acted properly may choose to negotiate with the supplier to avoid further litigation, although with different motivations. The former group's purposes may be to avoid the exposure of their irregularity to the public, to avoid remedies, to avoid further legal fees, or to keep their unlawful decisions for their sectional interests or the personal interest of the procurement officials involved. The latter's main aims may lie in avoiding delay to the procurement process and further protest costs caused by legal action.²⁹ To persuade the complainant to drop its claim, the procuring entity may agree (i) to award a future contract to the complainant;³⁰ or (ii) to pay an amount of cash to that bidder;³¹ or (iii) to amend the terms and conditions of the contract that the bidder is currently performing so as to compensate its loss by giving it more benefits in the current contract.³²

Meanwhile, the complainant may be also quite willing to reach such an agreement, since it can benefit from this settlement. In addition to the aforesaid benefits, the supplier can also save legal costs for further litigation and avoid the uncertainty of the outcome of the trial. Further, it is helpful for the supplier to maintain good relationship with the procuring entity.

These inappropriate compromises can benefit the complaining supplier only; the objectives of compliance that the remedies system seeks cannot be accomplished through such a settlement.³³ Other suppliers will be treated unfairly no matter which form of compromise

²⁹ Ibid.

³⁰ See Pachnou, fn.7 above, p402.

³¹ See Marshall, *et al*, fn.9 above, p298.

³² Ibid, p300, footnote 11.

³³ See Arrowsmith, fn.2 above, p1435.

noted above is made. Also, the public interest will be prejudiced, as this kind of settlement “may constitute a form of collusion by the litigants at the expense of the public.”³⁴ More seriously, when a promise of reserving a future contract is made to the complainant as an exchange of dropping claims, the prejudice to procurement is not limited to the current contract awards in which violation will be remained but will occur in the future contract award process.³⁵

2.2.4 Disruption to the procurement process.

Another potential problem that may be caused from the supplier review system is disruption to the procurement process. First, some suppliers may initiate speculative or frivolous complaints. One reason is there always are some uncertainties or vagueness in the procurement legislation, and how to adopt certain provisions into practice may be unclear with the development of the procurement practice.³⁶ It is possible that the review body’s further explanation can benefit the complainant. Another reason is because an inappropriate settlement between the procuring entity and the complainant may be reached, as discussed above, some suppliers may initiate speculative litigation or frivolous complaints for obtaining those possible benefits. These actions are more likely to be brought in states in which legal costs are not expensive, such as in Greece, as indicated by Pachnou’s research.³⁷ Such a challenge may disrupt the procurement process and cause delay and protest costs, harming the public interest.

Next, even if a complaint is lodged on the basis of an actual violation and it is not frivolous, the use of a certain form of remedy may also lead to disruption to the procurement process. For example, as further explained in chapter 6, suspension is a very effective remedy for protecting the aggrieved supplier’s interest; however, the use of this remedy may cause

³⁴ See Marshall, *et al*, fn.9 above, p307.

³⁵ See Pachnou, fn.16 above, pp262-263.

³⁶ See Braun, fn.13 above.

³⁷ Pachnou, fn.7 above, p397 and pp339-340.

disruption to the procurement process, since the procurement process has to be suspended for a period of time. Inevitably, it will result in delay and inconvenience to the public; and adversely affects other suppliers.³⁸

2.2.5 The cost of damages

The last potential problem that may be caused by the supplier review system concerns the cost of damages. The award of damages, especially generous damages including compensation of lost profits, to the aggrieved supplier has effects of protecting the supplier's interest and of deterring procuring entities from infringing procurement rules. However, "damages would be imposed on public authorities acting in the public interest" and they are "drawn from the public treasury."³⁹ Awarding damages may take money away from the procurement system; consequently, it may reduce the amount of money that can be spent on the procurement of better goods or on the improvement of the procurement system as a whole, such as training procurement officials. This side effect can be greater when damages are set at a high level.

2.3 Taking account of the aforesaid problems in designing a supplier review system

Whether some of potential problems mentioned above can actually happen in practice depends on the nature of remedies given and some of them can be removed or reduced to certain extent by a well-designed system. How this may be done is briefly noted below; further discussion will be made later in chapters 4-6 and 12.

As analysed earlier, suppliers' reluctance to sue is a possible problem. However, as Brown argues: "suppliers are not inherently reluctant to stand up for their rights: they would be willing to do so if they believe that there was a reasonable prospect of establishing that the awarding authority had committed an infringement and of deriving some effect form of redress."⁴⁰ It would often encourage the aggrieved supplier to claim for damages, if the procuring entity is required to prove that the complainant would be unsuccessful in

³⁸ See Arrowsmith, *et al*, fn.2 above, p774.

³⁹ See Fernández Martín, fn.3 above, pp214-215.

⁴⁰ Brown, fn.13 above, pp93-94.

competition for the contract.⁴¹ Also, to clearly support the grant of lost profits to the successful complainant and provide some guides on its calculation could be useful for reducing suppliers' reluctance to challenge. Both reforms may, however, increase the problems of the financial burden of damages. These can in turn be controlled, however, to a certain extent by providing for some conditions for damages, such as requiring the claimant to show it has a real chance to win the contract in the normal case as further considered in chapter 6.

The inappropriate compromises noted above might be reduced, if they are supervised by the review body. A requirement of prior approval may be helpful for regulating the settlement between the procuring entity and the complainant to avoid the harm to the public interest and other suppliers' interests.⁴² However, it is, of course, possible that some such compromises might then simply be driven underground.

The possible disruption to the procurement process may be minimised by certain features of the supplier review system, such as rapid decision-making further discussed in chapter 5. As explained above, the grant of suspension may deter the completion of the procurement. To clearly provide the maximum period of suspension and other conditions for suspension will be useful for controlling the adoption of this remedy and thus reducing the possible disruption to the procurement process, as further explained in chapter 6.

The problem of overdeterrence might be reduced to some extent by training procurement officers to improve their competence in making procurement decisions. However, it may still be difficult for them to resist a cautious approach if the system itself is highly focus on legal compliance, and not much on results, and that this is an issue that may need to be addressed through radical reforms to the culture of a system, of which training is just one part, to ensure a balance approach.

⁴¹ See Pachnou, fn.11 above, pp84-88.

⁴² See Marshall, *et al*, fn.9 above, p314.

Clearly, to establish a good review system, a State will want to carefully take all problems mentioned above into account to design a system that will address these problems as far as possible. How to do this will be considered further in this thesis. Nevertheless, before discussing that, it should be noted here that these problems will always remain factors to a certain degree no matter how well a particular supplier review system is designed.

3. Other methods for enforcing government procurement rules

A supplier review system can be a principal law enforcement mechanism but not the only way to enforce government procurement rules; other enforcement mechanisms are sometimes appropriate. In particular, the following three mechanisms also can be employed to promote the implementation of procurement rules. Before discussing these three mechanisms, one point needs to be pointed out is, although these mechanisms have their own merits and might be relevant to China, this thesis will not analyse them in detail, as the focus of this research is supplier review.

3.1 Criminal, administrative and disciplinary sanctions

3.1.1 The reasons why sanctions may be considered necessary for implementing procurement rules

The enforcement of procurement rules largely depends on whether the procuring entities, which occupy the leading position in the procurement process, strictly observe the relevant legal rules. Since concrete procurement activities are conducted by the procurement officers, their performances are of crucial importance for the implementation of procurement rules. These procurement officials may make inappropriate decisions due to intention or negligence. If a procuring officer knew that he was acting contrary to the established procurement rules and nonetheless still went on to commit a breach, his activity is regarded for the purpose of this analysis as an intentional action. Negligence means here that a procurement officer had no

knowledge or misunderstood whether the act was unlawful or it was caused by carelessness.⁴³

This situation is more likely to happen when the relevant provisions, such as the conditions for using alternative procurement methods, are unclear, which is usual in procurement legislation. Sanctions imposed on wrongdoers responsible for wilful breaches are often more stringent than those for negligence.

Clearly, violations by procurement officials, whether caused by a deliberate illegality, negligence or mistake, may harm some suppliers' interests and the public interest.

3.1.2. Sanctions and their application

To regulate the performance of procuring entities and procurement officers, many countries provide that some disciplinary, administrative or even criminal sanctions will be imposed on them if they violate the procurement rules. Disciplinary sanctions such as a warning, loss of increments, demotion or dismissal can be used in all forms of misconduct made by procurement officials. Administrative sanctions such as a court's order requiring repayment of a certain amount of money may be imposed on the person responsible for making the wrongful decision. When criminal offences, such as bribery, are involved, the procurement officers concerned will be subjected to criminal sanctions.⁴⁴

In addition, administrative sanctions, usually financial in nature, can be used to penalise the procuring entity infringing the law.

3.1.3. The role of sanctions

One obvious advantage of this enforcement mechanism is that these sanctions have deterrent effect. This can ensure compliance with the procurement rules by deterrence, rather than correction. Since there is a risk of being sanctioned, procurement officials and procuring entities may not only be deterred from willful violation of the procurement rules but also take

⁴³ There are different expressions on definitions of intention and negligence in different areas of law (such as tort law and the criminal law) and also in different legal systems. See further Deakin, S., Johnston, A. and Markesinis, B, (5th ed.) *Markesinis and Deakin's Tort Law* (Oxford: Oxford University Press, 2003) p20.

⁴⁴ See Arrowsmith, *et al*, fn.2 above, pp823-824.

greater care to avoid inadvertent mistakes, where sanctions apply to negligent or accidental violations.⁴⁵ Also, the imposition of sanctions on those violators can deter not only the violators' recurrence but also others from violation; and assure suppliers that improper procurement activities will not be tolerated,⁴⁶ which may maintain suppliers' confidence in procurement competition.

3.1.4 The limitations of this enforcement mechanism

The main shortcoming of this enforcement mechanism is that sanctions *per se* do not have the effect of requiring the procuring entity to correct the wrongful decision and re-run the procurement process. Also, the aforesaid sanctions are sometimes considered only when culpable violations are concerned, because the criminal law in principle should be used against substantial wrongs, rather than non-serious wrongs, and in any event to criminalise the non-serious is not appropriate.⁴⁷ This implies, as far as violations occurred in the procurement process are concerned, some of them (such as those deemed as non-serious violations) might not be dealt with. Finally, if sanctions are very strict – say, non-culpable behaviour (e.g. minor irregularities caused by merely negligence) is also subjected to severe sanction, some able people with good procurement knowledge may be deterred from being procurement officials.

3.2. Review by external enforcement authorities

In addition to providing suppliers with rights to supervise the enforcement of the procurement rules, many countries also empower some kinds of external government bodies independent from those directly responsible for the procurement, such as a specialised procurement office, to oversee procurement activity to enhance compliance with the procurement rules.⁴⁸

3.2.1 The reasons for empowering external authorities to monitor procurement activities

Firstly, as analysed in 2.2.1, suppliers may be reluctant to initiate proceedings because of the

⁴⁵ See Allen, R.L., "Integrity: Maintaining A Level Playing Field" (2002) 2 *P.P.L.R* p111 at p113.

⁴⁶ *Ibid.*

⁴⁷ See Ashworth, A., "Is The Criminal Law A Lost Cause" (2000) 116 *Law Quarterly Review* p225 at p244.

⁴⁸ See Arrowsmith, *et al*, fn.2 above, p825,

reasons explained earlier. Secondly, sometimes, suppliers may have no reason to sue, since the interests harmed by the procuring entity's violation only concern the public. For example, the procuring entity may use a competitive but inappropriate procurement method for a specific procurement, which may lead to waste procurement costs and unnecessary delay. Thirdly, providing for review procedures for aggrieved suppliers is essentially a re-active approach to enhance of the enforcement of procurement rules. For certain types of violations, such as failure to advertise contracts, they can be better detected by proactive review conducted by certain external authorities.

3.2.2. Functions of external enforcement authorities

To ensure the application of government procurement rules, certain types of functions may be given to external enforcement authorities. An external body may be authorised to perform one or more of the following functions: i) proactive review, such as the examination of specifications before they are disclosed to suppliers, to detect violation; ii) approval of certain decisions, such as the use of alternative procurement methods, to avoid violation; iii) providing training to procurement officials and other persons concerned to improve their capabilities to conduct procurement procedures properly; iv) advising on the application of the procurement rules, for example, in terms of guidance, to improve procurement practice as a whole, and providing advice in response to specific situations to help officers or suppliers to conduct the particular procurement properly; v) imposing sanctions or remedies, based on the violation discovered through proactive review or from suppliers' complaints; and vi) bringing cases before the competent courts on the basis of violations found through its own investigation or suppliers' complaints.⁴⁹ Where the authority can, based on suppliers' complaints, perform either the fifth or the last function, it will be considered further in the main part of this thesis, as it is one of the review bodies dealing with suppliers' complaints.

Bodies that are authorised to supervise government procurement to ensure compliance

⁴⁹ See further *ibid*, pp825-829.

have been established in many states and they perform to varying degrees all the functions set out above.⁵⁰ For example, a specialised Public Procurement Office was established in Poland and Estonia.⁵¹

In addition, an audit department or some other form of audit organisation exists in many states to supervise the government procurement system as a whole. The review of procurements by an audit organisation often covers not only legality but also efficiency of the procurement contracts. For instance, in the US, General Accounting Office (GAO) is responsible for auditing government procurement activities to ensure economy and efficiency of the procurement and its legality.⁵² The GAO is also a forum of settlement of bid protests from suppliers.⁵³

3.2.3 Advantages of enforcing procurement rules by this mechanism

Firstly, certain violations can be prevented by the oversight of an external authority. As noted above, an external body may be tasked to examine the correctness of announcements to be published and give approval on such matters on the choice of procurement method for a specific contract. This implies those irregularities can be found before they are disclosed to suppliers and thus the actual occurrence of those irregularities can be prevented.

Secondly, in certain aspects, this enforcement mechanism can provide deterrent to breaches. First, as already mentioned, an external authority may perform proactive review to detect violations. This is especially valuable in finding out about contracts not advertised at all. It may have advantages over a system of supplier complaints in which such violations may be impossible to be discovered. Also, such deterrent effect would work well especially when an external body has authorities to take actions against irregularities detected on its own.

Thirdly, those external enforcement authorities are supervisory authorities, rather than

⁵⁰ See Arrowsmith, fn.2 above, pp1439-1441; Arrowsmith, *et al*, *ibid*.

⁵¹ See further Carrier, P.J., "Analysis of Public Procurement Authorities in Central European Countries" (2003) 3 *P.P.L.R.*, p131.

⁵² See further Wittig, W.A., "A Framework for Balancing Business and Accountability within a Public Procurement System: Approaches and practices of the United Practices" (2001) 3 *P.P.L.R.* p139 at p156

⁵³ See further Lees, F.J., "Resolving Differences: Protests and Disputes" (2002) 2 *P.P.L.R.* p138.

participants or possible competitors of procurement contracts; thus it is impossible for them to reach an improper negotiated agreement mentioned earlier with the defaulting procuring entity. Also, they generally have no incentive to lodge speculative or frivolous complaints, and thus there will be less disruption caused by this enforcement mechanism.

Finally, the functions of an external authority aimed at improving the procurement system as a whole, such as providing training and advising on the application of rules, can be very helpful for improving procurement officials' capability to correctly conduct procurement. This would be very useful for reducing the occurrence of overdeterrence, which is more likely to happen in the supplier review system, as analysed in 2.2.2. Consequently, it will benefit the enforcement of procurement rules.

3.2.4 Disadvantages of enforcing procurement rules by this mechanism

Compared with supplier review, however, in general, this enforcement mechanism has less deterrent power in certain aspects, although it may have greater deterrent effect in relation to some aspects, e.g. failure to advertise. One important reason is that, unlike suppliers, external enforcement authorities and their staff such as auditors works for the government; thus they have no strong motivation to monitor the procurement proceedings. Moreover, as outsiders of the procurement proceedings, the external enforcement authorities are in disadvantaged position to detect breaches; thus in most cases, it is difficult for them to discover breaches in time.⁵⁴

Also, given the range of activities and number of bodies involved in the procurement process, it is impossible for external enforcement authorities to monitor every procurement process and detect every violation. This means that some violations will not be reviewed.

Finally, although it is impossible to reach compromise between the aggrieved supplier and the procuring entity when this enforcement mechanism is used, a different kind of improper agreement between certain officers of external authorities and the procuring entity

⁵⁴ See Marshall, *et al*, fn.4 above, p30.

might be reached, which will be detrimental to the implementation of the procurement rules.

3.3 Intergovernmental dispute-settlement procedures

Apart from the legal remedies that can be used by affected supplier at national level, under some international procurement instruments, an inter-governmental dispute settlement mechanism has also been established to solve disputes over the enforcement of international procurement rules between member states. In this section, two relatively well-developed such mechanisms – the intergovernmental dispute settlement mechanisms under the GPA and EU law introduced below - will be used to illustrate how such a mechanism can work.

To resolve disputes and secure compliance with the WTO rules, a new integrated Dispute Settlement Mechanism (DSM) was established in 1995.⁵⁵ This intergovernmental dispute settlement mechanism, subject to certain special rules of the GPA, is applicable to GPA matters.⁵⁶ Such a mechanism can be used to resolve disputes between the GPA Parties over the adoption of general measures such as procurement laws and individual procurement, including cases of “one-off” violations by procuring entities.⁵⁷ Similarly, there is an intergovernmental dispute settlement mechanism available in the EU regime to ensure proper application of the Community procurement rules.⁵⁸ The European Commission is empowered to monitor and enforce the EU procurement rules on behalf of all member states. It can initiate proceedings before the ECJ under the EC Treaty Article 226 (ex Article 169); and, proceedings can be brought by other member states under Article 227. This may have both a deterrent and correction effect, and enhance certainty.

3.3.1 The main features of intergovernmental dispute-settlement procedures

The main feature of this intergovernmental dispute settlement mechanism is that the users of

⁵⁵ See further Hudec, R. E., *The new WTO dispute settlement procedure :an overview of the first three years* (Geneva : PSIO, 1998); Ortino, F. and Petersmann, E-U., (eds.) *The WTO dispute settlement system, 1995-2003* (The Hague: Kluwer Law International, 2004).

⁵⁶ See further Arrowsmith, fn.8 above, chapter 14 and works cited in footnote 3 there.

⁵⁷ Ibid, p373.

⁵⁸ See Arrowsmith, fn.2 above, pp1444-1464; Delsaux, A., “The role of the Commission in enforcing public procurement rules” (2004) 3 *P.P.L.R.* p130.

this mechanism are governments rather than affected suppliers; and that the actions against the Member State that has committed obligations stipulated in the international instruments, rather than against the procuring entity breaching the rules. To settle a procurement dispute through this mechanism may turn the case of “one-off” violations by the procuring entity into an economic dispute between two States and may consequently affect economic transactions or even relationship between the two countries. This possible serious result may deter the occurrence of breaches. Meanwhile, to solve procurement disputes through this mechanism might sometimes impose greater pressure on the offending procuring entity than complaints initiated directly by suppliers. One reason is if its State does not take necessary measures to comply with the ruling or judgment of the intergovernmental dispute settlement body, the complaining party – the government of the aggrieved supplier – under the DSU Article 22.2, may suspend concession towards the offending party – the State of the violator.⁵⁹ In the EU, the ECJ may impose lump-sum penalty payment on the state for non-compliance.⁶⁰ Thus, the State may impose pressure on the procuring entity to force it rectify any infringement. The other reason is that disputes solved through this mechanism often arouse extensive concern. This might impel the offending procuring entity to correct the unlawful decision. In addition, since proceedings are initiated by the relevant government or the European Commission in the context of the EU regime, rather than the aggrieved supplier, possible anonymity of the complaining supplier is another advantage.⁶¹

Next, to settle procurement disputes through this mechanism can avoid those inappropriate compromises that may be reached between the procuring entity and the complaining supplier, since they are not the parties to the dispute.

Finally, it is common that Member States have different understandings of certain

⁵⁹ See Arrowsmith, fn.8 above, pp375-379.

⁶⁰ See Arrowsmith, fn.2 above, p1461.

⁶¹ However, sometimes, information on the complaining supplier may be leaked. See Pachnou, fn.11 above, p99 and p101.

provisions of an international instrument, and this is one reason why disputes are caused. Rulings or judgments of the intergovernmental dispute settlement body can clarify the relevant provisions.⁶²

3.3.2 The shortcomings of using this mechanism to enforce procurement rules

Firstly, the deterrent effect of this mechanism on individual breaches is limited. The first reason is that possibly only those disputes regarding particularly serious infringements occurring in major procurement contracts or cases with important influence, such as cases concerning the clarification of specific procurement rules, can be settled through an intergovernmental dispute settlement mechanism; since such breaches more easily catch the attention of the aggrieved supplier's government and may be more seriously treated due to their importance. (For example, under the new EU Remedies Directive introduced further in chapter 3, the Commission may only deal with *serious* infringement of the EU procurement rules.⁶³) This means those disputes without aforesaid features may not be solved by this mechanism. Lack of sufficient resource in intergovernmental dispute settlement bodies to handle every procurement dispute is also important.⁶⁴ It is argued that some suppliers may doubt that only the complaints of large and influential suppliers could promote their government or the European Commission to start proceedings.⁶⁵

Secondly, it is a time consuming process to settle procurement disputes through such intergovernmental proceedings. As far as individual breaches are concerned, the aggrieved supplier cannot initiate the proceedings on its own; it has to persuade its government or the European Commission in the context of the EU regime to use this mechanism. Nevertheless, the latter may take long time to decide whether to bring proceedings, as they need to investigate the facts and consider the importance of the case, the public interest involved and

⁶² See Arrowsmith, fn.8 above, p382.

⁶³ See Article 3(1) of the Remedies Directive and Article 8(1) of the Utilities Remedies Directive.

⁶⁴ See Bedford, B., "Powers of the EC Commission" in Tyrrell, A and Bedford, B., (eds.) *Public Procurement in Europe: Enforcement and Remedies* (London, Butterworth, 1997), p23.

⁶⁵ See Pachnou, fn.11 above, p101.

even political factors. For example, it is common that the European Commission needs more than one year to decide whether to bring proceedings before the ECJ.⁶⁶ In addition, because the award of procurement contracts covered by international instruments are possibly very complex and the procedures for handling disputes through the inter-government proceedings are more complicated than purely domestic proceedings, it may need long time for the dispute settlement body to make a decision. Therefore, it is likely that the contract has been concluded or even performed by the time of the resolution of the dispute, which means that the correction of wrongful decisions might become impossible. It should be pointed out that the DSU provides shorter time limits for handling procurement cases; however, the WTO dispute settlement mechanism is generally not sufficiently rapid to affect the outcome of particular procurements.⁶⁷

Finally, although it is impossible to reach an inappropriate compromise between the procuring entity and the complaining supplier when this mechanism is employed, there may be another kind of compromise reached between two states, in the context of such mechanism. As already introduced, a dispute between the procuring entity and the affected supplier might be upgraded to an economic or even political dispute between two nations after it is brought before the WTO Dispute Settlement Body. To avoid such serious consequences, the complaining state may drop the case for various reasons, such as for the consideration of political relations between two countries.⁶⁸ Such a compromise, regardless of its contents, would be detrimental to the enforcement of procurement rules. Such a situation can be avoided to some extent under the EU regime since the Commission, rather than individual states, often acts in bring proceedings before the ECJ. Nevertheless, sometimes, for example when the case is sensitive, the Commission may drop the case as a consequence of political

⁶⁶ See Delsaux, fn.58 above, pp135-137.

⁶⁷ See Arrowsmith, fn.8 above, p403.

⁶⁸ Ibid.

bargaining between the relevant Member States. If so, the aggrieved supplier's interest cannot be effectively protected and the proper enforcement of procurement rules cannot be realised, unless there are other effective ways, such as a supplier review system, to deal with violations.

4. Conclusions

As Arrowsmith points out, “remedies for aggrieved providers can play a significant role in ensuring compliance with legal rules on public procurement.”⁶⁹ This is because there are a number of advantages in the supplier review system over other possible enforcement mechanisms, as revealed above, although others have their own advantages in enhancing the enforcement of the procurement rules. Through reviewing suppliers' complaints, not only the affected supplier's interest but also the public interest behind the rules can be protected. Although there are also disadvantages to such a system, these can be reduced to some extent by a well designed system.

This thesis is based on the assumption that a supplier review system has a useful role to play in enforcing procurement rules in many systems, and it is likely to do so in China. The advantages of this system identified above are basic reasons to make this assumption. The fact that most states and international institutions have adopted this system also supports the view that it is a valuable system.

⁶⁹ See Arrowsmith, fn.2 above, p1435.

Chapter 3 Models for designing a supplier review system

1. Introduction

As introduced in chapter 1, the regulation of government procurement has become a concern of several international organisations, including the WTO, the EU, UNCITRAL and APEC. In this thesis, the instruments adopted by these organisations will be elaborated due to their importance and influence in the field of government procurement and / or their relevance to China. These provisions regarding supplier review can provide different models for designing a supplier review system, which would be very useful while considering options for improving the Chinese supplier review system. This chapter deals with the aforesaid models but mainly focuses on explaining the background to the above regimes. Thus, the context and significances of each model are considered respectively to help to understand and evaluate the specific provisions on the supplier review system analysed later in this thesis. The introduction to each model follows the same structure: first, some basic information about the model is given; then, the reasons for choosing it are explained; finally, the basic rules on supplier review of each model are briefly outlined.

2. UNCITRAL Model Law on Procurement

2.1 Overview of the Model Law

UNCITRAL published its Model Law on Procurement of Goods, Construction and Services together with a Guide to Enactment (GTE) in 1994.¹ Promoting international trade seems to

¹ The text of the Model Law is available at www.uncitral.org. See further Arrowsmith, S., "Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) vol.53, *I.C.L.Q.* p17; Wallace, D., "UNCITRAL Model Law on Procurement of Goods and Construction" (1994) 1 *P.P.L.R.* pCS2; Hunja, R.R., "The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform" in Arrowsmith, S., & Davies, A., (eds.) *Public Procurement: Global Revolution* (London: Kluwer Law International, 1998) p97; ITC, *Elements of a Modern Legal Framework for Public Procurement: the UNCITRAL*

be the Model Law's goal, considering that UNCITRAL aims at removing obstacles to international trade by promoting harmonisation and unification of international trade law and that the origin of the Model Law is as a trade instrument.² However, the GTE mentions trade later than efficiency and effectiveness as a subsidiary aspect for the Model Law;³ and in practice the Model Law is often in fact perceived as concerned simply with ensuring efficient and effective procurement more generally.

2.1.1 Nature of the Model Law

As the denomination indicates, the Model Law is not a legally binding and enforceable international instrument; rather, it is only a template available for national legislators for reference while enacting or improving national procurement law. Thus, whether to use the Model Law as the basis of their procurement legislation is totally decided by enacting States. Further, the Model Law is flexible in the adoption process. How to use the Model Law – adopting all provisions verbatim or accepting only part of them and amending others according to its peculiar circumstances – is also determined by the enacting State.⁴ The nature of this instrument as a model is particularly clear when the supplier review system is concerned, as explained further in 2.3.

2.1.2 Main characteristics of the Model Law – flexibility and internationalism

The most important feature of the Model Law is its flexibility, which is needed for the success

Model Law on Procurement of Goods, Construction and Services (module from Modular Learning System on International Purchasing and Supply Management for Public Sector); Myers, J. J., "The New UNCITRAL Model Law on Procurement" (1994) 23 *Public Contract Law Journal* p267; Beviglia-Zampetti, A., "The UNCITRAL Model Law on Procurement of Goods, Constructions and Services" in Hoekman, B.M. and Mavroidis, P.C., (eds.) *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (The University of Michigan Press, 1997), p273 and Dischendorfer, M., "The UNCITRAL Model Law on Procurement: How does it reconcile the goal of total objectivity with the practical requirement for some degree of subjectivity" (2003) 2 *P.P.L.R.* p100.

² See Arrowsmith, fn.1 above, p20 and p25.

³ See paras.4 and 5; also see Arrowsmith, fn.1 above, p20.

⁴ See Myers, J.J., "Commentary on the UNCITRAL Model Law on Procurement" (1994) June *International Business Lawyer* p253 at p253.

of the Model Law. Without flexibility, the Model Law cannot reflect differences in regulatory policy in different states with varied circumstances, dissimilar nature of the market and traditions and different policy objectives sought;⁵ and thus some states might be unwilling to accept it. To ensure that the Model Law can be adopted as broadly as possible and thus play a significant role in unifying and harmonising procurement law, the Model Law employs flexible approaches while dealing with many issues on procurement, as explained below.

Firstly, as already noted, the Model Law is non-binding in its nature. An enacting State can wholly accept the Model Law or partly adopt it and amend it to meet their needs.

Secondly, the availability of various options is an important aspect of its flexibility.⁶ The Model Law offers options on many issues, such as options for the coverage of procuring entities,⁷ options for the use of procurement methods and options related to review procedures, to enacting States so that they can make appropriate choices to suit their particular needs. For example, the Model Law provides for a variety of procurement methods. It sets forth all the basic procurement methods suitable for the procurement of goods, construction and services in the various circumstances.⁸ First, for procurement of goods and construction, the Model Law provides open tendering (as the main procurement method)⁹ and other six alternative procurement methods¹⁰ to deal with different circumstances. However, an enacting State needs not to introduce all of the alternative procurement methods into its national legislation.¹¹ For example, the GTE¹² clarifies that an enacting State needs not to incorporate

⁵ See Arrowsmith, fn.1 above, p22.

⁶ Ibid, p21.

⁷ See Article 2(b).

⁸ See further Arrowsmith, S. Linarelli, J. and Wallace, D., *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), chapter 8.

⁹ See Article 18.

¹⁰ These include restricted tendering (Article 20), two-stage tendering, request for proposals and competitive negotiation (Article 19), request for quotations (Article 21) and single-source procurement (Article 22).

¹¹ See the footnote to the Model Law Article 18 and the GTE, para.15.

all of the three alternative methods provided for complex procurement - two-stage tendering, request for proposals and competitive negotiation¹³ - into its national law. Second, given certain differences between the procurement of goods and construction and the procurement of services, e.g. the particular importance of the skill and expertise of the service provider, the Model Law especially offers a separate “principal method for procurement of services”.¹⁴ Such optional arrangements provide guidance for both States wishing to select a strictly regulated approach and States preferring a more liberal regime.¹⁵

Thirdly, the Model Law is a framework law. Although it intends to offer “all the essential procedures and principles for conducting procurement proceedings in the various circumstances encountered by procuring entities”, it does not itself set forth all necessary rules for implementing those procedures in an enacting State.¹⁶ For instance, whereas the Model Law offers detailed rules on formal open tendering, it does not stipulate detailed provisions on the use of other procurement methods. By offering an open framework, the Model Law intentionally leaves gaps to be filled by national legislators, on the consideration of different circumstances at play in the enacting State.¹⁷

Finally, absence of strict rules is one aspect of flexibility of the Model Law. To make the Model Law easier to be adopted by enacting States, some Model Law provisions are not stringent enough. For example, recognising that an enacting State may wish to exclude certain kinds of procurement from coverage, the Model Law (Article 1(2)(a)) gives enacting States the discretion to decide whether to include military and security-related procurement into the

¹² Ibid.

¹³ See Articles 46, 48, 49 and 19; Myers, fn.4 above, pp254-255.

¹⁴ See Articles 37-45.

¹⁵ See further Arrowsmith, fn.1 above, p22.

¹⁶ See the GTE, para.12.

¹⁷ Ibid.

coverage, although it is generally suitable for regulating this type of procurement.¹⁸

Internationalism is another feature of the Model Law. The Model Law is intended to be used as the base of the enactment or improvement of *national* procurement law. For national procurement legislation, its prime objective is to secure value for money and efficiency in procurement by providing appropriate procedural rules to regulate procurement activities; and it usually does not pay much attention to market access and international competition.¹⁹ However, as the very purpose of UNCITRAL is to promote international trade, many Model Law provisions reflect multilateral features which usually exist in a multilateral procurement agreement rather than a national code.²⁰ For example, Article 8 stipulates, subject to certain exceptions, all interested suppliers are permitted to participate in procurement proceedings without regard to nationality. Under Article 24, the invitation to tender should be published, in a language customarily used in international trade, in a publication of wide international circulation.

The above two features are also reflected in provisions on review, as explained further in 2.3.

2.1.3 Limitations of the Model Law

In theory, it is possible for UNCITRAL to prepare the best possible text of the Model Law which provides stringent rules to promote the realisation of its objectives. However, it is difficult to do so in practice. Sometimes, an enacting State may be unwilling to adopt them if they are rigid without any possibility to be derogated, due to political or economic considerations. For instance, from the perspective of promoting international trade, it is often

¹⁸ Ibid, remarks on Article 1, para.1.

¹⁹ See Westring, G., "Multilateral and unilateral procurement regimes- To which camp does the UNCITRAL Model Law on procurement belong" (1994) 4 *P.P.L.R.* p142 at p145.

²⁰ Ibid, p148.

hoped to state in an international instrument to prohibit domestic preference.²¹ For national government, such a policy may, to certain extent, affect the accomplishment of value for money due to the lack of the maximum competition. However, many States such as the United States insist on inclusion of such a provision in national laws to favor domestic suppliers.²² If the Model Law insisted on ideal standards, such as prohibiting domestic preference, its acceptability – the most concern of UNCITRAL - would be affected and accordingly its role in harmonising international trade law related to government procurement would be affected. Thus, the drafters of the Model Law had to make compromises on certain issues (for instance, acknowledging domestic preference) by using flexible and pragmatic approaches for its wider acceptance.

As revealed above, flexibility can be easily found in many Model Law provisions. The main advantage is that it can promote wider acceptance of the Model Law. However, “this approach may dilute the normative effect of the Model, possibly leading to sub-optimal choices” and “can limit the very standardization that UNCITRAL seeks to promote.”²³ Similarly, pragmatic considerations in the Model Law, on the one hand, are helpful for both widening the adoption of the Model Law in practice and ensuring that sub-optimal practices are carried out in the least damaging way;²⁴ on the other hand, it may legitimise undesirable practices.²⁵

Particularly, the above approaches are used to deal with those sensitive issues which are

²¹ See Reich, A., *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (London: Kluwer Law International, 1999) chapters 1 and 2; Arrowsmith, S., *The law of public and utilities procurement* (2nd.ed), (London: Sweet & Maxwell, 2005), chapter 19.

²² See Reich, *ibid*, p3.

²³ See Arrowsmith, *fn.1* above, p23.

²⁴ For example, permitting domestic preference but regulating it at the same time can ensure that discrimination on the basis of nationality is applied in a transparent manner to minimise the negative influence to international trade.

²⁵ See Arrowsmith, *fn.1* above, p24.

more difficult than others to reach balanced and widely accepted provisions, such as allowing the exclusion of defence procurement from the coverage mentioned above. Another example concerns supplier review, as further considered in 2.3.

2.2 Reasons for studying the Model Law and choosing it as the starting point

First, the Model Law is the product of the United Nations, “which is therefore not relevant solely to one or the other geographic region or level of economic development.”²⁶ The wide involvement of numerous states of different types in the adoption of the Model Law makes it possible to codify the common understanding that is good for a sound government procurement system and finally to establish a set of rules widely recognised as minimum essential procedures for the achievement of objectives of procurement policy.²⁷ It is commented that “[t]he Model Law illustrates the extent of consensus existing in the international community regarding ‘good practices’ ”²⁸ and “reflects an international norm that has never heretofore been achieved in the field of procurement.”²⁹

Next, on the whole, the Model Law has been supported by commentators and certain international institutions. For example, Arrowsmith thinks “[t]he Model Law is considerable achievement: not only does it offer sound solutions, but it is well-drafted.”³⁰ Kovacs points out that it provides suggestions for almost all issues that can arise during the operation of government procurement; also, it pays sufficient attention to practical detail.³¹ The Model Law has also been accepted by international institutions, notably the World Bank, as further

²⁶ See Sahaydachny, S.A. and Wallace, D., “Opening Government Procurement Markets” in Mendoza, M.R., Low, P. and Kotschwar, B., (eds.) *Trade Rules in the Making: Challenge in Regional and Multilateral Negotiations* (Washington, D.C: Organization of American States Brookings Institution Press, 1999), p472.

²⁷ Ibid, p472.

²⁸ See Beviglia-Zampetti, fn.1 above, p283.

²⁹ See Myers, fn.4 above, p255.

³⁰ See Arrowsmith, fn.1 above, p20.

³¹ See Kovacs, A., “The Global Procurement Harmonisation Initiative” (2005) 1 *P.P.L.R.* p15 at p23.

discussed below. Thus, it appears worth of study. It is recognised as a generally useful model, although its provisions on review are one of areas in which most criticism has been made, as explained further in 2.3.

Then, the Model Law provides the main principles and procedures that a modern procurement law usually has. More importantly, the Model Law provisions, especially provisions on review, are largely consistent with the GPA.³² This is particularly significant for this research related to China because of the possibility of China's accession to the GPA.

Finally, the Model Law has had considerable influence in the field of government procurement, including Chinese procurement legislation.³³ It is regarded as a useful model for establishing a sound national government procurement system and has been accepted widely as a global standard. More than 30 jurisdictions have established or reformed their national procurement legislation based on the Model Law.³⁴ Especially, it has played an important role in the developing countries and transition economies.³⁵ One reason concerns their desirability of acceding to the GPA or the European Union. Enactment of their procurement legislation based on the Model Law can ensure their laws are in conformity with the GPA or the EU regime.³⁶ Another reason relates to institution financial reform supported by financial international organisations, notably the World Bank. These organisations require or encourage the countries they are financing to base their procurement law on the Model law.³⁷

³² See Beviglia-Zampetti, fn.1 above, p283.

³³ See Arrowsmith, S., "New Development in UNCITRAL: Future work on public procurement and new model provisions on privately financed infrastructure projects" (2003) 6 *P.P.L.R.* pNA131 at p131.

³⁴ Report of UNCITRAL on its thirty-sixth session, 30 June -11 July 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)* Ch.X "Possible Future Work in the Area of Public Procurement", para.226, p51.

³⁵ See Hunja, fn.1 above, pp104-108; Hupkes, E. H.G., "Public Procurement in Central and Eastern Europe" (1997) 6 *P.P.L.R.* p49; Arrowsmith, fn.1 above, pp20-21.

³⁶ See Hunja, fn.1 above, p106; Piasta, "The Approximation of Polish Law on Public Procurement to the European Directives" (2000) 9 *P.P.L.R.* p95.

³⁷ See Arrowsmith, fn.33 above; Williams, R., and Servenay, C., "Introduction of a Regulatory Framework on Public Procurement in the Central and Eastern European Countries: The first step on a long road" (1995) 6 *P.P.L.R.*

In particular, it is worth emphasising that the Model Law has had important influence on the current Chinese procurement legislation. Many provisions of the current Chinese government procurement legislation, including certain provisions on review, are similar to rules suggested in the Model Law, as further explained in chapters 7-10. Therefore it is very significant to analyse the Model Law in this research.

2.3 Review under the Model Law

The last chapter of the Model Law (including Articles 52-57) sets out the details of the review system, concerning the right to review, forum for review and procedures, and remedies discussed further in chapters 4-6. Under the Model Law, an unsuccessful supplier has a right to seek review if it thinks that it has been or may be injured by the procuring entity's violation. The supplier must first bring its complaint before the procuring entity itself. Then, a higher administrative review and/or judicial review may be invoked. During the review process, review bodies may suspend the procurement process and finally grant certain remedies to the aggrieved supplier.³⁸

Both characteristics of the Model Law - flexibility and internationalism – and its limitations discussed above all reflect in the area of review, as explained further below.

2.3.1 Flexibility in the area of review

The feature of flexibility is very obvious, as far as the supplier review system is concerned.

Firstly, the nature of the Model Law as a model is particularly clear in the area of review. A footnote to the title of chapter VI on review expressly indicates that an enacting State may incorporate all articles on review without change or with only minimal necessary changes to

p237.

³⁸ See Hunja, fn.1 above, pp102-103; Beviglia-Zampetti, fn.1 above, p282.

meet particular important needs; or it may not to incorporate those articles into national procurement legislation if they are deemed inappropriate due to constitutional or other consideration.

Secondly, there are some optional provisions on review mechanism in the Model Law to make it flexible for use. A typical example concerns remedies available for administrative review. First, the Model Law Article 54(3) states that the administrative body may *grant* or *recommend* remedies listed in the Model Law, for accommodating those States where review bodies merely can recommend the relevant remedies.³⁹ Next, considering there are differences among national legal systems with respect to the nature of the remedies that administrative review bodies are competent to grant, the Model Law offers a list of remedies for choice. Furthermore, for the damages remedy, it provides two options⁴⁰ explained further in chapter 6.

Thirdly, because of the sensitivity of the issue of review explained further in 2.3.3, the provisions on review procedures “are of a more skeletal nature than other portions of the Model Law.”⁴¹ The Model Law only deals with basic features of review but provides no detailed rules on a number of issues related to review. For example, although the Model Law Article 52 expressly gives the right to review to suppliers, it leaves such issue as the capability of the supplier to seek review to be resolved by the enacting state under its relevant legal rules.⁴² Also, the Model Law does not stipulate detailed provisions on forum for review⁴³ which will be elaborated in chapter 4. For instance, the Model Law merely briefly refers

³⁹ See the footnote to Article 54(3).

⁴⁰ See Article 54(3)(f).

⁴¹ See the GTE, para.31.

⁴² Ibid, remarks on Article 52, para.1.

⁴³ See Articles 53, 54 and 57.

judicial review but provides no further recommendations on those important issues related to judicial review, such as procedural rules and the possible remedies.

Finally, certain rules on supplier review are not strict enough. First, as analysed in chapter 2(2.1), to establish an effective supplier review system can benefit the enforcement of procurement rules. Nevertheless, as noted above, the Model Law states that enacting States might not incorporate all or part of provisions on review into its national law. Then, a binding and enforceable ruling issued by a review body would be very helpful for enforcing the procurement rules and protecting the aggrieved supplier's interest; as it can impose obligations on the defaulting procuring entity. However, as already mentioned, under the Model Law, an administrative review body may not be empowered to issue binding and enforceable rulings, which can make the implementation of the decision depends upon the procuring entity's willingness.

2.3.2 Internationalism in the area of review

The internationalism feature of the Model Law is also reflected in provisions on review. The Model Law gives the right to review to "any supplier" claiming to have suffered or that may suffer loss due to the procuring entity's violation.⁴⁴ There is no limitation on the nationality of complaining suppliers. Thus, it seems that not only domestic suppliers but also suppliers from *any* other country can invoke the challenge procedures of the Model Law. Such an approach is more open than those international instruments such as the GPA and the EU regime; since, due to political-economic considerations, the latter opens up review facilities only to Parties or partner States thus enabling them to restrict the right to review of suppliers from non-member

⁴⁴ See Article 52(1).

states.⁴⁵

2.3.3 Limitations in the area of review

Limitations of the Model Law also exist in the area of review, as explained below.

To provide stringent remedies for suppliers is a sensitive matter.⁴⁶ One reason is that certain important aspects of review proceedings such as the forum for review “are related to fundamental conceptual and structural aspects of the legal system and system of state administration in every country.”⁴⁷ To establish a supplier review system or reform the current one may require some changes to the nature and structure of legal systems and administration systems. For example, the changes to judicial review such as the powers of the judicial review body enjoyed concerns the established constitutional arrangements in a State. Some States, because of political reasons and other factors such as time and cost needed, may not want to make changes to existing structures or sometimes it is merely a resistance to change *per se*. Next, an effective supplier review system may not be welcomed in those States that expect to use procurement to favor certain particular interest groups and even preserve the possibility of corruption, for example in some Africa countries.⁴⁸ In addition, it is especially difficult to regulate government procurement in international trade agreements. The history of the adoption of the GPA is an example.⁴⁹ The narrow coverage of the first procurement agreement, its nature as a plurilateral and the limited parties all demonstrate difficulties of reaching an agreement regulating government procurement at international level. Perhaps, a special difficulty in introducing strict review mechanism in the domestic context was also

⁴⁵ See Westering, fn.19 above, p149.

⁴⁶ See Arrowsmith, *et al*, fn.8 above, p754.

⁴⁷ See the GTE, remarks on Chapter VI.

⁴⁸ See Mosoti, V., “Reforming the laws on public procurement in the developing world: The example of Kenya” (2005) 54, *I.C.L.Q.* p621 at p649.

⁴⁹ See Blank, A.,and Marceau, G, “A History of Multilateral Negotiations on Procurement: From ITO to WTO” in Hoekman and Mavroidis, fn.1 above, chapter 2.

expected while drafting the Model Law. After all, UNCITRAL envisages providing a set of unified rules for developing international trade in this field rather than merely considering enacting States' needs.

Thus, the Model Law uses "a timid approach to supplier review".⁵⁰ First, the Model Law specially clarifies that an enacting State might not to incorporate the articles on review. This is unnecessary, as the nature of the *Model Law* itself allows enacting States determine whether to adopt these provisions. The further emphasis may impress enacting States that a supplier review mechanism may not be provided to suppliers. Second, although it was ever stated that "judicial review was the most important vehicle in the Model Law"⁵¹ in the draft process, it does not clearly indicate in the Model Law that a judicial review should necessarily be made available.⁵² The GTE explains that the current provision on judicial review can be merely used to confirm State's existing law.⁵³ In contrast, as introduced in 4.3 and 5.3, the GPA and the EU regime explicitly provide for judicial review as the only or final review. Third, although the Model Law suggests administrative review, for many important issues related to administrative review, such as the independence of the administrative review body, it does not even express its preferred view.⁵⁴

The provisions on supplier review have been criticised by some commentators that they are not stringent enough⁵⁵ and lack more detailed rules,⁵⁶ as discussed later in the thesis. Currently, UNCITRAL is updating and revising the Model Law.⁵⁷ The Working Group on

⁵⁰ See Arrowsmith, fn.1 above, p24.

⁵¹ See UNCITRAL Document A/CN.9/356, "Report of the Working Group on the New International Economic Order on the work of its thirteenth session" (New York, 15-26 July 1991) para.186.

⁵² See Arrowsmith, *et al*, fn.8 above, p753.

⁵³ See remarks on Article 57; Arrowsmith, fn.1 above, p41.

⁵⁴ See Arrowsmith, *et al*, fn.8 above, p754.

⁵⁵ See Arrowsmith, fn.1 above, p41.

⁵⁶ See Arrowsmith, *et al*, fn.8 above, p753.

⁵⁷ See Nicholas, C., "The UNCITRAL Model Law on Procurement – The Current Reform Programme" (2006) 6

procurement has agreed to provide further guidance on review provisions and possibly provide for minimum standards on the independence of administrative review bodies in the revised Model Law.⁵⁸

3. APEC Non-Binding Principles on Government Procurement (APEC NBPs)

3.1 Introduction to APEC NBPs

APEC is a unique multilateral grouping in the world committed to reducing trade barriers and increasing investment without requiring its members to enter into legally binding obligations. It has no signed treaty binding upon its members and no a mechanism to enforce its agreements.⁵⁹ In 1994, APEC leaders agreed the “Bogor Declaration”, which commits APEC members to achieve free and open trade in the region and set specific deadlines respectively for industrialised members (by 2010) and for other developing countries (by 2020).⁶⁰ In 1999, APEC Government Procurement Experts’ Group created for increasing the transparency of government procurement markets according to the Bogor Declaration’s goals developed the Non-Binding Principles on Government Procurement and illustrative practice lists. Under the revised NBPs text⁶¹ issued in September 2006, APEC NBPs are value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. The principle of transparency included in the original set of NBPs was subsumed into APEC Transparency Standards on Government Procurement developed in November 2004. The applicability of the above individual elements is decided by member

P.P.L.R. pNA161.

⁵⁸ *Ibid*, pNA166.

⁵⁹ See Fischer, T. C., “A Commentary on Regional Institutions in the Pacific Rim: Do APEC and ASEAN still matter?”, *Duke J. of Comp. & Int’l L.* (2003) 13 p337 at p342.

⁶⁰ See Faye, A.A., “APEC and the New Regionalism: GATT Compliance and Prescriptions for the WTO” (1996) *28 Law & Pol’y Int’l Bus.* p175 at pp190-193.

⁶¹ This is available at www.apec.org

economies, as they are *non-binding* principles.

While talking about the NBP of accountability and due process, it is stated that processes that ensure accountability can include complaints processes.⁶² Further, in Annex 3 providing additional information to inform the practical implementation of the above principle, special provisions on supplier review are set out, as further discussed in 3.3.

3.2 Reasons for studying APEC NBPs

To study APEC NBPs in this thesis is because of its direct relevance to China. China was incorporated into APEC in 1991. Currently, APEC NBPs are the only international instrument actually applying to China. As a member of APEC, although APEC NBPs are non-binding, China has undertaken to bring its government procurement regime, including its supplier review system, to comply with the APEC's standards.

3.3 APEC NBPs on supplier review

In APEC NBPs Annex 3, special provisions on review mechanism considered below are set out to assist governments, industry and the public in understanding how accountability is achieved in government procurement.

Firstly, mechanisms for handling complaints about procurement process or alleged breaches which cannot be solved through consultation with the procuring entity should be established. Such mechanisms should provide independent, impartial, transparent, timely and effective procedures for the review of suppliers' complaints.⁶³ This indicates that the general requirements of APEC NBPs on review mechanism are independence, impartiality,

⁶² See 3.5.

⁶³ See Annex 3, 4.1.

transparency, timeliness and effectiveness.

Secondly, APEC NBPs further clarifies in practice the form that a review body may take (discussed further in chapter 4) and available remedies (considered further in chapter 6). In addition, it provides that suppliers involved can access all information related to the review mechanism, and foreign suppliers can equally use the review mechanism.⁶⁴

We can see, because APEC was built on informality and it merely aimed at developing a set of non-binding *principles* on government procurement, its provisions on supplier review are merely certain general requirements; no detailed rules needed in national supplier review system are available.

4. The EU Regime

4.1 Overview of the EU procurement regime

The EU government procurement rules are included in the EC Treaty, specific procurement directives and the national implementing measures. For the Community as a whole, the most important rules on procurement are contained in those specific directives introduced below.

To open up government procurement market and regulate procurement activities in the Community, the EU has adopted not only substantive procurement rules - Directive 2004/18/EC⁶⁵ regulating procedures for the award of major public works, public supplies and public services contracts, and Directive 2004/17/EC⁶⁶ regulating procedures for the award of

⁶⁴ Ibid, 4.2.

⁶⁵ [2004] O.J. L134. Slight amendments to this Directive and Directive 2004/17/EC were made in 2004. See Commission Regulation (EC) No.1874/2004 amending Directive 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts. [2004] O.J. L326/17.

⁶⁶ [2004] O.J. L134. See further Arrowsmith, S., "An Assessment of the New Legislative Package on Public Procurement" (2004) 41 *C.M.L.Rev.* p1; Larsen, M.L., "The new EU Public Procurement Directive" and Dittmer, M.A., "The New Utilities Directive" in Nielsen, R. & Treumer, S., (eds.) *The New EU Public Procurement Directives* (Copenhagen: Djøf Publishing, 2006), p9 and p29; Bovis, C., *EC Public Procurement: Case Law and*

most works in the utilities sectors of water, energy, transport and postal services – but also two directives specially dealing with remedies.⁶⁷

The first is Directive 89/665/EC (hereafter “the Remedies Directive”),⁶⁸ dealing with remedies for enforcing the public sector directives. The second is Directive 92/13/EC (hereafter “the Utilities Remedies Directive”),⁶⁹ dealing with remedies for enforcing the utilities Directive. They have been subsequently amended,⁷⁰ and recently a new Directive amending the two Remedies Directives – the Directive 2007/66/EC (hereafter the “new Remedies Directive”)⁷¹ has been adopted. It came into effect on 9 January 2008 and must be implemented by Member States by 20 December 2009. The main purpose of this new Remedies Directive is to clarify and improve the effectiveness of the current provisions on pre-contractual reviews.

To enforce the EU procurement rules, two levels of legal remedies are available in the Community. At Community level, the European Commission is empowered to supervise Member States in the application of the EU procurement rules and may ultimately take actions in the ECJ if an institution of a member state violates the procurement procedural rules.⁷² This method and its limitation were discussed in chapter 2(3.3).

However, the enforcement of the EU procurement rules relies more on the national

Regulation (Oxford: Oxford University Press, 2006), pp198-200.

⁶⁷ See further Bowsher, M., “Prospects for Establishing an Effective Tender Challenge Regime: Enforcing Rights under EC Procurement Law in English Courts” (1994) 1, *P.P.L.R.* p30 at pp41-44.

⁶⁸ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. [1989] O.J.L395/33.

⁶⁹ Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.[1992] O.J.L76/14.

⁷⁰ See further Arrowsmith, fn.21 above, p136.

⁷¹ Directive 2007/66/EEC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Text with EEA relevance). [2007] O.J.L335/31; see further Walliams, R., “A New Remedies Directive for the European Community” (2008) 2 *P.P.L.R.* pNA19.

⁷² See Article 3 of each Remedies Directive. See further Arrowsmith, fn.21 above, pp1444-1464; Delsaux, A., “The Role of the Commission in Enforcing EC Public Procurement Rules” (2004) 3 *P.P.L.R.* p130.

enforcement mechanism.⁷³ At national level, Member States are required to allow aggrieved suppliers to institute proceedings against procuring entities before national review bodies. The minimum standards on this primary enforcement method are set out in the aforesaid two remedies directives and revised in the new Remedies Directive noted above, as further considered in 4.3.

4.2 Reasons for studying the EU regime

First, the EU procurement regime is the most longstanding and most developed regime in the field of government procurement.⁷⁴ The EU made efforts to regulate government procurement at international level from 1970s and had adopted a series of important directives on procurement before the GPA was concluded.⁷⁵ In particular, it adopted special remedies directives noted above, in which most rules concern supplier review at the national level. The EU made the earliest effort at international level to enforce procurement rules by requiring Member States to allow suppliers to seek redress before national review bodies. Its provisions on national review system would be very useful for the current research on supplier review. By analysing these provisions, some experience can be learned while considering how to improve the current Chinese supplier review system.

Another reason is that this regime has had great influence in the field of government procurement. Many of its rules have been used by some of the subsequent regimes as a model while enacting or improving government procurement legislation;⁷⁶ in particular, it has had a

⁷³ See further European Commission Green Paper, *Public Procurement in the European Union: Exploring the Way Forward* (1996) COM 583 final, chapter 3, section iv.

⁷⁴ See Gordon, H., Rimmer, S. and Arrowsmith, S., "The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO" (1998) 21 *The World Economy* p159 at p160.

⁷⁵ See further Reich, fn.21 above, chapters IV and VIII.

⁷⁶ See Arrowsmith, fn.1 above, p28..

significant influence on the development of the GPA.⁷⁷ This is especially so in the context of review - most GPA rules on domestic review procedures are similar to the relevant EU rules.⁷⁸ Because of the potential relevance between the GPA and China explained further in 5.2, considering the EU regime on supplier review, the basis of the GPA domestic review system, in this thesis, would be useful.

4.3 Supplier review system under the EU regime

Under the EC Treaty, it is normal and not exceptional to enforce the EC's legal rules by affected individuals, as a reflection of deeper integration.⁷⁹ The Remedies Directives mentioned above further provide certain basic rules and standards on domestic review system that Member States must satisfy.⁸⁰ Rules contained in the two Remedies Directives mainly concern general principles, available remedies, standing, forum and procedure.⁸¹

Firstly, Article 1 of the above Directives stipulates general principles applying to the review system of all Member States. Article 1(1) requires Member States to take the measures necessary to ensure that the procuring entities' decisions may be reviewed *effectively* and in particular, *as rapid as possible* according to the conditions set out in the Directives. The principle of effectiveness arguably requires that not only the domestic review system as a whole but also all aspects of remedies and procedure such as specific remedies are effective.⁸²

The requirement of rapidity, concerning the prompt initiation of complaints and the rapid

⁷⁷ See Gordon, *et al*, fn. 74 above, p160.

⁷⁸ See further Footer, M., "Remedies under the New GATT Agreement on Government Procurement" (1995) 4 *P.P.L.R.* p80 at pp88-90.

⁷⁹ See further Arrowsmith, S., "The Past and Future Evolution of EC Procurement Law: from framework to Common Code?" (2006) 35 *Public Contracts Law Journal* p337 at p376.

⁸⁰ See further Reich, fn.21 above, p218.

⁸¹ See Arrowsmith, S., "Public Procurement: Example of a developed field of national remedies established by Community Law", (1996) *P.P.L.R.* p125 at p130.

⁸² See further Pachnou, D., "Enforcement of the EC Procurement Rules: The Standards Required of National Review Systems under EC Law in the Context of the Principle of Effectiveness" (2000) 2 *P.P.L.R.* p55; Arrowsmith, fn.21 above, pp1387-1389.

resolution of disputes, is a key aspect of the general principle of effectiveness.⁸³ Rapid review is crucial for effectively remedying suppliers and protecting the public interest, as discussed further in chapter 5. Article 1(2) provides for a principle of equivalence, requiring remedies under the Remedies Directives to be as favorable as comparable domestic law provisions.⁸⁴

Secondly, Article 2 of the Remedies Directives states that Member States have an obligation to make available three kinds of remedies, namely interim measures including suspension, setting aside unlawful decisions and damages discussed further in chapter 6, to suppliers.

Thirdly, Article 1(3) indicates who should be given standing to make complaints in domestic review system, as further explained in chapter 5.

Finally, the Remedies Directives provide rules on forum for review and procedures.⁸⁵ They state that national review bodies may be judicial or not judicial in character and provide certain requirements for non-judicial review bodies as the final review body, as further explained in chapter 4.

We can see that the EU Remedies Directives are framework in nature. They lay down only minimum standards on national review system; more detailed rules, such as the concrete review body, are envisaged to be supplemented by Member States.⁸⁶ One reason for this framework nature could be the difficulty of conclusion of agreement with more detailed rules in such a sensitive area of government procurement in the Community. Others concern the fact that different circumstances and conditions existed in different Member States may make

⁸³ See Arrowsmith, fn.81 above, pp132-136; Pachnou, *ibid*, pp65-66; Trepte, P. *Public Procurement in the EU: A Practitioner's Guide* (2nd ed.) (Oxford: Oxford University Press, 2007), pp549-550.

⁸⁴ See Arrowsmith, fn.21 above, p1389.

⁸⁵ See new Article 2(8) and (9) of both Remedies Directives.

⁸⁶ See Article 1(3) of both Remedies Directives.

differences appropriate.

5. The GPA of the WTO

5.1 Introduction to the GPA

The GPA is an international instrument aimed at opening up government procurement to international competition in the Party States by requiring Parties to create a transparent and openly competitive government procurement system and to treat foreign competitors without discrimination.⁸⁷ It was concluded in 1994 and entered into force on 1 January 1996. It is a plurilateral agreement, which applies only to the limited WTO members (40 among 153 WTO members) which have signed it.⁸⁸

To ensure enforcement, a national challenge procedure for aggrieved suppliers considered further in 5.3 was introduced into the GPA in 1994, in addition to strengthening the traditional intergovernmental dispute settlement mechanism⁸⁹ discussed in chapter 2(3.3).

The GPA was revised with a view to make the GPA provisions “more user friendly”⁹⁰ and to introduce some reforms; and a provisional revision of the text of the GPA (hereafter the “revised GPA”)⁹¹ was published in December 2006. The revised GPA is provisional, which is subject to i) a final legal check and ii) a mutually satisfactory outcome to the ongoing negotiation on coverage. However, the GPA Parties have agreed that the revised text should be

⁸⁷ See further Arrowsmith, S., *Government Procurement in the WTO* (London: Kluwer International, 2003); Pouncey, C. and Brown, A., “Expanding the International Market for Public Procurement: The WTO’s Agreement on Government Procurement” (1995) 1(3) *P.P.L.R.* p69; Dischendorfer, M., “The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO” (2000) 1 *P.P.L.R.* p1.

⁸⁸ See <http://www.wto.org>; Davies, A., “The World Trade Organisation Agreement on Government Procurement: Current Initiative to Expand Membership” (1997) 18(5) *E.C.L.R.* p300.

⁸⁹ See further Wareham, P.A., “The new WTO dispute resolution procedure” (1995) 1(4) *Int.T.L.R.* p114.

⁹⁰ See WTO, “The re-negotiation of the Agreement on Government Procurement (GPA)”, available at www.wto.org

⁹¹ See WTO Document GPA/W/297; see further Anderson, R. D., “Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations” (2007) 4 *P.P.L.R.* p255.

used as the basis for accession negotiation.⁹² This means that China's GPA accession negotiation will be based on the revised GPA. In this revised GPA, a large number of rules of the current GPA are unaltered; there are some changes to the provisions on domestic review procedures, as further considered in the later chapters. (When articles of the revised GPA are mentioned, they are put in square brackets.)

5.2 Reasons for studying the GPA

To study the GPA in this research is mainly because of its potential relevance to China. When China joined the WTO in December 2001, China expressed its intention to become a GPA Party and committed to initiate the GPA membership negotiations as soon as possible.⁹³ After acceding to the WTO, China began to prepare for the accession to the GPA by establishing and reforming legal framework related to government procurement and by doing relevant research.⁹⁴ In February 2002, China became an observer of the GPA. On December 28, 2007, China officially started the process for joining the GPA by signing a written application for accession to the GPA and submitting its initial offer to the WTO.⁹⁵ This indicates the possibility that China will become one of GPA members in the next few years.

The GPA Article XXIV.5(a) [Article XXII.7] requires clearly that each government shall ensure its law and regulation related to government procurement to conform to the GPA rules, no later than the date of entry into force of the GPA. This implies that China will have an international law obligation to comply its government procurement legislation with the GPA rules after joining the GPA. However, although China's procurement reform process was

⁹² See fn.90 above.

⁹³ See Report of the Working Party on the Accession of China (01/10/2001), WT/ACC/CHN/49, paras.339 and 341, available at www.wto.org

⁹⁴ See Guan, Xiaofeng, "New study may speed up open gov't bids" *China Daily* (8 November 2004).

⁹⁵ See Press Office of the Ministry of Finance, "China officially initiates negotiation for joining the GPA of the WTO", available at www.ccg.gov.cn

largely motivated by its desire to accede to the WTO,⁹⁶ the current Chinese government procurement legislations including the *Government Procurement Law* promulgated after China's accession to the WTO, are inconsistent with the GPA rules in some aspects, including in the area of supplier review, as analysed in detail in chapter 11. Thus, it is significant to study the GPA standards on supplier review in this research.

5.3 Supplier review system under the GPA

It is generally acknowledged that the introduction of challenge procedures for aggrieved suppliers is a very important innovation of the new GPA.⁹⁷ The aforesaid domestic review procedures are set out in detail in the GPA Article XX [Article XVIII], under which suppliers can challenge the procuring entity's decision before national review bodies. The GPA rules on domestic review are quite similar to those of the EU regime, as they are mainly modeled on the EU Remedies Directives⁹⁸ introduced above.

First, like the EU regime, the GPA provides for certain general principles governing domestic review procedures. It requires GPA Parties to provide a timely, effective, transparent and non-discriminatory challenge procedure to suppliers.⁹⁹ The effectiveness requirement "appears to refer to the utility of challenge procedures in securing the objectives of the GPA by ensuring application of GPA award procedures and other substantive obligations."¹⁰⁰ Timeliness is one aspect of effectiveness; in addition, the effectiveness requirements concern independence of the review body, the availability of remedies and effective enforcement.¹⁰¹

⁹⁶ See Arrowsmith, S., "National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?" in Arrowsmith and Davies, fn.1 above, p3 at p6.

⁹⁷ Private enforcement of the WTO law before domestic courts is not very common in the WTO system. See further Arrowsmith, fn.87 above, p385 and the relevant footnotes there.

⁹⁸ See Footer, fn.78 above, p88-90.

⁹⁹ See Article XX.2 [Article XVIII.1].

¹⁰⁰ See Arrowsmith, S., "The Character and Role of National Challenge Procedures under the Government Procurement Agreement" (2002) 4 *P.P.L.R.* p235 at p242.

¹⁰¹ *Ibid.*

Unlike the EU regime in which the effectiveness requirement is an enforceable obligation for Member States, arguably, the GPA principle of effectiveness cannot be enforced based merely on this general requirement itself; and thus the effectiveness requirement applies only to the extent expressed in more specific provisions.¹⁰² The requirement of transparency concerns publicity for review procedures, the existence of clear rules to regulate their operation and the possibility for monitoring and enforcing the operation of the review process themselves.¹⁰³ The principle of non-discrimination requires that GPA Parties provide domestic review procedures to other Parties on a Most-Favored-Nation treatment basis and under national treatment stipulated in the GPA Article III.¹⁰⁴

Next, like the EU regime, the GPA Article XX.7 [Article XVIII.7] requires that Parties must provide the aggrieved supplier with remedies of suspension, setting aside and damages further considered in chapter 6. Then, the GPA indicates who has the standing to seek review in Article XX.2 [Article XVIII.1], which slightly differs from the relevant provision of the EU regime, as further analysed in chapter 5. Fourth, similar to the EU regime, the GPA states that review can be undertaken by judicial authority or administrative body and provides further requirement on independence and certain specific procedural rules for non-judicial final review body.¹⁰⁵ In addition, the GPA requires that Parties must make their domestic review procedural rules in writing and make them generally available.¹⁰⁶

We can see, like the EU regime, the GPA merely provides for a basic framework; it does not offer detailed rules on domestic review but leaves them to Parties.¹⁰⁷ This would be

¹⁰² Ibid, pp242-243.

¹⁰³ Ibid.

¹⁰⁴ Ibid, p241.

¹⁰⁵ See Article XX.6 [Article XVIII. 4-6] further explained in chapter 4.

¹⁰⁶ See Article XX.3 [Article XVIII. 1].

¹⁰⁷ See Arrowsmith, fn. 100 above, p235; Footer, fn. 78 above, p90.

helpful for attracting more states to join the GPA.¹⁰⁸ Similar to the EU regime, this is because it is very difficult to reach agreement related to this sensitive area in a binding international instrument; and also that national differences of conditions, policies etc may make different approaches legitimately appropriate.

¹⁰⁸ See Arrowsmith, *ibid*, p257.

Chapter 4 Key characteristics of national supplier review system (I)

-- Forum for review

1. Introduction

This chapter and the next two chapters elaborate key features of national supplier review system. These include: first, clear recognition of suppliers' right to review to make it possible for suppliers to challenge the procuring entity's decisions and seek redress; second, availability of different types of review authority to suppliers, including possibly the procuring entity itself as the first instance review body and a judicial body as the final review authority, to handle suppliers' complaints; third, provision of procedural rules regulating the disputes resolution process to avoid excessive disruption to the procurement proceedings; and fourth, availability of different forms of remedies to suppliers under different circumstances to ensure the enforcement of the procurement rules and the protection of suppliers' interests.

The above key features, concerning right to review, forum for review, procedural arrangements, and remedies, are found in supplier review systems of all models studied in this research. They are considered issue by issue in chapters 4-6. For above issues, each model may use various approaches to deal with them. Because of reasons explained in chapter 3(2.2), suggestions of the Model Law to the above issues are taken as the starting point for identifying options for each issue. Then, the relevant provisions of APEC NBPs, the EU regime and the GPA are used to inform the analysis of the recommendations of the Model Law.

This chapter analyses issues related to forum for review, which mainly concern the forum and avenues for review, the extent of review power that can be possessed by review bodies,

and the legal effect of review bodies' decisions. These three issues are considered further in the following three sections.

2. Forum and avenues for review

Review procedures may involve one or more of the following stages: i) procuring entity review, ii) administrative review and iii) judicial review, which has different advantages and disadvantages, as elaborated later.

Procuring entity review means that suppliers' complaints are brought before the procuring entity itself for review.

Administrative review and judicial review are undertaken by an external review body. Administrative review discussed here means a review stage that is not judicial, in which procurement complaints are handled by an external administrative review body. Administrative review is divided into two types in this research. If a regime provides for strict requirements on independence of administrative review bodies and requires adequate procedures, which are similar to the requirements on judicial review bodies elaborated in 2.3 below, the review is referred to as "independent and adequate administrative review". Administrative review without both the strict requirements on independence and judicial-type procedures for the review body is referred to as "general administrative review". Administrative review can in practice function as the final review or the only review, or it is sometimes used as a compulsory or optional stage prior to seeking judicial review, as analysed in 2.2 below.

Judicial review considered here refers to a review process where suppliers' complaints

are handled by a competent court.

There are different provisions on whether the above three stages or just one or two of them should be adopted while designing a supplier review system in different regimes, as further analysed below. This section first discusses whether in the Model Law and the other three international instruments procuring entity review, administrative review and judicial review noted above is suggested or allowed to be provided by States, either as a compulsory or optional stage for suppliers, or whether it is even actually required for States to provide for each of three phases (see Diagram 4.1 below). Then, assessments of procuring entity review, administrative review and judicial review as a forum for review are given.

Diagram 4.1 Provisions on forum for review in each model

Procuring Entity Review (PER)	
Model Law	Suggest PER as the <i>compulsory</i> initial stage of review.
EU Regime	Do not require but allow PER as the <i>compulsory</i> first instance review.
GPA	Do not require a <i>compulsory</i> PER stage; allow that PER is designed as an optional initial stage in States.
APEC NBPs	Do not require PER as a formal forum for review; allow member economies to design it, either as a compulsory or optional first instance review.

Administrative Review		
	General Administrative Review (GAR)	Independent & Adequate Administrative Review (IAAR)
Model Law	Suggest a GAR as a <i>compulsory</i> stage before the final review (judicial review) or as the <i>final</i> review.	Enacting States may decide to provide an IAAR as a precondition of judicial review or as the <i>final</i> review.
EU Regime	Allow a GAR as an <i>optional</i> stage prior to the final review - judicial review or IAAR; do <i>not</i> allow GAR as the <i>final</i> review in States.	Allow an IAAR as the <i>final</i> review, instead of judicial review.
GPA	Allow a GAR as an <i>optional</i> stage before the final review – judicial review or an IAAR; do <i>not</i> allow GAR as the <i>final</i> review in States.	Allow an IAAR as the <i>final</i> review, instead of judicial review.
APEC NBPs	Member economies may design a GAR as a compulsory stage before the final review; it seems inappropriate to design a GAR as the <i>final</i> review.	Member economies may decide to provide an IAAR as a precondition of judicial review or as the <i>final</i> review.

Judicial Review	
Model Law	Do not stress that judicial review is a must in domestic review system; do not suggest it as the only review.
EU Regime	Allow judicial review as the <i>final</i> or the <i>only</i> review.
GPA	Allow judicial review as the <i>final</i> or the <i>only</i> review.
APEC NBPs	Allow judicial review as the <i>final</i> or the <i>only</i> review.

2.1 Procuring entity review

2.1.1 Provisions on procuring entity review in each model

Procuring entity review is included in the Model Law as the first instance *compulsory* review before external review. The Model Law Article 53(1) states that, unless the procurement contract has already entered into force, a written complaint *shall*, in the *first* instance, be submitted to the procuring entity or the approval authority if the decision was approved by that authority. Article 53(4) further stipulates that the head of the procuring or approving entity shall, within the prescribed time limit, make a decision. The decision will be treated as a final one, unless the complainant seeks further appeal for a higher administrative review or judicial review.¹

Unlike the Model Law, the EU regime does not require but allows a *compulsory* procuring entity review as the first instance review. The new Remedies Directive clearly provides that “the Member States *may* (emphasis added) require that the person concerned first seek review with the contracting authority.”² This clearly indicates that *compulsory* procuring entity review is not required but allowed in domestic review system if a Member State wishes to require this.³

Like the EU regime, the GPA does not require a *compulsory* procuring entity review as the initial stage of review in Parties; it seems to allow a procuring entity review that is optional for suppliers as an option for the GPA Parties. There is no express stipulation in the GPA requiring suppliers to bring complaints before the procuring entity in the first instance. The GPA merely states that, where a supplier complains there has been a breach in the context of a procurement, “each Party *shall encourage* (emphasis added) the supplier to seek

¹ The Model Law Article 53(6).

² See new Article 1(5) of both Remedies Directives.

³ See Trepte, P., *Public Procurement in the EU: A Practitioner’s Guide* (2nd ed.) (Oxford: Oxford University Press, 2007), p593.

resolution of its complaint in consultation with the procuring entity.”⁴ This provision seems not to impose a legal obligation, as the wording “encourage” is used.⁵ Thus, arguably, the GPA Parties are merely required to *encourage* the supplier to discuss its dissatisfaction with the procuring entity to seek dispute resolution by consultation; however, it is not a necessary step for the supplier for using formal challenge procedures. As Dalby asserts, “[t]here is nothing to indicate that consultation is a pre-requisite to a challenge – least of all for the supplier who, it seems, could proceed to direct action straightaway.”⁶

In the same Article, however, the GPA further states that, in the above instances, “the procuring entity *shall* (emphasis added) accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system” (or to the supplier’s participation in ongoing or future procurement under the revised GPA Article XVIII.2). As Arrowsmith argues, this further requirement on procuring entities “does seem involve a legal requirement.”⁷ In addition, the revised GPA Article XVIII.5 provides where a body other than an authority referred to in paragraph 4 – an impartial administrative or judicial review authority that is independent of its procuring entities – *initially* reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial review authority that is *independent of the procuring entity* whose procurement is the subject of the challenge. This possibly means that the procuring entity itself can review suppliers’ complaints in the first instance.

Thus, the aforesaid provisions arguably do not mean that procuring entity review is

⁴ See Article XX.1 [Article XVIII.2].

⁵ See Arrowsmith, S., ‘The Character and Role of National Challenge Procedures under the Government Procurement Agreement’ (2002) 4 *P.P.L.R.* p235 at , p239.

⁶ See Dalby, J., “Remedies for Infringement of the Government Procurement Agreement” in Tyrrell, A and Bedford, B., *Public Procurement in Europe: Enforcement and Remedies*” (London: Butterworths, 1997) chapter 14, p248.

⁷ See Arrowsmith, fn.5 above, pp239-241.

required to be made available by Parties under the GPA. Rather, it seems more appropriate to argue that procuring entity review that is optional for suppliers is allowed as an option for the GPA Parties.

Like the GPA, APEC NBPs support that suppliers make first effort to seek resolution of their complaints with the procuring entity by consultation; nevertheless, unlike the Model Law, resorting to the procuring entity is not one of the substantial steps handling complaints, as explained below. APEC NBPs provide that review mechanisms should be available for handling suppliers' complaints "which cannot be solved through direct consultation with the procuring entity in the first instance."⁸ Further, while dealing with the issue of the review body, APEC NBPs stipulate that designing a review body is "for the purpose of an objective and impartial review of the complaint" and "the review body should have no interest in the outcome of the procurement"⁹ Clearly, the procuring entity does not have these characters. Arguably, the above provisions imply that procuring entity review is not required as a formal forum for review. However, member economies may decide to provide procuring entity review, either as optional or compulsory first instance review, in its domestic supplier review system, if they consider it fit.

2.1.2 Assessment of procuring entity review as a forum for review

Procuring entity review as the first instance review may have advantages of efficiency, of providing a non-confrontational method of dispute settlement, and of economy, as discussed below.

First, as the Guide to Enactment (GTE) points out, in many cases, especially prior to

⁸ See Annex 3, 4.1.

⁹ Ibid, 4.2.

awarding the contract, the procuring entity may be quite willing to correct procedural errors, of which it may even not have been aware of.¹⁰ It is easy for the procuring entity to rectify some incorrect decisions, such as the defective technical specifications, if it is willing to do so. The complaint may be handled between the procuring entity and the complaining supplier in a non-confrontational manner. This is very helpful for maintaining the supplier's confidence in procurement system. Both parties can also save money and time on handling the complaint, if it is handled by the parties at this early stage. The prompt correction of mistakes by the procuring entity is also beneficial to the operation of the disputed procurement contract, ensuring procurement is properly and speedily conducted.

However, the disadvantages of providing the procuring entity as a *compulsory* first forum cannot be overlooked. Lack of independence and impartiality is a significant problem,¹¹ as the procuring entity not only acts as a “judge” but also is an interested party.¹² Thus, sometimes, the procuring entities may be unwilling to correct their acts even if known to be unlawful, either to keep prestige or authority or because of procurement officers' corruption. If so, unnecessary delay may be caused. It is criticised that compulsory procuring entity review suggested in the Model Law can operate as an obstacle to rapid review.¹³ The procuring entity may take advantage of the time for this initial review step to rush into a contract, leading to irreparable harm to the supplier, if concluded contracts are not allowed to be annulled, as elaborated in chapter 6. Suppliers' confidence in the procurement may also be harmed.

Thus, whilst procuring entity review can potentially operate in a beneficial manner, its

¹⁰ See para.32.

¹¹ See Gordon, D.I., “Constructing A Bid Protest Process: The Choices that Every Procurement Challenge System must make” (2006) Vol.35, No.3 *Public Contract Law Journal* p427 at p433.

¹² See Reich, A., *International Public Procurement Law: The Evolution of International Regime on Public Purchasing* (London: Kluwer Law International, 1999) p226.

¹³ See Arrowsmith, S. “Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard” (2004) vol.53, *I.C.L.Q.* p.17 at p42.

overall impact depends on whether the procuring entity can fairly handle the complaint and is willing to correct its wrongful decisions. Therefore, it may be more appropriate to use procuring entity review merely as an *optional* means of recourse, so that the supplier can decide to bring the case either before the procuring entity first or directly seek an external review. This optional approach can reduce or avoid problems caused by procuring entity review, whilst retaining many of its advantages.

2.2 Administrative review

2.2.1 Provisions on administrative review in each model

2.2.1.1 Approach of the Model Law

The Model Law provides for and encourages an administrative review stage after procuring entity review. Under Article 53(5) and 54(1)(c) and (d), if the head of the procuring or approving entity has failed to make a decision in due time, or the complaining supplier disagrees with its decision, this supplier may further complain to an external administrative authority. In such cases, the administrative authority works as the second instance review body. The administrative body may also be involved as the first instance review when the complaint cannot be submitted or entertained by the procuring or approving entity because the contract has been awarded, and when the head of the procuring or approving entity refuses to entertain the complaint on the ground of the conclusion of the procurement contract.¹⁴

Article 54(2) and (4) requires the administrative authority to promptly inform the procuring or approving entity after receiving the complaint and issue a written decision within the specified time limit. Article 54(5) further stipulates that the administrative review authority's decision shall be final unless the complainant makes a request for judicial review.

¹⁴ See Article 54(1)(a) and (b).

These provisions indicate that administrative review is encouraged in the Model Law and it is permitted as a precondition of judicial review. Its adoption, however, depends on the constitutional, administrative and judicial structure of the enacting State; as the footnote to Article 54 states that “States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 54 and provide only for judicial review.”

For administrative review suggested in the Model Law, the following two points should be explained. One is that the Model Law does not specify which administrative body should exercise the review function. The GTE explains that the review function might be vested in a body that exercises overall supervision and control over procurement such as a central procurement board, or a relevant body whose competence is not limited only to procurement, such as the body that exercises financial control and oversight over Government and the public administration, (for example a general accounting or audit office) or a special administrative body designated to resolve procurement disputes such as a procurement review board.¹⁵

In addition, the Model Law itself provides no requirements for independence. However, the GTE stresses that “[i]t is important that the body exercising the review function be *independent of the procuring entity* (emphasis added).”¹⁶ Further, it states “if the administrative body is one that, under the Model Law as enacted in the State, is to approve certain actions or decisions of, or procedures followed by, the procuring entity, care should be taken to ensure that the section of the body that is to exercise the review function is

¹⁵ See remarks on Article 54, para.3.

¹⁶ Ibid.

independent of the section that is to exercise the approval function.”¹⁷ This means if the review task is entrusted to for example the central procurement board, it should separate the section in charge of review from the section responsible for approving certain actions of the procuring entity. Thus UNCITRAL indicates that it is desirable that the administrative review body should have a degree of independence from the procuring entity, although this is not made clear in the Model Law itself.

Another point is that because the Model Law is only “a ‘framework’ law, as explained in chapter 3(2.1.2), it does not offer detailed procedural rules for the administrative review body. The Model Law merely provides in Article 54(4) that the administrative review body should within 30 days issue its decision stating the reasons for the decision and remedies granted. The GTE explains that the enacting State may provide detailed rules concerning proceedings for hierarchical administrative review if the State does not have such rules.”¹⁸

We can see, under the Model Law, it is acceptable that administrative review is undertaken by an administrative body that is merely independent of the procuring entity and has *no* detailed procedural rules. In an enacting State that operates judicial review and has features with hierarchical administrative review of administrative decisions, what we have called a “general administrative review” under the Model Law can be a compulsory stage prior to judicial review. The general administrative review seems also allowed to be designed as the *final* review under the Model Law; since the Model Law and the GTE do not suggest that the administrative body’s decisions shall be subject to judicial review or further independent and adequate administrative review. Furthermore, as discussed further in 2.3.1,

¹⁷ Ibid.

¹⁸ Ibid, para.13.

the Model Law does not stress that judicial review is a must in enacting States. However, an enacting State may always choose to provide for stricter requirements on the independence and procedural rules for the administrative review body.

2.2.1.2 Approach of the EU regime

Administrative review is allowed in the EU regime, as the Remedies Directives indicate that a non-judicial body can be entrusted with the review task. New Article 2(9) of both Remedies Directives provide where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any illegal measure taken by the review body or any defective exercise of powers can be subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body. Further, the same article makes clear requirements on the appointment and removal of members of the non-judicial *independent* body and on procedures and on the effect of the above body's decisions explained later. These provisions mean that administrative review is allowed in the EU regime. Also, these imply that administrative review can work as the final review if the non-judicial review body can satisfy the above requirements on independence and procedures; if it cannot, administrative review can be an optional review stage prior to judicial review, as discussed further below.

As cited above, for non-judicial review bodies, similar to the Model Law Article 54(4), they must provide written reasons for decisions. In addition, the EU regime also explicitly requires that the above review body's decision must be subject to judicial review or an

independent and adequate administrative review considered further later. There are no further requirements on independence or qualifications of members of the above review bodies. This implies an administrative review body without strict requirements on independence and procedures can work as the first instance review body or the second instance review body if there is a compulsory procuring entity review in a Member State. This indicates that the EU regime allows a general administrative review that is *optional* for suppliers, at least, before judicial review or further independent and adequate administrative review. However, it seems unacceptable that such a general administrative review is designed as *compulsory* in Member States. The ECJ found in two cases¹⁹ that it is contrary to the objectives of the establishment of a speedy and effective national review mechanism provided in the Remedies Directives, if accession to the review procedures provided for by the Remedies Directives is conditional upon prior application to a non-judicial review body such as a conciliation commission. The conciliation commission in the above cases was not a court or tribunal within the meaning of the Treaty Article 234 (explained later); thus, arguably, a general administrative review undertaken by a non-judicial review body that cannot satisfy strict requirements on independence, qualification and procedures mentioned earlier seems not permitted as a *compulsory* stage prior to judicial review.

A non-judicial review body may work as the final review body, since Article 2(9) cited earlier indicate that a non-judicial review body, as an alternative to the judicial review body, can work as the appellate review body. To ensure such a final review body can handle the

¹⁹ See Case C-230/02, *Grossmann Air Service, Bedarfsluftfahrunternehmen GmbH & Co. KG v Republik Österreich* (Unreported, February 12, 2004) (ECJ); Case C-410/01, *Fritsch, Chair & Partner, Ziviltechniker GmbH v Autobahnen- und Schnellstrassen- Finanzierungs-AG (ASFINAG)* (Unreported, June 19, 2003) (ECJ). See further Bovis, C., *EC Public Procurement: Case Law and Regulation* (Oxford: Oxford University Press, 2006), pp.482-483.

complaint fairly and independently, the following requirements are provided in Article 2(9). First, the non-judicial appellate review body must be a body within the meaning of the Treaty Article 234. This means that “the body must be established on a legal basis, have a permanent character, have obligatory jurisdiction, have contradictory procedures (although this requirement is not an absolute condition), take decisions with legal effect, and it must be independent.”²⁰ Second, the body should be independent of *both the procuring entity and the initial review body*. Furthermore, members of the independent body must be appointed and leave office under the same conditions as members of judiciary. At least, its President must have the same legal and professional qualifications as members of the judiciary. In addition, the independent body must hear both sides before taking its decisions and these decisions must be legally binding. These requirements on the non-judicial appellate review body indicate that an independent and adequate administrative review is allowed, instead of judicial review, as the final review in Member States.

2.2.1.3 Approach of the GPA

The GPA rules on administrative review are quite similar to the EU regime. Like the EU regime, the current GPA does not expressly mention administrative review. However, it indicates in Article XX.6 that administrative review is allowed in national challenge procedure by providing that “challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures” explained further later.

²⁰ See Dingel, D.D., *Public Procurement: A Harmonization of the National Judicial Review of the Application of European Community Law* (The Hague, Kluwer Law International, 1999) p.250.

This provision arguably has two implications.

Firstly, a non-judicial review body satisfying the GPA requirements on independence and procedures can, as an alternative to the court, work as the final review body; i.e. an independent and adequate administrative review, instead of judicial review, can be designed as the final review. To work as the final review body, administrative review bodies must satisfy certain requirements. One concerns independence of the review body itself – it must be impartial and independent and have no interest in the outcome of the procurement. Another requirement concerns independence of its members - they must be free from any external influence during the term of appointment. In addition, the GPA requires that such a review body shall have the following judicial-type procedural rules to maintain due process: a) participants can be heard before an opinion is given or a decision is reached; b) participants can be presented and accompanied; c) participants shall have access to all proceedings; d) proceedings can take place in public; e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions; f) witness can be presented; g) documents are disclosed to the review body.

Secondly, a general administrative review stage, which is undertaken by an administrative review body that cannot meet requirements on independence and procedures for non-judicial review body, can be provided for as an *optional* phase before seeking judicial review or further independent and adequate administrative review. As commented by Dingel, Article XX.6 “does not impose any requirements on the first instance review body, provided that its decisions can be reviewed by a body fulfilling the requirements to a last instance

review body.”²¹ Thus, arguably, a general administrative review stage that does not satisfy the GPA standards on independence and procedural safeguards is not precluded, provided there is a further review meeting GPA criteria mentioned above available.²² For example, an alternative specialist review forum with an informal procedure can be provided for suppliers for optional use in those countries offering a system of judicial review.²³ However, it is unclear whether in a Party the above general administrative review can be designed as a *compulsory* stage prior to judicial review or independent and adequate administrative review; there are no panel/Appellate Body rulings on this point. A general administrative review may be allowed to be *compulsory*; however, this should be done in such a manner as to ensure the establishment of an *effective and timely* domestic review system as required by the GPA (Article XX.2).

In the revised GPA, two changes are made. First, the revised GPA clearly and explicitly provides for administrative review as an alternative to judicial review. Article XVIII.1 clearly states that each Party shall provide *administrative or* judicial review procedures through which a supplier may make its complaint. Article XVIII.4 also clearly provides that each party shall establish or designate at least one impartial *administrative or* judicial authority to receive and review a supplier challenge.

Second, for the administrative review body as the final review body, the revised GPA requirements on its independence are less strict than the current GPA provision introduced above. Article XVIII.4 merely requires this administrative review body to be “independent of its procuring entity”; the requirement on independence of *members* of the aforesaid

²¹ Ibid, p260.

²² See Arrowsmith, fn.5 above, p248,

²³ Ibid.

administrative review body contained in the current GPA is deleted in the revised GPA, possibly for facilitating GPA accession by new Parties.²⁴ Also, the revised GPA makes clear two points on judicial-type procedures that the final instance administrative review body must follow. One is that such a review body must have procedures providing that the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body,²⁵ to the benefit of speedy and smooth resolution of disputes. Another point is that, unlike the EU regime requiring the final instance administrative review body's decisions to be legally binding, the revised GPA (XVIII.6(f)) clearly allows that the adoresaid review body can issue written *recommendations* relating to supplier challenge instead of decisions.

2.2.1.4 Approach of APEC NBPs

An administrative review seems also acceptable in APEC NBPs. It provides that, in practice, “[t]he review body may take the form of a court, *an independent review body, a government agency not directly involved in the procurement* (emphasis added), or a reputable private sector arbitration/mediation service.”²⁶ This shows that an administrative review is accepted under APEC NBPs. Further, no matter administrative review is conducted by an independent review body or a government agency, the review body should be independent of the procuring entity at least; since, like the GPA, the same paragraph also provides that “[t]he review body should have no interest in the outcome of the procurement and its members should be secure from external influence during the review.”

As showed above, APEC NBPs do not make clear whether an administrative review

²⁴ See Anderson, R. D., “Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiation”, (2007) 4, *P.P.L.R.* p255 at p255.

²⁵ See Article XVIII.6(a). The current GPA Article XX.6(g) simply provides that “documents are disclosed to the review body.”

²⁶ See Annex 3, 4.2.

undertaken by an independent review body can work as an alternative to judicial review to handle complaints in the last instance, and whether an administrative review conducted by a government agency not directly involved in the procurement can be the final review. This is because, unlike the EU regime and the GPA discussed above, there is no provision in APEC NBPs requiring that the aforesaid government agency's decisions should be subject to further judicial review or independent and adequate administrative review. In addition, APEC NBPs do not mention whether an independent review body, like a court, should have certain procedural rules to ensure due process. These issues can be decided by member economies. Thus, considering the specific circumstances in their economy, they can decide to design a two-tiered review system, including for example, a compulsory general administrative review undertaken by a government agency having no judicial-typed procedural rules or an independent and adequate administrative review undertaken by an independent review body and judicial review. Alternatively they can empower only one forum (a court or an independent review body) to handle suppliers' complaints, if wish. However, to give effect to general principles of effectiveness, independence and impartiality of review mechanism discussed in chapter 3(3.3), it seems inappropriate to design a general administrative review as the final review.

2.2.2 Assessment of administrative review as a forum for review

As was seen from the above, administrative review, including general administrative review and independent and adequate administrative review, may work as the first or second or last instance review. The role and defects of different options are assessed below.

Firstly, administrative review may be used as the first instance review, instead of

procuring entity review, as allowed in the GPA and the EU regime. Compared with procuring entity review, an administrative review as the first instance review has general advantages: it can have a higher degree of independence and procedures similar to that of a judicial review body. This can reassure suppliers and encourage complaints.²⁷ However, the administrative review body may be unable to handle the complaint as quickly as the procuring entity mainly because, as an outsider, it needs time to ascertain infringements and make its decision. It may thus be useful, in a tiered review system, to allow the supplier to choose to bring its complaint in the first instance before either the administrative review body or the procuring entity, based on its own analysis of the advantages and disadvantages of the two options.

Secondly, administrative review may be used as the secondary review in a three-tiered review system – it follows procuring entity review and is subject to judicial review, as envisaged in the Model Law explained earlier. This approach has several benefits. First, it provides a second opportunity for the procuring entity and the supplier concerned to settle their dispute, whereas a judicial review can be slower and more costly and more confrontational, as analysed in 2.3.2. Second, the administrative review body as an external body can fairly handle the complaint. This is especially so when an independent and adequate administrative review is designed as the second stage of review; since, in addition to being independent of the procuring entity, by definition an independent administrative review body has certain judicial-type procedural rules to ensure due process. Also, the availability of further judicial review can place pressure on the administrative review body to handle the complaint impartially. Third, the administrative review body can handle the complaint in a timely manner because it may be “dedicated” to procurement matters or more narrowly, to

²⁷ See Gordon, fn.11 above, p434.

handling procurement disputes. Thus it may bring experts from procuring entities, suppliers, lawyers and academics who develop experience of handling complaints, which is helpful for resolving disputes efficiently.²⁸ In addition, special procedural rules, such as short time limits for completing the review process, might be created to deal with the procurement disputes.

However, there are also possible problems of administrative review as the second stage of three-tiered review. First, when a general administrative review is designed as a *compulsory* secondary review (as is possible in the Model Law), it may delay the ultimate resolution of the complaint; as the administrative review body sometimes may not handle the complaint properly because of its limited independence and the lack of judicial-type procedural rules. In addition, an administrative review body, especially one undertaking a general administrative review, may be merely authorised to make a recommendation, rather than a binding and enforceable decision, to the procuring entity. This is possible under the Model Law Article 54(3). In such a case, the procuring entity might ignore the recommendations, which can adversely affect the effectiveness of the review.

To ensure that administrative review, especially a general administrative review, as the second stage of review is effective, one solution might be to provide administrative review as an *option*, allowing suppliers to decide whether to invoke it before seeking the final review, on their own analysis of the merits and demerits of administrative review.

Finally, an administrative review can be designed as the final review, instead of judicial review. This has certain benefits, compared with judicial review as the final review. First, an administrative review body as the final review body may be able to handle the procurement cases more efficiently and expeditiously than a court. One reason is expertise and experience

²⁸ Ibid.

of procurement disputes. A court's jurisdiction usually covers a range of subject matter,²⁹ and it thus "may have little expertise in procurement matters, which may impair or slow up its resolution of protests."³⁰ Another reason is that an administrative review body specialising in procurement matters may have special procedural rules for procurement disputes, such as shorter time limits; court procedures applying to administrative or civil cases in general can be complicated and lengthy.³¹ Second, if administrative review that is independent is designated as the final review in most cases the complaint can be fairly and impartially handled and suppliers can have confidence in it. This is why an independent and adequate administrative review is allowed in the GPA and in the EU regime as an alternative to judicial review. Possibly, because of these advantages, it appears to be the current trend to create an independent administrative entity to resolve procurement disputes.³² For example, in Hong Kong³³ and in Japan,³⁴ a specialised independent administrative review body has been established to handle procurement complaints.

Administrative review as the final review may also have disadvantages as compared with judicial review. First, the degree of independence of the administrative review body is often not as high as the competent court. As elaborated in 2.3.2, judicial review bodies are required not only to be independent of the procuring entity but also independent from government; and this high degree of independence is secured through various means in a State. However, it is very difficult or impossible for the administrative review body (such as a local government

²⁹ UNCITRAL Document (A/CN.9/WG.V/WP.22) "Procurement: report of the Secretary-General", *UNCITRAL Yearbook*, 1989, Vol.XX, pp116-149, para.223.

³⁰ See Gordon, fn.11 above, p434.

³¹ *Ibid.*

³² *Ibid.*

³³ See further Gao, H., "The Bid Challenge Procedures under the WTO Government Procurement Agreement: A Critical Study of the Hong Kong Experience", (2007) 4, *P.P.L.R.*, p.211.

³⁴ See further Grier, J.H., "Uncertain Prospects for Japan's Bid Challenge Mechanism", (2001) 3 *P.P.L.R.* pNA81.

procurement office) to be independent of the government. Pressure from the government may affect the fair resolution of complaints. Second, an administrative body, even if independent and having certain procedural rules may be weaker in the bureaucratic struggle than the procuring entity. This may make it difficult for the administrative review body to gather documents and facts or to enforce decisions.³⁵ However, a judicial body is often better able to collect evidence and enforce its judgments, as analysed in 2.3.2. Finally, unlike judicial review bodies which have been established already in many states, if an independent administrative body is set up to solely hear the procurement cases, some costs will be incurred.³⁶

While considering the use of administrative review as the final review, an independent and adequate administrative review is more appropriate than a general administrative review, as limited independence of the administrative review body and the lack of strict procedural rules may result in improper resolution of the procurement dispute. To ensure an independent and adequate review works well as the final review, one possibility is to locate the administrative review body in a powerful government department such as the finance department;³⁷ since it is often responsible for allocating funds used for projects, the procuring entity may have to cooperate in the review and comply with any decision. Such an arrangement can also save the costs that may be needed for establishing an entirely new review board - although a special review section may be needed to be set up in the finance department.

2.3 Judicial review

2.3.1. Provisions on judicial review in each model

³⁵ See Gordon, fn.11 above, p.434.

³⁶ Ibid.

³⁷ Ibid.

The Model Law mentions judicial review briefly but does not stress it as a must in domestic review system. The Model Law Article 57 simply provides: “The [insert name of court or courts] has jurisdiction over actions pursuant to article 52 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit, under article 53 or [54].” Under this Article, the specified national court or courts may be vested with jurisdiction to handle appeals against the administrative review body’s decisions (or the procuring or approving entity’s decisions if no administrative review available in a State) and against failure by those review bodies to act.

The GTE explains that the purpose of this article “is merely to confirm the right and to confer jurisdiction on the specified court or courts over petitions for review commenced pursuant to article 52.”³⁸ Further, as shown above, the Model Law does not touch certain important issues related to judicial review, such as the procedural rules and the possible remedies, but leaves them to be governed by the law applicable to the proceedings.³⁹ In addition, a footnote to chapter VI on review states that some articles, including Article 57, might not be incorporated in an enacting State, if the State does not see fit to incorporate these articles. These indicate that the function of Article 57 is merely to be used to confirm a State’s existing law. In other words, the Model Law does not clearly suggest that a judicial review is necessary or even expressly indicate the desirability of judicial review, for the acceptability of the Model Law in certain States.⁴⁰ This reflects its flexibility characteristic in the area of review discussed in chapter 3(2.1.3).

Unlike the Model Law, the other three international instruments clearly provide for a

³⁸ See remarks on Article 57.

³⁹ Ibid.

⁴⁰ See Arrowsmith, fn.13 above, pp.41-42.

judicial review and it may be designed as the final or the only forum for review. The two Remedies Directives noted in 2.2.1.2 indicate that judicial review body is envisaged as the ordinary review body and can work as the only or final forum for review. The GPA clearly provides that challenges shall be heard by a court (or by an independent review body) and that a decision of a non-judicial review body must be subject to judicial review.⁴¹ APEC NBPs states that the review body may take the form of a court, independent review body, etc.⁴²

Whether an ordinary court or an administrative court is conferred jurisdiction to handle the procurement cases in a State, “a court” referred to in the GPA is assumed independent, free from external influence, etc.⁴³ This assumption also applies to courts mentioned in the EU regime and APEC NBPs. It should be noted, however, that the revised GPA (Article XVIII.4) has less strict requirements on independence of a judicial review body. It merely provides a minimal requirement of independence for the judicial authority - independence from the procuring entity - and has no requirement on independence of judges -; possible for attracting States in which the judicial review body may be not independent of government but merely independent of the procuring entity to join the GPA.

Like the Model Law, the other three international instruments do not provide detailed procedural rules for judicial review. For the Model Law, this is because it only aims at adopting a minimal approach so as to avoid impinging on existing national laws and procedures relating to judicial proceedings.⁴⁴ For the GPA, “it is assumed that any review body which is a ‘court’ or is ‘judicial’ by definition provides adequate procedures”.⁴⁵ Also,

⁴¹ See Article XX.6 [Article XVIII.4]

⁴² See Annex 3, 4.2.

⁴³ Arrowsmith, fn.5 above, p247.

⁴⁴ See the GTE, remarks on Article 57.

⁴⁵ See Arrowsmith, fn.5 above, p247.

the EU Member States have established their own judicial procedural rules in which the Remedies Directives do not interfere because of procedural autonomy. APEC economies can be assumed that they have had judicial procedural rules as well. The above assumptions reflect two main features of judicial review: a high degree of independence – independence from government - and the availability of integrated procedural rules. These two features are also main benefits of judicial review, as analysed below.

2.3.2. Assessment of judicial review as a forum for review

Judicial review as a forum for review may have two main benefits, compared with other forum for review discussed earlier.

First, judicial review bodies usually have higher level of independence than other review bodies - independence from government. Independence from government is the core element of judicial independence,⁴⁶ which is essential for judicial review bodies to perform its function. Thus, many States have requirements of independence from government for judicial review bodies and for their members. The courts are usually established as independent institutions; and they must have no interest in the outcome of the dispute to ensure they can handle complaints independently and impartially. For members of courts, a basic requirement is to hear cases independently and fairly. To secure judicial independence, various means commonly the following means have been adopted in many regimes. The first one is the appointment of judiciary. Judges must satisfy the minimum qualifications for appointments and be appointed under procedures of selection provided in law.⁴⁷ The second means

⁴⁶ There are different explanations on the concept of judicial independence. See further Bailey, S.H. and Gunn, M.J., *Smith and Bailey on the Modern English Legal System* (London, Sweet & Maxwell, 1991) p225 and Becker, T.L., *Comparative Judicial Studies* (Chicago: Rand McNally and Co., 1970) p144.

⁴⁷ See further Slapper, G. and Kelly, D., *The English Legal System* (4th ed.) (London: Cavendish Publishing Limited, 1999) pp.162-168.

concerns tenure of the judicial office - a crucial component of judges' independence from external influence.⁴⁸ To protect the independence of the judiciary, many States allow judges to hold their office during good behavior and have very strict limitations on the removal of judges. To ensure judges are free from of any pressure from the government, judges salaries should be not dependent on executive decision but fixed by an Act and cannot be reduced by the executive.⁴⁹ In addition, a fundamental measure is to provide for judicial immunity from suit, guarantying that judges are exempt from civil or criminal liability for things they said or done in their judicial capacity in good faith.⁵⁰

Another benefit of judicial review is that, to maintain the quality of justice in the courts, many States have adopted integrated procedural rules. These rules often include, inter alia, the following general principles: each party should have the opportunity to access to all proceedings; both sides to a dispute should be heard before a decision is made; proceedings should be generally taken place in public, and witnesses should be presented.⁵¹ There is often also a set of rules on the submission of evidence which empower the court to compel the procuring entity to furnish documents. This is significant in handling procurement disputes, as the procuring entity that is the key source of evidence may be disinclined to provide evidence to the review body.⁵²

In addition, depending on the context, the court may be able to enforce its decision.⁵³

This could be very significant for the supplier if the procuring entity will not implement the

⁴⁸ See Herron, E.S. and Randazzo, K.A., "The Relationship between Independence and Judicial Review in Post-Community Courts" (2003) May, Vol.65 No.2 *The Journal of Politics* p422 at p424.

⁴⁹ See Bradley, A. W. and Ewing, K.D., *Constitutional and Administrative Law* (12th ed.) (London: Longman, 1997), pp420-421.

⁵⁰ See Slapper and Kelly, fn.47above, pp.174-175.

⁵¹ See Bradley and Ewing fn.49 above, pp426-428 and pp786-799.

⁵² See Gordon, fn.11 above, p439.

⁵³ *Ibid*, p434.

judgment willingly.

Judicial review may, however, have some drawbacks. Judicial review may sometimes need more time to settle procurement disputes, as its procedural rules are more complicated and rigorous than those for other review stages. Also, unlike an administrative review body that may be dedicated to procurement matters only, while the court may not be a specialist forum and thus may have little expertise in procurement matters, slowing up the resolution of procurement disputes.⁵⁴ In addition, the confrontational nature of judicial review may lead to ill-feeling between the parties.

2.4 Further comments

As was seen, the Model Law suggests a tiered review system with compulsory procuring entity review and the possibility of a higher administrative review and/or judicial review. The other three international instruments use different approaches to deal with the forum and avenue for review. The GPA provisions on forum for review are quite similar to those of the EU regime. They both allow States to decide to have only one level review or a tiered review system, and require that the final review or the only review must be judicial review or an independent and adequate administrative review. The GPA Parties and the EU Member States may establish a two or three-tiered review system, including for example, (compulsory or optional) procuring entity review and judicial review or an independent and adequate administrative review. APEC NBPs merely provide the form of the review body but do not make clear whether a tiered system or only one level review is envisaged in member economies. However, member economies can determine by themselves to establish a tiered

⁵⁴ Ibid.

review system, including for example an initial administrative review by a government agency not directly involved in the procurement and judicial review; or require only one level review such as judicial review.

As revealed, the establishment of a tiered review system is an option for a State. This hierarchical review system could increase accountability and “due process”; however, it could also add the cost and time spent in the process of dispute resolution.⁵⁵ To merely provide a judicial review or an independent and adequate administrative review is another possible option. This may avoid the problem of lengthy and costly procedures that may occur in a hierarchical review system. However, the possible benefits of procuring entity review and administrative review analysed above will not be enjoyed by the supplier concerned.

As far as a hierarchical review system is concerned, a two-tiered system, typically including procuring entity review and a further judicial or administrative review, is common. In this two-tiered review system, the first review stage – procuring entity review - may be optional or compulsory. The former choice is better, as it can give suppliers freedom to decide whether to experience this initial stage. For the second tiered review, the independence of the review body needs to be paid sufficient attention for ensuring the fair resolution of disputes ultimately. It is common to empower a court to provide review. However, it is not necessary to always entrust the task of final review to courts.⁵⁶ An administrative body may be entrusted with such a task, if there are provisions guarantying that it is independent at least of the procuring entity and has necessary procedural rules to ensure that it can impartially and fairly handle complaints.

⁵⁵ See Gordon, fn.11 above, p434.

⁵⁶ See Arrowsmith, fn.13 above, p42.

3. The extent of review powers

As discussed above, a State may choose to establish a tiered review system to deal with the procurement disputes. Where a hierarchical review system is adopted, the question of the powers possessed by appeal authorities, which are sometimes the main review body in a tiered review system, arises; since possibly it is not all views of the procuring entity and any lower review body on matters of law, fact and judgment will be examined by the above review body.⁵⁷ Appeal bodies, especially when they are judicial review bodies, are often limited to review legal errors only.⁵⁸

To make a procurement decision may involve various types of assessment which the procuring entity must make. These include not only interpreting and applying the relevant legal rules (for example considering when a single source procurement is permitted by law) but also making determinations on the primary facts (for example ascertaining whether a supplier had undertaken a similar procurement project if required) and making discretionary judgments (for example assessing whose bid is the best under pre-stated award criteria).⁵⁹ Whether appeal bodies in the hierarchy review system can review the original decision on issues of fact, judgment and law needs to be determined in a review system. It should be noted here that sometimes, it may be difficult to decide whether an issue is one of law or fact; as in practice, law and fact are sometimes mixed⁶⁰ and perhaps there are different understandings

⁵⁷ See further Arrowsmith, S., Linarelli, J and Wallace, D., *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), pp803-814.

⁵⁸ Ibid, pp764-765.

⁵⁹ Ibid, p803.

⁶⁰ See Wade, H.W.R. and Forsyth, C.F., *Administrative Law* (9th ed.) (Oxford: Oxford University Press, 2004), pp943-946.

on the meaning of law and fact.⁶¹

This section considers the power possessed by the main review body – the judicial review body or an administrative review body as the appeal body - of the hierarchical review system under the Model Law and the other three international instruments.

As noted earlier, under the Model Law, the procuring entity's decision can be brought before an administrative review body or a judicial review body for further review. The Model Law and its GTE offer no provision and explanation on the power possessed by the administrative review body. The GTE explains that in the case of an appeal of review decision of the head of the procuring entity, whether the court is to examine de novo the aspect of the procurement proceedings complained of, or is limited to merely examine the legality or propriety of the decision reached in the review proceeding will be decided by the law applicable to the proceedings.⁶² This shows that the Model Law also leaves the issue of the power enjoyed by the court in handling procurement appeals to be determined by enacting States. However, the minimum requirement is that the court and the administrative review body as the appeal body enjoy the power to review based on legal errors.

The EU Remedies Directives offer no provision on whether the power of the judicial organ or independent administrative body as the appeal body should be limited to deal with legal errors only or extend to determine factual questions contained in the original review decision. However, it seems the very minimum standard to give the appeal body power to review legal questions concerned in the procurement decision and in the original review decision and substitute its own view for that of both the procuring entity and the first instance

⁶¹ See Craig, P.P. *Administrative Law* (5th ed.) (London: Sweet & Maxwell, 2003), pp269-271 and pp488-499.

⁶² See remarks on Article 57.

review body.⁶³ It is unclear in the Remedies Directives to what extent that the appeal body should be able to control the finding of facts and exercise of judgment by the procuring entity.⁶⁴ This is determined by Member States.

As analysed earlier, APEC member economies may establish a tiered review system in which a court or an independent review body may serve as the appeal body if they wish. There is also no provision on such detailed rules on the powers enjoyed by the appeal body in APEC NBPs aimed at merely providing certain *principles* on procurement. The power of the appeal body is decided by member economies.

However, both the current and the revised GPA seem to require giving the court or impartial administrative review bodies the power to deal with both legal and factual questions concerned in the initial review, although they do not clearly say so. As was introduced, under the GPA Article XX.6 [Article XVIII.6], a court *or* an impartial administrative body meeting the requirements on procedural rules can work as the appeal body in a tiered review system. Those procedural requirements noted earlier are made for the appeal administrative review body, which implies that a court is assumed to have had such procedural rules. Some of the GPA procedural rules, such as requirements on witnesses and production of documents, are directed to finding of facts. Thus, arguably, the appeal body should be empowered to deal with not only legal errors but also factual issues; since, otherwise, the participants cannot benefit from those procedural rules.⁶⁵

To limit the appeal body's power to review legal errors may benefit the rapid resolution of the dispute. However, if factual and discretionary judgments are allowed to be totally out of

⁶³ See Arrowsmith, *et al*, fn.57 above, p804..

⁶⁴ *Ibid*.

⁶⁵ See Arrowsmith, fn.5 above, pp247-248.

the control of this review body, it “would leave too much latitude for procuring entities to abuse the rules, by disguising discriminatory decisions behind false factual and discretionary assessments.”⁶⁶ It is the minimum standard to allow the appeal body to deal with legal problems concerned in the initial review only. It might be better to give the appeal body some control over the finding of facts and the exercise of discretion by the procuring entity in certain cases, for instance, when the finding of facts or exercise of judgment is “wholly unreasonable” or “arbitrary and capricious”.⁶⁷

4. Legal effect of decisions

The issue of legal effect of decisions concerns whether an external review body’s decisions are legally binding; and if so, whether they can be enforced. Because of the sensitivity of procurement decisions, they may be not binding and not enforceable. Such possibilities are found in the Model Law, as discussed below.

Considering the higher administrative review body in some countries may lack the power to grant the suggested remedies discussed further in chapter 6, the Model Law allows the administrative authority in those states to merely “*recommend*” one or more remedies.⁶⁸ The wording “recommend” means that the administrative review body has no authority to order but merely *suggest* the procuring entity to provide certain remedies to the aggrieved supplier. This implies the administrative review body’s decisions are not binding and are non-enforceable. In such a case, there may be a risk that the recommendation would not be enforced, since the procuring entity may disregard the review body’s recommendation without

⁶⁶ See Arrowsmith, *et al*, fn.57 above, p804.

⁶⁷ *ibid*.

⁶⁸ See Article 54(3) and the GTE, remarks on Article 54.

pressure to compulsorily enforce it. This is perhaps a plausible possibility in some states. This “recommendatory” nature of review reflects again, to ensure the widest acceptability of the Model Law, a pragmatic approach discussed in chapter 3(3.1.3) is used to deal with this issue.

However, it is also inappropriate to suppose that the recommendations are fruitless because of the possibility of non-enforcement. In practice, in some States, non-legally binding measures has a great effect. For example, in the UK, an overwhelming majority of recommendations of central government ombudsmen are followed in practice.⁶⁹ Thus, it can be argued that the aforesaid recommendation approach can produce substantial results in some States, although it may not work well in other States.

The Model Law refers to judicial review very briefly, as noted above. It does not define the powers that should be given to a judicial review body, but simply indicates that these should be powers generally available to the judicial review body in the state concerned.⁷⁰ This means whether a binding review from a judicial body is available and whether it can be enforced is determined by enacting States.

Unlike the Model Law, the EU regime requires that external review bodies’ decisions must be binding and enforceable in Member States. It is assumed that a judicial body makes binding decisions. New Article 2(9) of both Remedies Directives clearly requires that the independent administrative review body’s decisions must be legally binding. Further, new Article 2(8) requires that Member States must ensure that decisions taken by review bodies can be effectively enforced.

Similar to the EU regime, the current GPA seems also require that the review body’s

⁶⁹ See Craig, fn.61 above, p240; Le Sure, A and Sunkin, M., *Public Law* (Longman, 1997), pp406-441.

⁷⁰ See the GTE Remarks on Article 57; Arrowsmith, *et al*, fn.57 above, p753.

decisions must be binding, although it does not expressly stipulate so. Article XX.7 provides that challenge procedures shall “provide for” rapid interim measures to correct breaches, and “correction” of breaches or compensation, which indicates decisions of the review body, including the court and the impartial administrative review body, should be binding.⁷¹ However, under the revised GPA, it seems that the impartial administrative body as the final review body may issue non-binding and non-enforceable decisions, since Article XVIII.6(f) states that the aforesaid administrative review body can provide decisions or *recommendations* relating to supplier challenges.

Unlike the EU regime, both the current and the revised GPA do not provide that the review body’s decisions must be ensured to be effectively enforced. It may be interpreted that the general GPA requirement of effectiveness considered in chapter 3(5.3) means that the review body’s decisions should be effectively enforced, as effective enforcement is an important element of an effective challenge system. However, it may be inappropriate to say that the effectiveness principle indicates a requirement of the enforcement of the review body’s decisions where there is no further specific provision stipulating so, since the effectiveness principle seems not constitute an independent obligation.⁷²

Like the GPA, APEC NBPs do not expressly provide legal effect of the external review body’s decisions. The further guidance on review mechanism in practice specifies that review mechanism can “provide for correction of breaches or compensation”.⁷³ This indicates a desire that the review body’s decisions should be binding. Because one of the APEC general requirements for review mechanism is effectiveness as discussed in chapter 3(3.3), this may

⁷¹ See Arrowsmith, fn.5 above, p255.

⁷² Ibid, pp241-243 and p255, footnote 63.

⁷³ See Annex 3, 4.2.

imply that the review body's decisions should be enforceable, although the information here is far from clear.

Chapter 5 Key characteristics of national supplier review system (II)

-- Standing and Procedures

1. Introduction

This chapter discusses who should enjoy the right to bring proceedings with those fora for review considered in chapter 4 and which procedural rules should be followed while handling procurement disputes.

2. Standing

This section discusses who should have the standing to bring proceedings, and restrictions on the right to review.

2.1 Standing to bring proceedings

Who can exactly enjoy a right to review is a key question in the supplier review system, as it determines who can bring the case before the relevant forum to seek review.¹ Suppliers who have participated (actual suppliers) or intend to participate (potential suppliers) in a specific procurement process (hereafter called “main contractors”) are generally granted the right to review, as their interests will be inevitably injured if the procuring entity violates the procurement rules.

In addition, the right to review may be extended to subcontractors of disappointed main contractors and others including trade associations, certain government bodies (such as finance departments of the government), taxpayers or even citizens in certain regimes. Subcontractors may be given the standing to seek review, because they have an interest in the

¹ See Gordon, D.I., “Constructing A Bid Protest Process: The Choices that Every Procurement Challenge System must make” (2006) Vol.35, No.3 *Public Contract Law Journal* p427 at p436.

procurement process by way of contracting with the main contractor, although they have no direct contractual relationship with the procuring entity, and they may be harmed if the procuring entity violates the procedural rules. For example, a subcontractor would lose the contract opportunity if the main contractor with the lowest price were not awarded the contract as pre-indicated. As representatives of suppliers, trade associations may be granted the standing to sue to protect the interests of suppliers who are members of the association. This approach can keep the aggrieved supplier anonymous. The supervising authority may also be permitted to act *ex officio* and initiate an action against infringement, because the public interest may be adversely affected by the procuring entity's violation. In addition, the public may be allowed to use the challenge mechanism as well, since taxpayers or citizens have rights to care and know the use of the public funds, and the irregular procurement process may cause inconvenience to them.

If all individuals or units mentioned above were given the right to review, it may be helpful for protecting the integrity of the procurement process and promoting the procuring entity and procurement officials' accountability to use public funds. However, the procurement process may be excessively disrupted and negatively affect the economy and efficiency of public purchasing. This problem may be avoided, if the right to review were conferred merely on main contractors. However, the supplier review system may not be effectively used in some cases, since these suppliers may be reluctant to initiate a complaint because of reasons explained in chapter 2(2.2.1), such as fear of retaliation. How this problem - to give the right to review merely to main contractors or extend it to subcontractors and even others - is addressed in the Model Law and the other three international instruments is

considered below. As revealed below, sometimes, they use different approaches to the issue of standing (see Diagram 5.1 below).

Diagram 5.1 Who has a standing to seek review

	Main contractors	Subcontractors	Others
Model Law	Yes	No	No
EU Regime	Yes	No	No
GPA	Yes	Yes	No
APEC NBPs	Yes	Yes	No

2.1.1 Position of main contractors

Drafters of the Model Law recognise that an important safeguard of proper adherence to procurement rules is that suppliers have the right to seek review of the procuring entity’s decision. Such a review process is helpful for making the law self-policing and self-enforcing to a significant degree.² Thus, the Model Law Article 52(1) expressly states that, subject to certain limitations discussed further in 2.2, “any supplier or contractor that claims to have suffered, or they may suffer, loss or injury due to a breach of a duty imposed on the procuring entity” has the right to seek review. The Guide to Enactment (GTE) further clarifies that “the right to review appertains only to suppliers and contractors, and not to members of the general public.”³ This indicates that standing is only given to any *supplier* or *contractor*, rather than anyone else. Further, Article 2(f) defines “supplier or contractor” as “any potential party or the

² See the Guide to Enactment, para.30.

³ Ibid, remarks on Article 52, para. 1.

party to a procurement contract with the procuring entity.” This indicates that the Model Law narrowly uses the term “supplier”, which confines the person who has a standing to seek review to a firm seeking to be party to a government contract,⁴ i.e. main contractors mentioned above. Under the Model Law, for example, the supplier whose tender has been rejected has the right to review.

Article 52(1) mention above also indicates that, to have the standing to seek review, first, main contractors should claim that they have suffered or may suffer loss or injury. This test can have the effect of excluding some suppliers (for example main contractors not affected by the violation) and others (such as the public) from initiating complaints. Consequently, it can avoid excessive disruption to the procurement process. Second, such a loss or injury should be caused by a breach of *duty* imposed on the procuring entity. As explained further in 2.2, under the Model Law, requirements on the procuring entity do not all constitute duties of the procuring entity towards suppliers.⁵ For example, the selection of procurement method is not regarded as a duty of the procuring entity; thus suppliers affected by the procuring entity’s inappropriate procurement method have no right to review, as discussed further in 2.2.

The Model Law, however, does not deal with the capacity of the supplier to seek review or with the nature or degree of interest or detriment that is required to be claimed for a supplier to be able to seek review.⁶ Those issues are left to be clarified by the enacting State.

Like the Model Law, the other three international instruments also give the standing to main contractors. APEC NBPs provide for conferring the right to review on “suppliers who

⁴ See Arrowsmith, S., “The Character and Role of National Challenge Procedures under the Government Procurement Agreement” (2002) 4 *P.P.L.R.* p235 at p243.

⁵ See the GTE, remarks on Article 52, para.3.

⁶ *Ibid*, para. 1

have, or have had, an interest in the procurement concerned.”⁷ The GPA Article XX.2 obliges its Parties to offer challenge procedures enabling a supplier to challenge a breach of the Agreement, (or a failure to comply with a Party’s measures implementing the GPA if direct challenging a breach of the Agreement by suppliers is not allowed under the domestic law according to the revised GPA Article XVIII.1), arising in the context of procurements in which it has or has had an interest. The EU Remedies Directives require Member States to ensure the review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.⁸ The common feature of the above provisions is that they emphasise that suppliers who can bring proceedings must have an “interest” in the procurement concerned. Of course, main contractors are those suppliers who have an interest in the procurement. The purpose that they participate in a procurement competition is to win a particular procurement contract. This “interest” requirement can have the same effect that the requirement of suffering loss contained in the Model Law can have. A sensible application of this requirement can deal with a potential problem – excessive disruption to the process caused by allowing subcontractors and others mentioned above to initiate a complaint,⁹ as further explained in 2.1.3. Such an “interest” requirement also has an effect to exclude some potential main contractors from seeking review. For example, due to the lack of interest, a supplier legally excluded at the early stage because of unsatisfied qualification can be denied to have standing to initiate a complaint over the application of unlawful criteria for the evaluation of tenders.¹⁰

It should be noted that the aforesaid international instruments do not define the concept of an

⁷ See Annex 3, 4.1.

⁸ See Article 1.3 of both Remedies Directives.

⁹ See Arrowsmith, fn.4 above, p244.

¹⁰ Ibid, p245.

“interest”; thus it might be difficult to establish an interest in some cases, for example, where the contract was not advertised.

2.1.2 Position of subcontractors

As showed above, the Model Law and the other three international instruments explicitly provide for conferring the right to review to suppliers who have an interest in the procurement and/or suffer or risk suffering loss or damage because of an alleged violation. Do suppliers mentioned above include subcontractors who may have an interest in the procurement? The Model Law’s answer is no. As noted earlier, Article 52(1) merely states there is a right to review for “any supplier or contractor”. The GTE clarifies that subcontractors have been *intentionally* omitted from the ambit of the right to review stipulated in the Model Law, to avoid an excessive degree of disruption, which might impact negatively on the economy and efficiency of public purchasing.¹¹

In the other three international instruments, whether subcontractors have standing to bring proceedings is not as clear as in the Model Law. It needs to be further interpreted according to the relevant context. As revealed above, the EU regime stresses to give the right to review to the person who has an interest in “obtaining a particular contract”. This seems to exclude subcontractors from seeking review, as “they do not have an interest in *obtaining* the contract but merely in obtaining work because of the award.”¹²

As showed above, the GPA and APEC NBPs stress that suppliers who can invoke challenge procedures should have an interest “in the context of procurements”¹³ (“in the

¹¹ See remarks on Article 52(1) para.1.

¹² See Arrowsmith, S., “Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts” in Arrowsmith, S., (eds.) *Remedies for Enforcing the Public Procurement Rules* (Earlsgate Press, 1993), p1 at p62.

¹³ See the GPA Article XX.2.

context of a covered procurement” under the revised GPA XVIII.1) or “in the procurement concerned”,¹⁴ rather than “obtaining a particular contract”. Reich argues that the GPA provision “would appear to allow not only main contractors to file challenge, but also potential sub-contractors who also have an interest in the procurement.”¹⁵ This broader use of the term “suppliers” referred in the GPA is supported by Arrowsmith. She argues, considering that the GPA Article XX.2 is concerned to ensure that the GPA rules are effectively enforced, it is better to extend “supplier” referred to in this Article to “any firm engaged in supplying works, supplies or services, whether as a main contractor, subcontractor, or operating further down the supply chain.”¹⁶ The same interpretation can also be used to argue that subcontractors have a standing to seek review under APEC NBPs, since they arguably have an interest “in the procurement concerned.”

2.1.3 Position of others

As noted earlier, others may also be granted standing to bring proceedings. However, this is not the case of the Model Law. As explained, the Model Law gives standing merely to “suppliers”; and the GTE further clarifies that the right to review does not appertain to members of the public. Under the Model Law, trade associations are clearly excluded from the ambit of the right to review, simply because they are not “suppliers”.

Similarly, in the other three international instruments, it seems that others do not have a right to review. The “interest” requirement contained in these instruments excludes the person or organisation that is considered as having no sufficient interest in the procurement process, such as trade associations and the public, from seeking review. For example, an individual

¹⁴ See Annex 3, 4.1.

¹⁵ See Reich, A., *International Public Procurement Law: The Evolution of International Regimes on Public Procurement* (London: Kluwer Law International Ltd, 1999), p308.

¹⁶ See Arrowsmith, fn.4 above, p244.

cannot complain to the review body merely on the ground that the procuring entity wasted the public funds and harmed the public interest due to wrongly exclusion of several qualified suppliers from competition, as it has no interest in the procurement.

2.1.4 Further comments

As showed above, the Model Law and the other three international instruments all give standing to main contractors. Subcontractors are excluded from seeking review in the Model Law and in the EU regime. However, provisions of APEC NBPs and the GPA can be interpreted as granting standing to subcontractors. For others, the Model Law and the other three international instruments do not provide that they are given the right to review. However, provisions on the right to review stipulated in the Model Law and the other three international instruments do not limit States' rights to extend standing to subcontracts and others, since it is merely a *minimum* standard to give main contractors rights to review.¹⁷

To grant the right to review to not only main contractors but also subcontractors and trade associations may have some advantages above giving everyone noted earlier standing to sue or merely allowing main contractors to bring proceedings. On the one hand, it can avoid, to a great degree, excessive disruption to the process caused by giving everyone mentioned above the right to review. On the other hand, it is useful to a certain extent for solving problems caused by limiting standing to main contractors. By granting trade associations standing to sue, the affected supplier may be able to preserved anonymity and thus reduce its reluctance to sue. As to subcontractors, it is possible that sometimes infringements affect their interests rather than potential main contractors. For example, in the case of a procurement

¹⁷ See Arrowsmith, S., Linarelli, J. and Wallace, D., *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), p772.

notice with certain discriminatory product specifications such as requirements of only local components, the potential main contractors may not be affected as they can obtain the components from a local subcontractor thus they may not care to challenge the defective specifications; however, such specifications will make the non-domestic potential subcontractors ineligible for competing the work thus they may be willing to initiate a complaint.¹⁸ To extend standing to subcontractors will also be useful for avoiding potential problems in the case of tenders by consortia, commonly found in procurement of major contracts;¹⁹ since subcontractors, as members of the consortium, can challenge the procuring entity's decisions, although the contract is reached between the procuring entity and the consortium.

A problem to extend standing to subcontractors and trade associations is that more disruption to the procurement process may be caused. However, this can be reduced by applying the "interest" requirement discussed above. Subcontractors' interest can be required to be shown "in the context of a procurement", as required by the GPA introduced earlier. For trade associations, it might be appropriate to require showing that at least one of their members was interested in bidding that sort of contracts.

2.2 Restrictions on the right to review

Although suppliers concerned are given a right to review in the Model Law, suppliers cannot challenge the procuring entity if the rules unfulfilled by the procuring entity are not regarded as imposing obligations on it; since under Article 52(1) mentioned earlier, the complaining supplier's loss or injury should be caused by a breach of the procuring entity's *duty*. Further,

¹⁸ See Reich, fn.15 above, p308.

¹⁹ See Arrowsmith, fn.4 above, p244.

Article 52(2) states that the following shall not be subject to the review: a) the selection of a procurement method; b) the choice of a selection procedure for procurement of services; c) the limitation of participation in procurement on the basis of nationality; d) a decision to reject all tenders, proposals, offers or quotations; e) a refusal to respond to an expression of interest in participating in request for proposals proceedings; and f) an omission of reference to the Model Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings in solicitation documents and in requests for proposals for services.

The GTE explains that the exemption of the above acts and decisions from review is based on a distinction between duties and discretionary decisions of the procuring entity.²⁰ On the one hand, the breach of duties imposed on the procuring entity that are directed to its relationship with suppliers and that are intended to constitute legal obligations towards suppliers, for example failure to select the winning bidder under the pre-stated criteria, would result in the exercise of right to review. On the other hand, the exercise of discretion by the procuring entity is regarded as only an internal requirement of the administration that may merely aim at the public interest, and thus would not give rise to private remedies. The selection of a procurement method, for example, is at the discretion of the procuring entity and does not directly concern the fairness of treatment of the suppliers; thus it is excluded from review.²¹ To restrict suppliers' right to review aims at striking a workable balance between the need to protect suppliers' interests and the integrity of the procurement process and the need to limit disruption of the procurement process.²²

²⁰ See remarks on Article 52, para.3.

²¹ See the GTE, para33.

²² Ibid.

However, the above arguments may not stand up; as some of them are not convincing and some suppliers' interests would be prejudiced and ultimately the enforcement of the procurement rules would be adversely affected, if certain restrictions were adopted in practice, as discussed below. The aforesaid restrictions on right to review have been criticised by many academics. For instance, Arrowsmith argues that these restrictions are too broad.²³ Indeed, some of exemptions, including the choice of procurement method, the choice of a selection procedure for procurement of services and the rejection of all tenders, are unreasonable.

For example, to treat the choice of procurement method as immune from review is highly likely to lead to abuse in practice. One reason is that conditions for the use of alternative methods stipulated in the Model Law are not clear and rigorous enough. The procuring entity may thereof deliberately evade the procurement method that should be used but select a less-competitive method to favour a particular supplier, by broadly explaining the conditions for the use of alternative methods. As Myers argues, “[f]ollowing the rules with respect to choice of the methods of procurement is one of the most important aspects of government procurement. It would obviously be inappropriate to simply use sole source procurement because he knows of only one manufacturer of an item and has made no further investigation to determine whether there are other available suppliers.”²⁴ Thus, he considers that the exemption of selection of procurement methods from review is incorrect and does not advise governments adopting the Model Law to adopt it.²⁵

To treat the selection of procurement method as immune from review is also unfair for

²³ See Arrowsmith, S., “Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard” (2004) *I.C.L.Q.* p17 at p42.

²⁴ Myers, J.J., “Commentary on the UNCITRAL Model Law on Procurement”, (1994) June, *International Business Lawyer* p253 at p255.

²⁵ *Ibid.*

suppliers concerned, as they are unable to take an action against the procuring entity even if it acted in bad faith, as revealed in the above examples. More seriously, it may conversely encourage the procuring entity to choose an alternative procurement method other than open tendering, to avoid suppliers' complaints. For example, where single source procurement is employed, it is likely for suppliers even not being aware of the existence of a particular procurement contract and thus no opportunity to complain. This will not only harm suppliers' interests but also adversely affect the enforcement of procurement rules. The same consequences can be caused when the choice of a selection procedure for procurement of services and the rejection of all tenders are exempted from review, as they are also easily abused in practice.

The aforesaid problems have been realised by UNCITRAL. During the current review of the Model Law it is being considered whether to delete the above list of exceptions to the review process in the revision of the Model Law.²⁶

Unlike the Model Law, the EU regime, the GPA and APEC NBPs do not provide for similar restrictions on right to review.

3. Procedural arrangements – time limits and publication of the decision

3.1 Time limits

Rapid resolution of procurement disputes is quite important for the effective enforcement of the procurement rules and the adequate protection of the aggrieved supplier's interest and other interests involved.²⁷ This is because the contract will often be awarded or even be

²⁶ See Nicholas, C., "The UNCITRAL Model Law on Procurement – The Current Reform Programme" (2006) 6 *P.P.L.R.* pNA161 at pNA166.

²⁷ See further Fernández Martín, J. M., *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon

carried out by the winning supplier quite quickly following the conclusion of the award procedures, which may make it very difficult or even impossible to correct the breach.²⁸ After the contract is concluded, it is often not allowed to be annulled, for protecting the winning supplier's interest and the public interest and maintaining the legal certainty; and the only remedy for the aggrieved supplier in some regimes is to claim damages which may be difficult to obtain, as further discussed in chapter 6. Of course, suspension may be used to prevent the conclusion of the contract during the dispute resolution process. However, the review body may be reluctant to order a suspension for protecting interests of the public and other suppliers, as further explained in chapter 6. It is clear, if a procurement dispute cannot be settled rapidly, the aggrieved supplier's interest may not be effectively protected and the public interest and other suppliers' interests may be adversely affected. To ensure the speedy resolution of procurement disputes, the Model Law provides for detailed time limits on the review process; the other three international instruments stipulate a general requirement on speedy remedies, as further discussed below.

3.1.1 Suggestions of the Model Law

To ensure speedy resolution of procurement disputes, the Model Law stipulates precise time limits, including both time limits for initiating a complaint and for completing the review, for procuring entity review and administrative review, as explained below. Time limits for judicial review are envisaged to be determined by enacting States.

It is important for the successful and rapid resolution of the procurement dispute to initiate a complaint as quickly as possible, since it is the first step to the speedy settlement of

Press, 1996), pp209-210; Pachnou, D., "The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works section in the United Kingdom and Greece", PhD thesis, (Nottingham University, 2003), pp39-42.

²⁸ See Arrowsmith, *et al*, fn.17 above, p761.

the dispute. The earlier the case is brought, the easier it may be settled and the less disruption to the procurement it may be caused. A complaint concerning defective specifications, for example, can be easily handled in the early stage by simply deleting or correcting those inappropriate requirements and thus minimise the harm to the procurement process. By providing time limits for initiating a complaint, suppliers are limited to file a complaint within specified time periods, which will benefit the rapid resolution of disputes and reducing disruption to the procurement proceeding.

The Model Law suggests that a complaint should be submitted before the procuring entity within 20 days of the time that the supplier became aware or should have become aware the circumstances giving rise to the complaint,²⁹ so as to avoid unnecessary delay and disruption in the procurement proceeding at a later stage.³⁰ Similarly, a 20-day time limit is also given to have recourse to a higher administrative body for review.³¹

The time limit for completing the review is also crucial for the speedy resolution of procurement disputes. If there is no clear time limit or at least a clear requirement on the rapid completion of the review procedures, the resolution of disputes may be delayed; since, for example, the review body may spend many months investigating complicated procurement.³² If no suspension is available during the dispute resolution process, the contract may be awarded before the decision is made. Even if the procurement process can be suspended while the challenge is pending, a strict time limit for deciding the case is also needed for avoiding or reducing disruption to the procurement process. Also, a definite time limit for completion is helpful for minimising some problems that may be caused by the supplier review system, such

²⁹ See Article 53(2).

³⁰ See the GTE, remarks on Article 53, para.3.

³¹ See Article 54(1).

³² See Gordon, fn.1 above, p438.

as inappropriate compromise because of fear of lengthy litigation discussed in chapter 2(2.2).

The Model Law explicitly stipulates that both the procuring or approving entity and the higher administrative body shall, within 30 days after the submission of the complaint, issue a written decision with grounds based and remedies granted.³³

3.1.2 Provisions of the EU Remedies Directives

Unlike the Model Law, the original two Remedies Directives do not provide precise time limits for various stage of the review process.³⁴ Instead, they merely made a general requirement on review procedures, requiring Member States to ensure the procuring entity's decisions can be reviewed "effectively and, in particular, as rapidly as possible."³⁵ This means that Member States can decide specific time limits for bringing and completing review proceedings, based on the above general requirement. The ECJ further clarified in cases³⁶ that national statutory time limits might be acceptable if they were "reasonable". In *Universale-Bau*, time periods as short as two weeks³⁷ and as long as six weeks, starting from the time when the procuring entity's decision become known or ought to know to those concerned, were accepted by the ECJ as reasonable time limit for initiating complaints in different cases.³⁸

The new Remedies Directive makes clear where a Member State provides that any application for review of a procuring entity's decision taken in the context of, or in relation to,

³³ See Article 53(4) and 54(4).

³⁴ See Reich, fn.15 above, p224.

³⁵ See Article 1.1 of each Remedies Directive.

³⁶ See Case C-470/99, *Universale-Bau v EBS* [2002] E.C.R. I-11617, ECJ and Case C-327/00, *Santex v Unita Socio Sanitaria Locale n.42 di Pavia* [2003] E.C.R.I-1877, ECJ.

³⁷ However, Treumer argues that this fourteen days time limit appears not to be reasonable as more time is often needed to identify violations and make a decision to bring proceedings, especially for foreign suppliers. See Treumer, S. "Recent Trends in the Case Law from the European Court of Justice" in Nielsen, R. & Treumer, S., (eds.) *The New EU Public Procurement Directives*, (Copenhagen: Djøf Publishing, 2005), p17 at pp21-22.

³⁸ See further Arrowsmith, S., *The law of public and utilities procurement* (2nd ed.) (London: Sweet & Maxwell, 2005), pp1408-1410.

a contract award procedure falling within the scope of substantive Directives must be made before the expiry of a specified period, this period shall be at least 10 calendar days from the day following the date on which the procuring entity's decision, accompanied by a summary of the relevant reasons, is sent to the supplier.³⁹ This indicates that Member States are required to give suppliers at least 10 days to initiate their complaints when they apply for review of a procuring entity's decision.

In addition, the new Remedies Directive requires Member States to ensure that a contract is considered ineffective by an independent review body in certain cases discussed further in chapter 6 and provides for the limitation period for claiming ineffectiveness.⁴⁰ Under Article 2f.1 of both Remedies Directives, Member States may provide that the time limits for bring an application for ineffectiveness is 30 days where a contract award notice is published and six month where no contract award notice is published.⁴¹

The original two Remedies Directives do not deal with the time limit for completing review procedures, and it is not made clear in the new Remedies Directive. This is a matter to be decided by Member States according to the above general requirement of effectiveness and rapidity. In practice, length of completing review proceedings is different from State to State.

3.1.3 Provisions of the GPA

Similar to the revised EU Remedies Directives, the GPA provides a general requirement on a rapid review and a minimum time limit for initiating complaints; it does not provide the time limit for completion. To ensure speedy resolution of disputes, the GPA first requires that each

³⁹ See Article 2c of both Remedies Directives.

⁴⁰ See Article 2d.1 and 2f.1 of both Remedies Directives.

⁴¹ See further Golding, J and Henty, P., "The New Remedies Directive of the EC: Standstill and Ineffectiveness" (2008) 3 *P.P.L.R.* p146 at p153.

Party shall provide “timely” challenge procedures for suppliers to seek review.⁴² As Arrowsmith argues, this “timeliness” requirement “relates to the fact that the review body should commence and complete procedures with reasonable expedition.”⁴³ Moreover, the GPA makes a further general requirement on the completion of review, requiring the challenge procedures to be normally completed “in a timely fashion”,⁴⁴ although it does not provide for specified time limit for completing procedures. “Timely” used in the GPA is a vague word. Its meaning “will depend on the nature of the measure challenged and the remedies sought.”⁴⁵ For example, it is more important to rapidly make a decision on a claim of correcting defective specifications than a damages claim; as in the former case, the procurement process probably cannot proceed but in the latter case the contract may have been awarded. Thus, it is inappropriate to spend several months to handle the former case but it seems acceptable in the latter case.

As noted above, the GPA provides for the minimum time limit for bring proceedings. Article XX.5 states that the interested supplier may be required to initiate a challenge procedure “within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known but in no case within a period of less than 10 days.” The revised GPA Article XVIII.3 further clarifies that suppliers should be given the aforesaid time limit to prepare and submit a challenge. It can be seen that the GPA establishes a minimum period for initiating proceedings for ensuring that suppliers have sufficient time to prepare and make a challenge. The GPA Parties must respect this minimum time frame to give suppliers 10 or more days to raise complaints.

⁴² See Article XX.2 [Article XVIII.1].

⁴³ See Arrowsmith, fn.4 above, p241.

⁴⁴ See Article XX.8 [Article XVIII.6(f)].

⁴⁵ See Arrowsmith, fn.4 above, p250.

3.1.4 Provisions of APEC NBPs

APEC NBPs provide for only a general requirement on speedy resolution of procurement disputes. It states that review mechanism should provide “timely” procedures for the review of complaints.⁴⁶ The word “timely” used here can be interpreted as that, in its member economies, proceedings should be brought rapidly by suppliers and also should be accomplished by the review body in a timely manner. This is also a necessary requirement to achieve “effective procedures” for the review of procurement complaints, which is also a general requirement for review mechanism in APEC NBPs discussed in chapter 3(3.3).

3.1.5 Further comments

As revealed above, the Model Law sets up definite time frame for bring and completing review proceedings. To use this approach is because the Model Law is a blueprint designed to be used by national legislators while establishing or improving national procurement legislation. Explicit and detailed provisions would be helpful for national legislators, and benefit the ultimate purpose of the Model Law – to promote international trade in the field of government procurement by harmonising the relevant national laws. Predictability is one advantage of this approach. It makes suppliers know exactly the length of time allowed for them to bring proceedings; and makes all the players know the maximum time limit that the review body should resolve the dispute.⁴⁷ Also, it can avoid interpreting the “timeliness” requirement on the case by case basis.

Unlike the Model Law, the other three international instruments provide some general requirements with certain further guidance (a minimum time limit for initiating complaints in

⁴⁶ See Annex 3, 4.1.

⁴⁷ See Gordon, fn.1 above, p438.

the EU regime and in the GPA) and leave detailed rules on time limits to be supplemented by States. One reason is that it is very difficult or impossible to prescribe detailed review procedural rules such as time limits in such binding international agreements as the GPA and the EU Remedies Directives, because this concerns quite different established legal rules and legal tradition of different States.⁴⁸ Also, it is a particular sensitive issue to set a specified time frame for review process in an international instrument, as this may concern speeding up legal proceedings in some States which involves allocation of financial resources in the judicial system.⁴⁹ As to APEC NBPs, as provisions contained are all non-binding *principles*, it is understandable there are no detailed rules on time limits. To use the aforesaid approach can make the relevant provisions easier to be accepted by States and thus reach an international instrument. However, compared with the approach used in the Model Law, the general requirement on the rapid review proceedings is not clear enough and often needs to be further clarification. It is argued that the effectiveness of the GPA challenge rules and the EU regime would be greatly improved if a clearer time frame or a maximum time limit were provided for resolution of procurement complaints in national fora.⁵⁰

As to the concrete time limit for initiating complaints, the GPA and the EU regime stipulate a minimum 10 day period. As Arrowsmith argues, such “a 10-day period is in fact relatively short, especially if the initially challenge must set out the legal and factual basis for the claim.”⁵¹ Indeed, within this short time frame, the supplier may be unable to complete necessary preparatory work for challenging, such as identification of possible violations and

⁴⁸ See further Pachnou, fn.27 above, p41.

⁴⁹ See Pachnou, D., “Enforcement of the EC Procurement Rules: The Standards Required of National Review systems Under EC Law in the Context of the Principle of Effectiveness” (2000) 2 *P.P.R.L.* p55 at p70.

⁵⁰ See Arrowsmith, fn.4 above, p250 and Gordon, H., Rimmer, S. and Arrowsmith, S., “The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO” (1998) 21 *The World Economy*, p51.

⁵¹ See Arrowsmith, *ibid*, p251.

going through a number of internal levels to decide whether to bring an action.⁵² If an aggrieved supplier has to give up bringing proceedings thereof, “significant defects in the procurement system may escape oversight.”⁵³ Of course, implementing States may set a more generous time limit, for example, a 20 day period as recommended in the Model Law, to reduce or avoid the occurrence of the above problem.

3.2 Publication of the decision.

To ensure transparency of the review proceedings and the effective enforcement of procurement rules, it is useful to let suppliers concerned and the public know the review body’s decision.

The Model Law Article 55(3) suggests that a copy of the decision made by the head of the procuring entity or the external administrative review body shall be furnished to not only the complainant and the procuring entity but also any other supplier or governmental authority participated in the review proceedings, within 5 days after the issuance of the decision. Furthermore, the complaint and the decision shall promptly be made available to the public for inspection, except for information that the disclosure of which would lead to adverse results, such as prohibition of fair competition.

There is no similar provision in the EU Remedies Directives. Detailed rules on this issue are left to be supplemented by Member States in national legislation. It can be argued that it is somehow required by the Remedies Directives under the principle of effectiveness.

The GPA also does not require publishing the review decision. However, the GPA Article XIX.1 [Article VI.1] requires publishing various general measures affecting government

⁵² See further Treumer, fn.37 above, p22.

⁵³ See Dordon, fn.1 above, p437.

procurement including judicial decision and administrative ruling of general application, which arguably “entails publication of the outcome of any challenge procedure that have a value as precedent or as guide for resolving future complaints.”⁵⁴

APEC Transparency Standards on Government Procurement (mentioned in chapter 3(3.1)) 1(a) clearly states that each Economy will ensure that progressively judicial decisions and administrative rulings related to government procurement are promptly published or otherwise made available, for example, via the Internet, in such a manner as to enable interested persons and other Economies to become acquaint with them. Under this provision, decisions of administrative and judicial review bodies should be published in member economies

⁵⁴ See Arrowsmith, fn.4 above, p247 and p255.

Chapter 6 Key characteristics of national supplier review system (III)

- - Remedies

1. Introduction

This chapter discusses in the Model Law and the other three international instruments which remedies are available to the aggrieved supplier in the review process. Provisions on remedies available are an integrated part of an effective supplier review system. The Model Law and the other three international instruments all provide for remedies of suspension, setting aside and damages, although their concrete provisions are different, as elaborated below.

The following section provides an overview of remedies stipulated in the Model Law and the other three international instruments. Then, sections 3-5 discuss remedies of suspension, setting aside and damages in detail. While discussing these three specific remedies, the importance of each remedy will be first considered; then how each remedy is addressed in the Model Law and the other three international instruments will be examined; finally further comments will be provided.

2. An overview of remedies stipulated in each model

2.1 The Model Law

The Model Law provides for remedies that can be granted by the procuring entity itself and by the administrative review body; in particular, it offers a detailed list of remedies for the latter. As explained in chapter 3(2.3), the Model Law deals with judicial review very briefly and does not touch the issue of remedies for judicial review proceedings; however, the aforesaid

remedies list discussed below is equally useful in deciding which remedies should be granted by a court.¹

For remedies available in procuring entity review, the Model Law Article 53(4)(b) stipulates that the head of the procuring entity shall indicate the corrective measures to be taken in its written decision, if the complaint is wholly or partly upheld. Then, the Guide to Enactment (GTE) further explains that the possible corrective measures might include: requiring the procuring entity to rectify the wrongful procurement procedures to comply with the law; requiring the procuring entity to accept a more advantageous offer if there is, instead of the issuance of acceptance notice to the tenderer initially chosen; terminating the procurement proceedings and ordering to re-commence the proceedings.² In addition, the procurement proceedings may be suspended after a complaint has been promptly submitted.³

The Model Law Article 54(3) offers a list of optional remedies for administrative review explained below. (a) Declaring the relevant legal rules or principles that govern the subject-matter of the complaint. (b) Prohibiting the procuring entity from adopting unlawful action or decision or from following an unlawful procedure. (c) Requiring the procuring entity to act or to proceed in a lawful manner or to reach a lawful decision. This remedy requires the procuring entity to correct its wrongful decision by itself. (d) Annuling wholly or partly an unlawful decision of the procuring entity, except the decision bringing the procurement contract into force. This remedy of setting aside is further considered in section 4. (e) Revising an unlawful decision by the procuring entity or substituting its own decision for such a decision, other than any decision bringing the procurement contract into force. It implies that

¹ See Arrowsmith, S. Linarelli, J. and Wallace, D., *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), pp782-783.

² See remarks on Article 53, para.5.

³ See Article 56.

the administrative review body can correct the procuring entity's unlawful decision or directly issue its own decision to substitute the entity's decision, rather than compelling the procuring entity to render a lawful decision. It is much stronger than the third remedy. (f) Requiring the payment of compensation. This strong remedy is discussed further in section 5. (g) Ordering the termination of the procurement proceedings. Under such circumstances, the procuring entity may institute new procurement proceedings.⁴ In addition, suspension elaborated in section 3 can be used provided certain requirements are satisfied.⁵

Considering that national legal systems are different with respect to the nature of the remedies that the administrative review body is competent to grant, the GTE explains that a State may choose to introduce all remedies listed above or only those that an administrative body is normally competent to grant in the legal system of that State.⁶

2.2 The EU regime

Unlike the Model Law, the EU Remedies Directives expressly require the following three specific remedies to be made available in national review procedures in Article 2(1) of both Remedies Directives:

The first is interim measures. National review bodies shall have power to take interim measures, including suspension, at the earliest opportunity for correcting the alleged infringement or preventing further damages to the interested concerned. This means that national review bodies should have the power to suspend contract award procedures, while the review proceedings are pending, to restrain any further infringement.

The second is setting aside unlawful decisions. This includes the removal of

⁴ See the GTE, remarks on Article 54, para.11.

⁵ See the Model Law Article 56.

⁶ See remarks on Article 54, para.8.

discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.

Under the Utilities Remedies Directive (Article 2(1)(c) and 2(5)), Member States are permitted to empower the review body to impose dissuasive penalty payment on the procuring entity, instead of granting interim measures and the annulment of unlawful decisions, in cases where the infringement has not been corrected or prevented.

The third is damages. National review bodies shall have the power to award damages to persons harmed by an infringement.

Considering there are different legal frameworks and different legal traditions in Member States, the two Remedies Directives provide that the above three remedies may be available from separate bodies responsible for different aspects of the review procedure.⁷ This implies that a Member State, for example, may choose to empower the administrative courts to order remedies of suspension and setting aside and the ordinary courts to award damages.⁸

2.3 The GPA

Like the EU regime, the GPA also requires that three specific remedies – interim measures, correction and compensation – must be made available to suppliers in domestic review procedures, as discussed below.

The GPA first required that domestic challenge procedures must provide for rapid interim measures to correct breaches and to preserve commercial opportunities, and further states that the above action “may result in suspension of the procurement process.”⁹ This implies that

⁷ See Article 2(2) of each Directive.

⁸ This is the case in Italy. See Bovis, C., *EC Public Procurement: Case Law and Regulation* (Oxford: Oxford University Press, 2006), pp496-497.

⁹ See Article XX.7(a) [Article XVIII.7(a)].

the GPA Parties must authorise their national review bodies the power of suspension.¹⁰

Also, the GPA requires that correction of the breach *or* compensation for the loss or damages suffered must be available in national challenge procedures.¹¹ The use of word “or” in the provision results in different understandings on whether both remedies of correction and damages or only one of them are required.¹² Taking the word “or” literally, arguably this means the GPA Parties “do not have to provide for set aside remedies if they do wish to do so, but may rely solely on damages as a method for enforcing the rules.”¹³ However, this interpretation would conflict with one GPA general requirement to challenge procedures – providing *effective* procedures to suppliers concerned.¹⁴ If a State limits the review body’s authority to award damages only, it is hardly to say that such a remedy system is effective. As further explained in section 5, it is not easy for suppliers to claim damages due to some procedural difficulties and the aggrieved supplier may have no incentive to complain if compensation is limited to costs only. Moreover, the damages remedy has no corrective effect and thus cannot ensure the enforcement of procurement rules. Thus, arguably, both remedies should be available in a national review system under the GPA principle of effectiveness.¹⁵

2.4 APEC NBPs

Provision on remedies in APEC NBPs is quite brief. It provides that, in practice, review mechanism of member economies can provide for “correction of the breaches or compensation for the loss or damages caused”¹⁶. Similar to the GPA, the word “or” is used

¹⁰ See Arrowsmith, S., “The Character and Role of National Challenge Procedures under the Government Procurement Agreement” (2002) 4 *P.P.L.R.*, p235 at p251.

¹¹ See Article XX.7(c) [Article XVIII.7(b)].

¹² See Arrowsmith, fn.10 above, p253.

¹³ See Arrowsmith, *et al*, fn. 1 above, p784.

¹⁴ See Arrowsmith, fn.10 above, p253; Reich, A., *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (Kluwer Law International, 1999) pp310-311.

¹⁵ See Arrowsmith, fn.10 above, p253.

¹⁶ See Annex 3, 4.2.

and APEC NBPs provide that review procedures should be effective.¹⁷ Thus, it can be argued that the interpretation on whether both remedies of correction and damages are required in the GPA can be used here as well; i.e. arguably, both remedies should be available in national review mechanisms to satisfy the general requirement of effectiveness.

Interim measures are not referred to in APEC NBPs. However, this does not mean that suspension is excluded from possible remedies available to suppliers; since it may be needed for giving effect to the general principle of effectiveness of review procedures to empower the review body to grant suspension.

3. Suspension

3.1 The importance of suspension and conditions for suspension

Suspension is a very effective remedy for protecting the complaining supplier's interest, as it can maintain the *status quo* before the review body issues its decision. If the procurement process continues during the review process, the procurement contract may be concluded or even be performed.¹⁸ In this case, the review body may be not allowed to annul concluded contracts for protecting the public interest and the successful supplier's interest as further explained in section 4. Consequently, the aggrieved supplier may not be given relief or merely granted limited monetary relief explained further in section 5, which is the second best for the complainant.¹⁹ More seriously, "a resource mechanism would lose much of its effectiveness if the contract could be entered into force notwithstanding the fact that the procurement

¹⁷ Ibid, 4.1.

¹⁸ See further Reich, fn.14 above, p310; Arrowsmith, *et al*, fn.1 above, p761.

¹⁹ See Gordon, I., "Constructing A Bid Protest Process: The Choices That Every Procurement Challenge System Must Make" (2006) Spring 35 *Pub. Cont. L. J.* p427 at p441 and p444.

proceedings or decision had been challenged and might be defective.”²⁰

To order a suspension can provide effective remedy to the aggrieved supplier. Also, it can have some effect to deter procuring entities from making violations, since inconvenience to the procuring entity’s projects and criticism from the public can be caused if its projects are delayed. Therefore, it is necessary to make a specific remedy of suspension available in a supplier review system. The application of suspension may be automatic after the initiation of a complaint, or decided by the review body on a case-by-case basis.²¹

However, the application of a suspension will inevitably result in a delay to the procurement process. Suspension will interrupt the procurement process, especially when an automatic suspension is applied.²² Thus, to avoid the abuse of this remedy and reduce its adverse effects, the review body may be required to consider the following factors while deciding the award of suspension; and they may also be relevant to any automatic suspension.

The first factor is whether the applicant’s case is arguable or even serious.²³ This means that the applicant for a suspension should show, at least, the case is not manifestly ill-founded, i.e. the case has some merits thus it has certain degree likelihood of success or even reasonable prospects to win the case.

The second is whether the suspension is really needed.²⁴ The applicant is often required to demonstrate that it is at the risk of suffering irreparable damages in the absence of a suspension. For example, in a State where only damages limited to costs is available after the conclusion of the contract, in the case that the contract is likely awarded soon, the applicant

²⁰ See UNCITRAL Document (A/CN.9/WG.V/WP.22), “Procurement: report of the Secretary-General”, *UNCITRAL Yearbook*, 1989, Vol. XX, pp146-149 para.225.

²¹ See Gordon, fn. 19 above, pp441-442.

²² *Ibid.*

²³ See Arrowsmith, *et al*, fn. 1 above, p773.

²⁴ *Ibid.*

can argue that it will suffer irreparable damages without a suspension. In those States where damages including lost profits are provided, it may be difficult for the applicant to demonstrate the need for a suspension; since the review body may take the view that the supplier's damages can be redressed by adequate compensation thus decline to order a suspension.

The third is whether suspension can adversely affect the public interest and the third parties' interests. Suspension will inevitably delay the completion of the procurement project, which will cause inconvenience to the public, for example in the case of establishing a public hospital. Also, delay can harm the interests of other suppliers participating in the award process, especially the winner bidder's interest, because more time and thus more costs are needed for competing or completing the contract. Thus, the review body is often required, before deciding a suspension, to carry some kind of "balance of interests" test²⁵ - taking into account all interests involved first and then weigh the importance of a suspension against the possible adverse consequences for the public interest and third parties' interests.

The fourth is whether the contract has been concluded. Suspension may be not allowed after the conclusion of the contract in some regimes, because the suspension of concluded contracts can adversely affect the administration, the public interest and in particularly the innocent winning supplier's interest.²⁶

Whether the applicant is able to give an undertaking in damages may be also a requirement in some States, for preventing some suppliers from seeking suspension rashly. This requirement implies that the applicant has to compensate the procuring entity's loss

²⁵ See further Arrowsmith, *et al*, fn.1 above, p774; Arrowsmith, fn.10 above, p251 and Reich, fn.14 above, p310.

²⁶ See Arrowsmith, fn.10 above, p252; Arrowsmith, "Public Procurement: Example of a Developed Field of National Remedies Established by Community Law" (1996) *P.P.L.R.* p125 at p144.

suffered as a result of the suspension, if it loses the case in the main action.²⁷

3.2 The Model Law

The Model Law (Article 56) suggests a “semi-automatic” suspension approach²⁸ to preserve the complainant’s rights pending the disposition of review proceedings.²⁹ Under this procedure, after a timely complaint to the procurement entity or an administrative review body is filed, the procuring proceedings or performance of the procurement contract when the contract enters into force should be automatically suspended for 7 days, provided certain conditions explained below are satisfied. This initial suspension period can be extended by the review body to 30 days.

The GTE clarifies that the above suspension is *not* automatic but is subject to the fulfillment of certain conditions.³⁰ It points out that an automatic suspension may benefit the resolution of the complaint at a lower level without burdening a judicial review procedure, thus facilitating a more economic and efficient dispute resolution. However, it may also increase the extent of disruption to the procurement process, thus affecting the operation of the procuring entity.³¹ To limit the unnecessary triggering of a suspension, Article 56(1) sets forth the following conditions for suspension.

Firstly, the complaint is not frivolous. This provision aims at enabling the review body to look on the face of the complaint to reject frivolous complaints, in the case that *ex parte* proceedings can be initiated by the complainant.³² Unfortunately, it is not clear enough as the

²⁷ See Arrowsmith, *et al*, fn.1 above, p774; Pachnou, D., “Bidder Remedies to Enforce the EC Procurement Rules in England and Wales” (2003) 1 *P.P.L.R.* p35 at p52.

²⁸ See ITC, “Elements of a Model Legal Framework for Public Procurement: The UNCITRAL Model Law on Procurement of Goods, Construction and Services” p20.

²⁹ See the GTE, remarks on Article 56, para.1

³⁰ *Ibid*, para.2.

³¹ *Ibid*, para.1.

³² *Ibid*, para.2.

Model Law and the GTE do not further explain the kind of thing frivolous complaints mean. Because of the lack of clarification, the identification of a frivolous case depends entirely on the discretion of the review body. In practice, it is very possible that a complaint on a very minor irregularity, such as an omission of the contact telephone number in the invitation to tender, is treated as a frivolous case. However, it may not always be obvious that a complaint is frivolous in practice.

Next, the complaining supplier submits a declaration the contents of which, if proven, demonstrate that the supplier will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers. This requirement includes actually three conditions commonly required for awarding a suspension - the need for a suspension, the strength of the case and the “balance of interests”. Before further considering them, one point worth emphasising is that the above provision is not intended to involve an adversarial or evidentiary process, since this would run counter to the objective of a swift triggering of a suspension upon timely raising a complaint.³³

The first condition for suspension is that the complainant must assert that it will suffer irreparable injury if no suspension is given, i.e. it must demonstrate there is a need for suspension.³⁴ For example, the unsuccessful supplier may argue the procuring entity’s award decision will bring it serious and irreparable damages, which cannot be adequately compensated by financial damages. Second, the complainant must declare that it would have a chance to succeed in the main action. This means that the complainant should allege at this

³³ Ibid.

³⁴ See Arrowsmith, *et al*, fn. 1 above, p773.

stage that the procuring entity has invoked a breach of duty and thus it has a possibility to win the case. Third, the complainant must state that no disproportionate harm to the procuring entity or other suppliers would be caused. This means that the complainant must indicate that suspension will not entail serious inconvenience or damages to other interests involved.

Finally, Article 56(4) clearly states that suspension shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. This means that the suspension might be circumvented on the consideration of urgent public interest, for example in the case of procurement of goods needed urgently at the site of a natural disaster.³⁵

As mentioned earlier, after the initial short period of suspension expires, the suspension period may be prolonged up to 30 days by the review body on the assessment of the merits of the complaint.³⁶

It should be reiterated here that the Model Law says nothing about the remedy of suspension at judicial level, since it does not deal with judicial review in detail.

3.3 The EU regime

In the original two Remedies Directives, automatic suspension was not required and the precise conditions for suspension were not made clear. However, the new Remedies Directive clearly requires Member States to ensure an automatic suspension in certain circumstances, although it still does not clarify the conditions for suspension, as explained below.

Firstly, Article 2.3 of both original Remedies Directives states that review procedures need *not* in themselves have an automatic suspensive effect on the contract award procedures

³⁵ See the GTE, remarks on Article 56, para.3.

³⁶ Ibid.

to which they relate. The new Remedies Directive still states the same principle as the general rules but adds the very important qualification, requiring an automatic suspension in the following cases.³⁷ The new Article 1(5) of both Remedies Directives clearly states, in the case that Member States require the aggrieved supplier to first seek review with the procuring entity, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract. The suspension shall not end before a period of at least 10 days with effect from the day following the date on which the procuring entity has sent a reply. This indicates if a Member State requires a compulsory procuring entity review, to prevent the procuring entity from rushing into the contract before the supplier seeks an external review, it must provide for an automatic suspension, not ending before the expiry of the limitation period introduced in chapter 5(3.1.2). Also, new Article 2(3) of both Remedies Directives requires, when a body of first instance independent of the procuring entity reviews a contract award decision, Member States must ensure that the procuring entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period introduced further in 4.3. This seems to imply when an external review body as the first instance review body reviews a contract award decision, the conclusion of the contract should also be automatically suspended until at least the expiry of the standstill period. Except in the above cases, both Remedies Directives do not require an automatic suspension at stage of appeal from the first instance review; thus Member States can decide whether to require an automatic suspension

³⁷ See new Article 2(4) of the Remedies Directive; new Article 2(3a) of the Utilities Remedies Directive.

when the supplier seeks review from the appellant review body such as a court or an independent body.

In addition, new Article 2d(1)(b) of both Remedies Directives clearly provides that the external review body shall consider the contract ineffective, if it has infringed the above automatic suspension requirements and there is another breach of rules which has affected the supplier's chance to win the contract.

Secondly, the precise conditions for suspension were not made clear in the two original Remedies Directives. Similarly, the new Remedies Directive merely states that Member States may provide that the body responsible for review procedures may consider the probable consequences of interim measures for all interests likely to be harmed, and the public interest, and may decline to grant such measures where their negative consequences could exceed their benefits.³⁸ This indicates that some kind of "balance of interests" test may be applied in Member States. They may allow a review body, when it needs to decide a suspension, refuse to suspend the procurement if it thinks that inconvenience or harms caused to the public and other interests involved as a result of suspension could be greater than benefits possibly obtained by ordering a suspension, after weighing all interested involved. In practice, review bodies tend to give greater weight to the public interest, as the possible damages are to an individual supplier only if no suspension is awarded.³⁹

New Article 2(7) of the Remedies Directive and new Article 2(6) of the Utilities Remedies Directives seem to indicate another condition that Member States may, if they choose, impose as a condition for suspension – the contract has not been concluded. The

³⁸ See new Article 2(5) of the Remedies Directive and new Article 2(4) of the Utilities Remedies Directive.

³⁹ See Brown, A., "Effectiveness of Remedies at National Level in the field of Public procurement" (1998) 4 *P.P.L.R.* p89 at p92.

above Articles allow Member States to provide that, after the conclusion of a contract under provisions on automatic suspension and standstill requirement explained further in 4.3, the review body's power shall be limited to award damages only. This implies it is acceptable in the EU regime that suspension will not be awarded after the contract has been concluded according to the relevant rules.

In addition to these two conditions, in practice, the following criteria may be considered by the review body while deciding whether to award a suspension.

To consider whether there are the prospects of success of the case may be one criterion. For example, in *CS Communications Systems*,⁴⁰ a supplier raised a complaint with the Federal Procurement Office of Austria to seek to set aside the procuring entity's decision rejecting its tender and apply for suspending the conclusion of the contract. The review body sought a preliminary ruling from the ECJ as to whether the prospects of success of the substantive action was permitted to be considered while deciding a suspension, because it was not expressly indicated in the Remedies Directive. The ECJ observed that the fact that the prospects of the substantive action are not mentioned in the Remedies Directive does not mean the preclusion of such prospects from being considered. Member States can require their national review bodies to take such prospects into account when deciding the grant of interim measures, provided it does not breach the principle of equivalence and effectiveness. This clearly indicates that strength of the case can be considered while deciding a suspension.

Also, the adequacy of a damages remedy may be a relevant criterion. The review body may deny awarding a suspension if it considers that the applicant's loss can be adequately

⁴⁰ Case C-424/01, *CS Communications & Systems Austria GmbH v Allgemeine Unfallversicherungsanstalt* [2003] E.C.R. I-03249. See further Brown, A., "Whether the prospects of success of the substantive Action may be taken into account when considering an application for interim measures: A note on case C-424/01 *CS Communications & Systems Austria v AUV*" (2003) 6 *P.P.L.R.* pNA144.

compensated by financial damages. For example, in *Esedra*,⁴¹ the CFI rejected Esedra's application for a suspension; one reason is that it thought that financial loss was not irreparable if this can be compensated by awarding damages. Nevertheless, to consider the adequacy of damages while determining a suspension is a controversial issue. As further explained in section 5, it is generally not easy for the supplier to be given adequate damages and even impossible to seek compensation in certain cases. More importantly, the adequacy of a damages remedy does not necessarily result in the preclusion of a suspension; as the EC Law requires that the particular remedy of suspension should be effective.⁴² In the UK, in *Harmon*,⁴³ the judge took the view that the adequacy of damages condition cannot be applied to the suspension remedy, since suspension under the regulations is a particular remedy and the EC law requires that remedies in procurement should be effective. As Arrowsmith argues, *Alcatel*⁴⁴ discussed further in 4.3 indicates that a remedy of setting aside is still needed although damages may be awarded; this interpretation also applies to the suspension remedy.⁴⁵

3.4 The GPA

As introduced in 2.3, the GPA requires that national challenge procedures shall provide for rapid interim measures, and clearly states that such action may result in suspension of the procurement process. This indicates that the award of suspension may be decided by national review bodies on the case-by case basis, rather than applying automatically after the review

⁴¹ Case T-169/00R, *Esedra Sprl v Commission* [2000] E.C.R. II-2951. See further Brown, A., "Interim Measures against the Community Institutions in Procurement Cases: A Note on the Esedra Case" (2001) 2 *P.P.L.R.* pNA51.

⁴² See Arrowsmith, S., *The law of public and utilities procurement* (2nd ed.) (London: Sweet & Maxwell, 2005), pp1418-1419; Pachnou, fn.27 above, p51.

⁴³ *Harmon CFEM Facades (uk) Ltd v The Corporate Officer of the House of Commons*, [2002] 2 L.G.L.R.372. See further Arrowsmith, S., "EU Procurement Rules in the UK Courts: An Analysis of the Harmon Case Part I and II" (2000) 3 and 4 *P.P.L.R.*, p120 and p135.

⁴⁴ Case C81/98, *Alcatel Austria AG v Bundesministerium fur Wissenschaft und Verkehr* [1999] E.C.R. I-7671. See the notes by Oehler, M., & Dischendorfer, M., (2000) 2 *P.P.L.R.* at pCS54; Dischendorfer, M., & Arrowsmith, S., (Case C212/02) (2004) 6 *P.P.L.R.*, pNA165; Arrowsmith, fn.42 above, pp1396-1397 and pp1427-1431.

⁴⁵ See Arrowsmith, fn.42 above, p1419.

proceedings are initiated. The GPA Parties can provide automatic suspension if they wish.⁴⁶

Like the EU regime, the GPA merely clearly provides for one test – the balance of interests - to be applied if Parties choose this when considering the award of a suspension. Article XX.7(a) [Article XVIII.7(a)] states that procedures may provide that overriding adverse consequences for the interest concerned, including the public interest, may be considered in deciding whether interim measures should be applied, and just cause for not acting shall be provided in writing. This indicates that national review bodies may be given some discretion in balancing the interests involved.⁴⁷ If they think there will be “overriding” adverse affections on other interests concerned, they can deny awarding a suspension.

Although other factors are not expressly mentioned in the GPA, it is submitted that the following conditions for suspension seem acceptable under the GPA. One concerns the strength of the case. Because interim measures need only be provided to correct “breaches” of the Agreement in Article XX.7(a), it seems to imply that the applicant for a suspension may, if states choose, be required to indicate at least that the procuring entity has invoked a breach of duty under the GPA and its claim is thus likely to be successful.⁴⁸ The other concerns an undertaking in damages. It is argued that Article XX.7(a) may be concerned only with limiting the substantive grounds for rejecting interim measures, and does not prohibit States from imposing procedural requirements on the application of suspension; thus an undertaking in damages can be required in the GPA Parties.⁴⁹

The limitation based on adequacy of damages is probably not permitted under the

⁴⁶ See Dingel, D. D., *Public Procurement: A Harmonization of the National Judicial Review of the Application of European Community Law* (The Hague: Kluwer Law International, 1999) p240.

⁴⁷ See further Arrowsmith, fn.10 above, p252.

⁴⁸ Ibid.

⁴⁹ Ibid.

GPA.⁵⁰ As already noted, Article XX.7(a) clearly states that the interim measures is used to “correct breaches” and “preserve commercial opportunities”, rather than for protecting the interests concerned. Adequate damages may sufficiently compensate the aggrieved supplier’s damages; but it cannot correct irregularities occurred.

In addition, the GPA says nothing about whether interim measures can apply to concluded contracts. There are different understandings on this. Reich argues that, considering the broad requirement of the GPA is to use interim measures to “correct breaches” and “preserve commercial opportunities”, national review bodies should be empowered to suspend the performance of a concluded contract.⁵¹ Dingel asserts this is a matter to be decided by the GPA Parties, since there is no express provision prohibiting suspending concluded contracts.⁵² A better view is that it seems acceptable to place a bar on suspending a concluded contract,⁵³ since Article XX.7 allows rejection of interim measures for protecting “overriding” public interest and other interests concerned. After the conclusion of the contract, arguably, the successful bidder’s interest in legal certainty is generally an “overriding” interest, unless it is aware of the breach.

3.5 APEC NBPs

As noted in 2.4, there is no provision on suspension in APEC NBPs. Member economies may provide for suspension and conditions for suspension in national legislation if they wish.

3.6 Further comments

As noted above, suspension may be automatic, or decided by the review body. An automatic suspension can avoid “the need for litigation of whether to grant interim measure on a

⁵⁰ Ibid.

⁵¹ Reich, fn.14 above, p310.

⁵² See Dingel, fn.46 above, p241.

⁵³ See Arrowsmith, fn.10 above, pp252-253.

case-by-case basis, but that comes at the cost of disruption in every procurement that is protested.”⁵⁴ To empower the review body to award a suspension on a case-by-case basis can avoid the problem of abuse. However, it may be difficult for the aggrieved supplier to be awarded this remedy, as they will presumably need to persuade the review body the procurement procedure should be suspended during the review process.⁵⁵ Considering the public interest and other interests involved, the review body is often reluctant to give a suspension, especially when it is allowed to take long time to resolve the dispute.⁵⁶

The “semi-automatic” approach adopted in the Model Law is though to “represent the best and most modern techniques” in the area of procurement legislation.⁵⁷ This approach can strike a balance between the protection of the aggrieved supplier’s interest and the avoidance of an excessive or undue disruption of the procurement process. On the one hand, the complaining supplier can be easily afforded a short initial period of suspension; and during that period it would have an opportunity to persuade the review body to extend suspension. On the other hand, the exercise of the above short initial suspension is conditional upon the satisfaction of certain conditions; and the prolongation of the initial suspension, which is limited to 30 days, is determined by the review body especially on the consideration of all interests involved; and suspension is allowed to be avoided in exceptional circumstances.

Conditions for suspension should not be too difficult to satisfy. If they are too strict, for example, requiring the applicant to show that the absence of a suspension would endanger its commercial survival, it would make the suspension remedy very difficult or impossible to

⁵⁴ See Gordon, fn.19 above, p442.

⁵⁵ Ibid, pp441-442.

⁵⁶ Ibid, p442; Arrowsmith, *et al*, fn.1 above, p774.

⁵⁷ See Myers, J. J., “Commentary on the UNCITRAL Model Law on Procurement” (1994) June *International Business Lawyer* p253 at p255.

obtain.⁵⁸ Consequently, the general requirement of effectiveness of the review system clearly stated in the EU regime, the GPA, APEC NBPs and actually included in the Model Law⁵⁹ will not be complied with.

4. Setting aside unlawful decisions

4.1 The importance of annulment and issues on the annulment of concluded contracts

Aggrieved suppliers often prefer to have the procuring entity's illegal decision to be annulled and then re-run the whole or the relevant procurement procedure,⁶⁰ since the remedy of setting aside can allow the supplier an opportunity to compete for the contract. This remedy can also benefit the enforcement of the procurement rules, as it can correct irregularities occurred and deter procuring entities from making infringements.

As far as the remedy of setting aside is concerned, particular attention should be paid to concluded contracts. Whether concluded contracts can be annulled is a sensitive issue. If a concluded contract is annulled and a new procurement process is conducted, the public has to bear the inconvenience caused by the delay; also, the innocent winning supplier's interest may be harmed as it may lose the contract in the new competition. In some States, it may be thought that priority should be given to the public interest and the winning supplier once a contract has been signed, and accordingly review bodies are not allowed to interfere with concluded contracts.

However, the prohibition on annulling concluded contracts may cause the following problems: first, the aggrieved supplier's interest can be harmed, as possibly it cannot be

⁵⁸ See further Brown, fn.41 above, p53.

⁵⁹ See the GTE (para.31).

⁶⁰ See Arrowsmith, *et al*, fn.1 above, pp781-782.

granted damages (or sufficient damages) because of procedural difficulties further explained in section 5, and it has no chance to win the disputed contract. Also, such a prohibition implies that the irregularity will be maintained in the contract. More seriously, it may reduce the incentive to comply with the procurement rules, and encourage the procuring entity to rush to conclude contracts to avoid the application of certain effective remedies.⁶¹ Consequently, the effectiveness of the review system may be seriously affected. Therefore, how to address the above problems is an important problem faced by every review system. Provisions on the remedy of setting aside, especially whether it can be applied to concluded contracts, stipulated in the Model Law and the other three international instruments are discussed below.

4.2 The Model Law

The remedy of setting aside is expressly listed in the remedy list of the Model Law. Article 54(3)(d) and (e) suggests that the annulment of a decision and the revision of a decision or the substitution of its own decisions for the procuring entity's decision should not be available in respect of a contract which has entered into force. This implies that the Model Law does not suggest setting aside concluded contracts.⁶² This is further clarified in the GTE, which states that, considering that the “annulment of procurement contracts may be particularly disruptive of the procurement process and might not be in the public interest, it has not been provided for in the Model Law itself.”⁶³

4.3 The EU regime

The EU regime requires Member States to give national review bodies the power to set aside procuring entities' unlawful decisions. It allows Member States to provide in principle not to

⁶¹ Ibid, p787.

⁶² Ibid, p786.

⁶³ See remarks on Article 54, para.12.

annul concluded contracts, although the new Remedies Directive provides that concluded contracts can become ineffective in specific circumstances, as discussed further below.

Article 2(1)(b) of the original two Remedies Directives require that national review bodies shall generally have the power to “either set aside or ensure the setting aside of decisions taken unlawfully”. However, they do not set out conditions for awarding this remedy.⁶⁴ Thus, whether the review body can deny setting aside an unlawful decision in certain circumstances is decided by the review body.⁶⁵

Further, Article 2(6) allows Member States to limit the review body’s power to award damages after the conclusion of a contract, except where a decision must be set aside prior to the award of damages. This clearly indicates that Member States are allowed not to annul concluded contracts.⁶⁶ Because of this and because the original two Remedies Directives did not require that the procuring entity must notify unsuccessful suppliers the award decision before the conclusion of the contract, the following situations sometimes happened in practice: before the contract was signed, the aggrieved supplier had no chance to know that the contract would be concluded soon and thus take an action in time to seek effective remedies such as correction; after the conclusion of the contract, it may be only allowed to claim damages. It was especially so when the procuring entity illegally directly awarded a contract.⁶⁷ Many academics and practitioners criticised that the prohibition on annulling concluded contracts can make it impossible to remedy effectively non-compliance with Community procurement rules.⁶⁸ It was indicated in *Alcatel* mentioned earlier that the effectiveness requirement of the

⁶⁴ See Bedford, B., “The EC Public Procurement Regime: the Remedies Directives” in Tyrrell, A and Bedford, B., (eds.) *Public Procurement in Europe: Enforcement and Remedies* (London: Butterworths, 1997) p1 at p4.

⁶⁵ See further Arrowsmith, *et al*, fn.1 above, p784.

⁶⁶ See Arrowsmith, fn.42 above, p1425.

⁶⁷ See Williams, R., “A New Remedies Directive for the European Community”, (2008) 2 *P.P.L.R.*, pNA19 at p21.

⁶⁸ See “Proposal for a Directive amending Directives 89/665 and 92/13 with regard to improving the effectiveness

Remedies Directives was not met when there was a limitation on the availability of setting aside to concluded contracts and no guarantee to ensure that disgruntled suppliers have a practical opportunity to challenge the award decision in advance of the conclusion of the contract. Further, it confirmed that Member States must ensure that the award decision was in all cases open to review to allow the decision to be annulled, despite there was a possibility to grant damages once the contract has been concluded. This ECJ' judgment actually requires "effective remedies to set aside all kinds of decisions, including award decision."⁶⁹ Alternatively, the procuring entity should publicise its award decision and suspend a period of time to allow any interested supplier to seek a review of the award decision before the contract is signed.⁷⁰

The new Remedies Directive (Article 2.7 of the Remedies Directive and Article 2.6 of the Utilities Directive) still allows Member States to provide the prohibition of annulling concluded contracts in most cases. Instead, it introduces a mandatory standstill period⁷¹ to allow disgruntled suppliers an opportunity to initiate an effective and rapid review procedure at a time when infringement can still be corrected. Under new Article 2a of both Remedies Directives, the procuring entity, after making an award decision, should in principle delay the conclusion of the contract until the end of a period of at least 10 days beginning to run following the communication of the award decision and the relevant information. Member States are allowed, under new Article 2b, to derogate from the aforesaid standstill requirement

of review procedures concerning the award of Public Contracts", COM (2006) 195 final/2, p4; Reich, fn.14 above, pp220-221; Arrowsmith, fn.26 above, p145.

⁶⁹ See Arrowsmith, fn.42 above, p1427-1431.

⁷⁰ See Henty, P., "Is the Standstill A Step Forward?: The Proposed Revision of the EC Remedies Directive" (2006) 5 *P.P.L.R.* p253 at p253.

⁷¹ See further Arrowsmith, S., "Implementation of the New EC Procurement Directives and the Alcatel Ruling in England and Wales and North Ireland: A review of the New Legislation and Guidance" (2006) 3 *P.P.L.R.* p86 at p131.

in certain circumstances.⁷²

It should be noted, under new Article 2d(1) of both Remedies Directives, contracts are concluded in breach of the standstill period or automatic suspension requirements (introduced in 3.3) should in principle be considered ineffective by the external review body, if they are combined with infringements of substantive directives to the extent that the complainant's chance to win the contract has been affected. Also, the illegal direct award of contracts without prior publication of a contract notice should be considered ineffective. The consequences of a contract being considered ineffective are decided by Member States; they may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which have not been performed and provide for the application of other penalties in the latter case.⁷³ These provisions indicate that under the new Remedies Directive concluded contracts can be annulled in special circumstances.

However, the new Remedies Directive does not set out detailed condition for annulling concluded contracts except one concerning the public interest. New Article 2d(3) of both Remedies Directives states that Member States may provide that the external review body may not consider a illegal concluded contract ineffective but impose alternative penalties instead, if it finds, after having examined all relevant factors, that overriding reasons relating to a general interest (which do not cover purely economic interests) require that the effect of the contract should be maintained. This indicates that the review body may deny annulling a concluded contract for the public interest consideration. In addition, under new Article 2d(4), for illegal direct awarded contracts, the risk of ineffectiveness can be avoided by the procuring

⁷² See further Golding, J and Henty, P., "The New Remedies Directive of the EC: Standstill and Ineffectiveness" (2008) 3 *P.P.L.R* p146 at pp148-150.

⁷³ See new Article 2d(2) and 2e(2) of the both Remedies Directives; *ibid*, pp150-153.

entity by notifying its intention to conclude the contract in the official Journal and applying a standstill period.

4.4 The GPA

As introduced in 2.3, the GPA requires that national challenge procedures shall provide for correction of the breach. This “must imply that the review body should be able to set aside decision conflicting with it”⁷⁴; since in certain circumstances such as the wrongful exclusion of a qualified supplier from competition, setting aside an unlawful decision is the first step to correct the breach. The GPA does not refer to conditions for setting aside. Review bodies should normally have some discretion in determining the grant of this remedy. Thus, as with the limitation on the application of interim measure, national review bodies may deny awarding the annulment remedy if it considers that serious public inconvenience could be caused.⁷⁵

Unlike the EU regime, the GPA does not provide special rules for concluded contracts. It is argued that annulling concluded contracts seems acceptable in the GPA, since there is nothing in the GPA to preclude national review bodies from interfering with contracts that have been concluded.⁷⁶ Reich also asserts that “it would seem that the review body must have the authority not just to suspend of a contract but also to terminate a contract that has already been awarded whenever it has determined that the award was in conflict with the Code (the GPA) and that its termination is feasible and required in order to correct breach.”⁷⁷

4.5 APEC NBPs

APEC NBPs merely stipulates that review mechanism in practice can provide for “correction

⁷⁴ See Dingel, fn.46 above, p240.

⁷⁵ See Arrowsmith, fn.10 above, p253.

⁷⁶ See Ibid.

⁷⁷ See Reich, fn.14 above, p311.

of the breaches”⁷⁸. This is quite similar to the GPA. Thus, similarly, it can be argued that the provision of “correction of the breaches” implies that review bodies of member economies should have power to annul unlawful decisions. There is no further provision on whether the remedy of setting aside can be applied to concluded contracts in APEC NBPs; it is decided by individual member economies.

4.6 Further Comments

As revealed above, a key issue in relation to the remedy of setting aside is whether such a remedy can apply to concluded contracts. The Model Law does not suggest the annulment of concluded contracts. The EU regime generally allows Member States to prohibit annulling concluded contracts and requires a standstill period to allow suppliers to initiate complaints before the conclusion of the contract. This approach can cause disproportionately disruptive to procurement, as every procurement process has to delay for a period, although often not long, simply because there is a possibility of challenge.⁷⁹

Arguably, the disruption to procurement caused by annulling concluded contracts can be less, since it is unlikely that every concluded contract is challenged. Under the GPA, States may allow the annulment of concluded contracts, as indicated above. Where concluded contracts can be annulled, the following two features of a review system may be helpful for decreasing its adverse affection on the public and the winner bidder. One is to require that suppliers promptly raise their complaints, as the extent of the aforesaid adverse affection largely depends on the time that has lapse since the contract has been signed.⁸⁰ The other is to provide for certain conditions for annulling concluded contracts, allowing at least, the possible

⁷⁸ See Annex 3, 4.2.

⁷⁹ See Arrowsmith, fn.71 above.

⁸⁰ See Reich, fn.14 above, p221.

negative consequence for the interests concerned, in particular, for the public, to be considered while deciding to annul concluded contracts.

5. Damages

5.1 The role of damages and two key issues related to it

The importance of the damages remedy in the review system, to certain extent, depends on whether suspension is available before the contract is concluded and whether concluded contracts can be annulled. If a suspension can be taken quickly after the complaint is filed, there may be no need for the aggrieved supplier to seek the damages remedy. This is also the case where concluded contracts can be annulled. However, damages may be the only available remedy after the conclusion of the contract in some regimes. This remedy is very helpful for protecting the aggrieved supplier's interest, since it can compensate at least some of its losses (for example bid costs) or put it in the position in which it would have been had the wrongful act not occurred where lost profits are compensated, as explained further later. The availability of this remedy, especially when it includes compensation for lost profits, can also bring pressure on procuring entities and thus deter them from making violations. However, the damages remedy has no corrective effect.

Although the Model Law and the other three international instruments provide for the damages remedy, as revealed below, they deal differently with two key issues related to this remedy - conditions for damages and the extent of compensation.

As to conditions for damages, the following factors are often concerned. The first is to require showing the procuring entity's infringement. In some States, damages are available for

all violations whether they are serious or not. However, other regimes may require showing a “serious” breach. Another condition concerns the standard of proof for the recovery of damages. The complaining supplier may be required to prove that it would have won the contract if no violation had occurred. Alternatively, a less stringent requirement may be provided which requires the complainant to prove that it has a chance to win the contract in the normal case. In addition, it is normal to require there is a causal link between the procuring entity’s violation and the affected supplier’s loss.

As to the extent of compensation, as elaborated below, damages may include the recovery of tender costs *and* lost profits, or may be limited to bid costs only. In addition, punitive or exemplary damages may be allowed.

Firstly, damages may be generous including lost profits, based on the rationale that the supplier should be put in the same position as it would have been in if no violation was made.⁸¹ To successfully claim this remedy of damages, the complainant may be required to prove that it would have been successful in the competition, as only the successful supplier can make profits. However, sometimes, it may be very difficult (when the selection criteria concerns not only price but also other factors) or unlikely (when the procuring entity failed to advertise the contract) for the supplier to prove that.⁸² Some States use a principle of “loss of chance”⁸³ to deal with this problem; under which, the complainant should show that it has a chance to win the contract if no breach has occurred.⁸⁴ The review body will assess “the percentage chance of the complainant’s success, and awards damages for lost profits that are

⁸¹ See Arrowsmith, fn.26 above, p148; Arrowsmith, *et al*, fn.1 above, p801.

⁸² See Arrowsmith, S., “Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts” in Arrowsmith, S., (eds.) *Remedies for Enforcing the Public Procurement Rules* (Earlsgate Press, 1993), p1 at p72.

⁸³ *Ibid*; Arrowsmith, *et al*, fn.1 above, p799.

⁸⁴ See Arrowsmith, fn.42 above, p1422.

discounted to reflect the value of this chance.”⁸⁵ Although the amount of profits may be easily predicted in for example those short-term supply contracts for purchasing an off-the-shelf product,⁸⁶ in some other cases for example when those complex long term contracts are concerned, it may be difficult to predict how many profits can be made.⁸⁷ Under such circumstances, the amount of profits may be ascertained by making a rough estimate, or by assuming a profit of an ascertainable amount (say 10 percent of the value of the contract), or by presuming it is at least equivalent to tender costs.⁸⁸

Secondly, damages may be limited to bid costs only, based on the rationale that suppliers would not have incurred the expenditure where they had been aware of there would be certain violations in the award procedure.⁸⁹ To claim bid costs, the complainant may be required to prove that it was certain to win the contract in the normal case; as unsuccessful suppliers would waste their costs even if no breach have occurred.⁹⁰ In that case, probably, only one supplier can be compensated for tender costs.⁹¹ Alternatively, the complainant may be merely required to show that it would have a chance of winning if the procurement were properly conducted. This would make it possible for all participating suppliers to claim compensation for their tender costs.⁹² Of course, an intermediated position may be employed, requiring the complainant to show that it is within the “zone of consideration” for the contract.⁹³ In addition, the complainant may be required to prove that the procuring entity has made a breach and thus affected its chance of winning.

⁸⁵ See Arrowsmith, *et al*, fn.1 above, p799.

⁸⁶ See Arrowsmith, fn.82 above.

⁸⁷ See Pachnou, fn.27 above, pp59-60.

⁸⁸ See Arrowsmith, fn.82 above, pp72-73.

⁸⁹ See Arrowsmith, *et al*, fn. 1 above, p801.

⁹⁰ *Ibid*, also see Pachnou, fn.27 above, p58.

⁹¹ See See Arrowsmith, *et al* , fn.1 above, p801.

⁹² *Ibid*.

⁹³ *Ibid*.

Thirdly, punitive damages may be imposed on the procuring entity in some regimes, for securing enforcement of the procurement rules through its stronger deterrent effect, rather than compensating suppliers.⁹⁴ As to conditions for awarding such damages, it is asserted that the procuring entity acting in good faith should not be unfairly punished by a large award of damages; and minor irregularities caused by mere negligence should not be treated the same way as intentional discriminatory awards.⁹⁵ Indeed, it is inappropriate to award punitive damages in normal cases, since they are from the public fund and may cause the problem of “over compliance”, as indicated in chapter 2(2.2.2).

5.2 The Model Law

The Model Law allows administrative review bodies to grant or recommend damages to the aggrieved bidder. This remedy may also be awarded by a judicial review body, as explained in 2.1. However, the Model Law does not directly suggest the extent of compensation; it provides the following two options on damages for enacting States in Article 54(3)(f).

One is to compensate “[a]ny reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity.” The GTE clarifies that these costs do not include profits lost because of non-acceptance of the complainant’s tender.⁹⁶ It is clear that this option limits compensation to the complainant’s reasonable costs; it excludes damages for lost profits. The Model Law does not define the conditions for such damages; however, the text of this option arguably indicates that the compensation of costs is conditional upon, first, the procuring entity made an infringement; and second, as a result,

⁹⁴ Ibid, p803.

⁹⁵ See Fernández Martín, J.M., *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press, 1996), p215.

⁹⁶ See remarks on Article 54, para.10.

certain costs in connection with the procuring proceedings occurred. It is not specified whether the complainant needs to prove it was certain or merely have a chance to win in the competition.

Another option is to compensate “[l]oss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings.” This means that lost profit might be compensated in appropriate cases.⁹⁷ Detailed conditions for such damages are also not expressly defined in the Model Law. Similarly, based on its text, it can be argued that the procuring entity’s breaches and the affected supplier’s loss suffered seem necessary for the grant of this remedy. Also, arguably the complainant needs to prove that it would have won the contract because only the winning supplier can have a chance to make profits. Of course, enacting States may adopt the principle of “loss of chance” introduced above to make it easier to obtain the compensation of lost profits by requiring showing a chance of winning.

5.3 The EU regime

The EU regime provides for very basic requirements on the grant of damages; it leaves more detailed rules on the extent of compensation and conditions for damages to be supplemented by Member States, as explained below.

As noted in 2.3, the EU regime explicitly requires the damages remedy to be available to persons harmed by an infringement in national review system; and such a remedy may be used as the only remedy, if Member States wish, after the conclusion of the contract under provisions on automatic suspension and standstill introduced in 3.2 and 4.2. The public Remedies Directive offers no provision on conditions for damages. However, Article 2.7 of the Utilities Remedies Directive further states “[w]here a claim is made for damages

⁹⁷ Ibid.

representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.” Thus, it is clear, to claim *bid costs* under the Utilities Remedies Directive, the complainant must prove: i) the procuring entity has breached the rules; ii) it had a real chance of success in the competition; and iii) there is a causal link between the violation and the loss of chance. Some academics argue that the same conditions should also apply to the public sector.⁹⁸ Thus, in both public and utilities sector, the affected supplier can claim for the recovery of bid costs, provided it can satisfy the aforesaid three requirements. It should be noted, the “real chance” test mentioned above seems to imply that an affected supplier would be compensated its bid costs, provided it could establish the proof that it was not devoid of any chance to win the contact, even if its chance may be as little as 1 percent.⁹⁹ Therefore, possibly more than one supplier will be compensated bid costs, as more than one supplier can prove that they have certain percentage chance of success in the procedure.¹⁰⁰

Both Remedies Directives does not clearly provide the possibility of compensating for lost profits; however, it is generally submitted in theory that the compensation of lost profits is probably also required in the Remedies Directives.¹⁰¹ This is mainly because, first, both Remedies Directives do not expressly restrict the compensation to bid costs only; thus by

⁹⁸ See Arrowsmith, fn.26 above, p150 and Dingel, fn.46 above, p239.

⁹⁹ This is the case in France, See Lichere, F., “Damages for Violation of the EC Public Procurement Rules in France” (2006) 4 *P.P.L.R.* p171 at pp172-173.

¹⁰⁰ See Arrowsmith, fn.42 above, p1423.

¹⁰¹ Ibid, p1422; also see Treumer, S., “Damages for Breach of the EC Public Procurement Rules from a Danish Perspective” (2005) 5 *European Business Organisation Law Review*, p563 at p571; Arrowsmith, *et al*, fn.1 above, p802; Leffler, H., “Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions” (2003) 4 *P.P.L.R.* p151 at p161.

analogy with other areas of Community law, lost profits must be available to protect suppliers' interest.¹⁰² Second, it is necessary to compensate lost profits for meeting the effectiveness requirement of the two Remedies Directives.¹⁰³ Also, the case law of Member States indicates that lost profits can be compensated for breach of the EU procurement rules.¹⁰⁴ For example, in *Harmon*¹⁰⁵ mentioned in 3.3, the British judge considered that the effectiveness principle allows recovery of losses, whether or not normally recoverable in English law, and thus granted the complainant lost profits. Also, in other Member States such as Denmark¹⁰⁶ there are successful cases where damages for profits have been awarded.¹⁰⁷

The EU regime does not define the conditions for claiming damages including lost profits. However, it might violate the effectiveness principle if the complainant is required to show that it was certain to win the contract had the procurement been properly conducted; since as explained in 5.1, in some cases, it is very difficult or impossible for the complainant to prove that. Many Member States have applied the "loss of chance" principle to deal with this problem.¹⁰⁸ For example, in *Harmon*, it was held that the supplier concerned is entitled to recover lost profits if it has been wrongfully deprived of a contract or of a real and substantial chance of being awarded the contract.¹⁰⁹

As revealed above, in the EU regime, the complainant should prove an infringement of the procuring entity, whether it claims for the recovery of bid costs only or for lost profits. The

¹⁰² See Arrowsmith, *et al*, fn.1 above, p802; Arrowsmith, fn.42 above, p1422, footnote 89.

¹⁰³ See Arrowsmith, *ibid*.

¹⁰⁴ See Treumer, S., "Damages for Breach of the EC Public Procurement Rules – Changes in European Regulation and Practice" (2006) 4 *P.P.L.R.* p159 at p161; Leffler, fn.101 above.

¹⁰⁵ See further Bowsher, M. and Moser, P., "Damages for Breach of the EC Public Procurement Rules in the United Kingdom" (2006) 4, *P.P.L.R.* p195; Arrowsmith, fn.42 above, pp1421-1424.

¹⁰⁶ See Treumer, S., "Enforcement of the EC Public Procurement Rules in Denmark" (2005) 6 *P.P.L.R.* pNA186.

¹⁰⁷ See Treumer, fn.104 above, p160.

¹⁰⁸ See Lichere, fn.99 above, p173; Arrowsmith, *et al*, fn. 1 above, pp799-800.

¹⁰⁹ See further Bowsher and Moser, fn.105 above, p207.

Remedies Directives do not clearly state whether such an infringement should be serious.¹¹⁰ The ECJ ruled in *Commission v. Portugal*¹¹¹ that it infringes the Remedies Directive to make damages conditional upon proof of intentional or negligent breach because of the practical difficulties of such proof. The dominant trend in the national regulation seems not to require the seriousness of violation while claiming for damages, although in the Nordic countries a requirement of “sufficient serious” breaches is more likely to be required especially when awarding lost profits.¹¹²

In addition, as noted in 2.2, under the Utilities Remedies Directive, instead of suspending the award procedure or setting aside unlawful decisions, it is possible to require the procuring entity to pay for a particular sum in cases where the infringement has not been corrected or prevented. As to conditions for such punitive damages and the amount of damages, they are left to be decided by Member States within the limits of the effectiveness requirements.

5.4 The GPA

Similar to the EU regime, there is a provision on the grant of damages in the GPA. However, it is less detailed and less strict than provisions stipulated in the EU regime, especially in the Utilities Remedies Directive,¹¹³ as explained further below.

The current GPA (Article XX.7(c)) merely states that national challenge procedures shall provide for compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest (or both under the revised GPA Article XVIII.7(b)). This

¹¹⁰ See further Treumer, fn.104 above, pp164-167.

¹¹¹ Case C-275/03; see further Arrowsmith, fn.42 above, p1421, footnote 86; Dischendorfer, M., “The Conditions Member States may impose for the award damages under the Public Remedies Directive: Case C-275/03 *Commission v. Portugal*” (2005) 2 *P.P.L.R.*, pNA19.

¹¹² See Treumer, fn104 above, p167.

¹¹³ See further Dingle, fn.46 above, pp242-243.

indicates that the damages remedy must be available in domestic review procedures and the minimum requirement on the extent of compensation is to compensate tender preparation costs *or* protest costs. The GPA Parties may provide more generous damages including the compensation of lost profits. The GPA does not require punitive damages,¹¹⁴ as showed above. To obtain damages, the complainant should prove that it has been harmed as a result of the procuring entity's breach, as the above provision clearly states that compensation is given for "the loss or damages suffered".¹¹⁵

It can be seen clearly, unlike the EU Utilities Remedies Directive, the GPA does not make clear one important condition for the recovery of costs – how much of chance of winning should be showed by the complainant while claiming damages.¹¹⁶ Thus, it is uncertain under the GPA whether the complainant must prove that it was certain to win the contract in the case of no violation or merely show that it has a reasonable chance to win. This issue is left to be determined by the GPA Parties.¹¹⁷ However, it seems inappropriate for Parties to provide the former strict requirement, as it may make that compensation is not truly available and consequently cannot satisfy the GPA general requirement of effectiveness of domestic review.¹¹⁸

In addition, it is also clear that the GPA gives Parties discretion to provide for rules on how to calculate damages, whether based on costs or profits.¹¹⁹

5.5 APEC NBPs

¹¹⁴ See further de Graaf and King, "Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round" (1995) *Intl. Lawyer* p435 at p440; Footer, M., "Remedies under the New GATT Agreement on Government Procurement" (1995) 4 *P.P.L.R.*, p80 at p90.

¹¹⁵ See Dingle, fn.46 above, p242.

¹¹⁶ See Davies, A., "Remedies for Enforcing the WTO Agreement on Government Procurement from the Perspective of the European Commission: A Critical View" (1997) Vol.20 No.4 *World Competition*, p113 at p123.

¹¹⁷ See Arrowsmith, fn.10 above, p254; Footer, fn.114 above, pp89-90.

¹¹⁸ See Arrowsmith, *ibid.*

¹¹⁹ *Ibid.*

Like the GPA, APEC NBPs simply state that, in practice, review mechanism can provide for “compensation for the loss or damages caused, which may be limited to the costs of tender preparation or protest.”¹²⁰ This implies, similar to the GPA, to the minimum extent, the compensation available in national review system of APEC member economies can be limited to costs only, and the complainant should prove that it has some loss or damages caused by the procuring entity’s violation.

Also, it is clear that more detailed rules on the remedy of damages, such as to what extent the complainant should show its chance of winning and how to calculate damages, will be supplemented by member economies. Furthermore, it seems also inappropriate if member economies require the complainant to show that it would certainly have won the contract; as, like the GPA, one general requirement for national review mechanism of APEC NBPs is also effectiveness.¹²¹

5.6 Further comments

As showed above, under the Model Law and the other three international instruments, the extent of compensation may include lost profits. This is very advantageous for the aggrieved supplier. Further, such damages can have deterrent effect and thus can ensure the enforcement of the procurement rules. However, this generous compensation is generally drawn from the public treasury.¹²² Also, it may have the side effect of encouraging “over-compliance” and unnecessary bureaucracy.¹²³

The above problems are less likely to be caused when the compensation is limited to bid costs only, which is also allowed under the Model Law and the other three international

¹²⁰ See Annex 3, 4.2.

¹²¹ Ibid, 4.1.

¹²² See Fernández Martín, fn.95 above, pp214-215.

¹²³ See Arrowsmith, fn.10 above, p254.

instruments, since such compensation is normally very limited. However, such limited compensation may discourage the aggrieved supplier's incentive to complain,¹²⁴ which may significantly reduce the deterrent effect of the damages remedy.¹²⁵

As to conditions for damages, the Model Law, the GPA and APEC NBPs do not state how much of chance of winning should be showed by the complainant while claiming damages. If a State requires that the complainant must prove it would have won the contract had the procuring entity acted properly, as noted earlier, this requirement may make it difficult or impossible in certain cases for the supplier to provide evidence to that effect, which may adversely affect the effectiveness of the review system. Thus, it is argued that it would be unacceptable to provide such a requirement as a condition for the recovery of any damages.¹²⁶

If a less strict approach – the loss of chance test adopted in the EU regime– is applied, the above problem can be avoided; as this approach may encourage the supplier to bring proceedings and thus benefit the enforcement of the procurement rules.¹²⁷

¹²⁴ See further Treumer, fn.104 above, p161 footnote 20.

¹²⁵ See Arrowsmith, fn.10 above, p254; Davies, fn.116 above, p123.

¹²⁶ See Arrowsmith, fn.82 above, p75.

¹²⁷ See Arrowsmith, *et al*, fn.1 above, p801.

Chapter 7 Chinese government procurement regulations

The following chapters will focus on Chinese supplier review system. This chapter provides an overview of Chinese government procurement regulations laying down as the context of the Chinese supplier review system. Next three chapters will then explore the main aspects of the current Chinese supplier review system, namely forum for review, standing and procedures and available remedies.

1. Introduction

China launched its market-oriented economic reform in 1979, which has introduced dramatic changes to all aspects of Chinese economies, including great changes in the area of government procurement. Before the reform, there was no real government procurement practice in China, as the government's needs were usually met by government planning and allocation. After the initiation of economic reform, government procurement practices, initially open and selective tendering and then other procurement methods, were gradually introduced into China and have rapidly developed, in particular in recent years. Statistics show, in China, total expenditure by government agencies and public institutions (excluding state enterprises) has increased from only 3.1 billion Yuan in 1998 to 368.16 billion Yuan in 2006 and during the last eight years, the average annual growth rate of the scale of government procurement reaches 68.1%.¹ With this development, various regulations have been enacted in China to regulate government procurement activities.² China has established its legal

¹ See Treasury Department of the MOF, "Statistical Analysis of National Government Procurement Information of 2006" (2007) 9 *China Government Procurement*, p72.

² See further Cao, Fuguo, (a) *The Principle and Application of Chinese Bidding Law* (Beijing, China Machine Press, 2002); Cao, Fuguo, (b) *Annotation to the Chinese Government Procurement Law* (Beijing, China Machine Press, 2002); Cao, Fuguo, and Wang, Ping, "The New Chinese Government Procurement Law" (2002) 6 *P.P.L.R.* pNA133; Tian, Jianbin, "Public Procurement in China: The Way Forward" (2001) 4 *P.P.L.R.* p207; Kong,

framework governing government procurement, although it is far from being completed, as explained further below.

This chapter provides an overview on the legislative regime governing government procurement in China by introducing the main development of government procurement legislation and main procurement rules (in section 2) and by analysing the main characteristics of Chinese government procurement legislation (in section 3). Finally, section 4 provides a general introduction to main regulations dealing with issues of supplier review, to set the scene for the detailed examination of supplier review in China that will follow in the later chapters.

2. The development of government procurement regulations

The development of China's government procurement regulation, as argued by Wang,³ can be broadly divided into the following three stages:

2.1 Stage I: Development of a tendering system and enactment of the Tendering Law

This stage started from mid-1980s and ended by the promulgation of the *Tendering Law* (TL) in 1999.⁴ The feature of this stage is that main efforts were made to establish a legal framework specially regulating tendering activities.

Tendering started to be used in China, as a useful technique to pursue China's own

Qingjiang, "Chinese Law and Practice on Government Procurement in the Context of China's WTO Accession" (2002) 2 *P.P.L.R.* p201; Cao, Fuoguo, (c) "China's Government Procurement Reform: From the Bidding Law to the Government Procurement Law" in Arrowsmith, S., and Trybus, M., (eds.) *Public Procurement: The Continuing Revolution* (The Hague: Kluwer Law International, 2003), p61; Tong, Xinchao, "Chinese Procurement Law: Current Legal Framework and A Transition to the World Trade Organization's Government Procurement Agreement" (2003) Spring, *Temp. Int'l & Comp.L.J.* p139; Wang, Ping, "China's Evolving Legal Framework on Public Procurement" (2004) 6 *P.P.L.R.* p285; Cao, Fuguo, (d) "Developments in China: The Regulations Implementing the Chinese Government Procurement Law, and Progress Towards GPA Accession" (2006) 6 *P.P.L.R.* pNA205.

³ See Wang, Ping, "The Third Phase in the Evolution of China's Public Procurement Framework: A Critical Perspective" (unpublished) and Wang, *ibid.*

⁴ See Wang, fn.2 above, p287.

policy goals, in the early 1980s.⁵ After more than a decade of trial and ad hoc regulation, on 30 August 1999, the TL, drafted by the State Planning Commission (the current National Development and Reform Commission (NDRC)), was promulgated which came into effect on 1 January 2000. Its enactment is the first milestone for the Chinese government procurement reform and regulation.⁶ The TL has 6 chapters and 68 articles. Its main rules are as follows:⁷

1) Objectives and principles. The objectives of the law, as stated in Article 1, include increasing economic benefits and guaranteeing project quality.⁸ Article 5 requires tendering activities to follow principles of openness, fairness, impartiality and good faith. These provisions are quite close to the objective of best value for money and principles of transparency and non-discrimination usually found in modern government procurement legislation.

2) Coverage. Article 2 states that the TL applies to *all* tendering activities conducted in China. Further, Article 3 provides that construction projects involving the public interest or public security and works funded by the State or using loans from international organisations or foreign governments or when required by other law or regulations of the State Council must be procured through tendering. These provisions show that this law uses a mixture of compulsory and voluntary approaches to define the coverage of the law. In the works sector, under the circumstances introduced above, the use of tendering is compulsory for most projects.⁹ In other cases and in other sectors, this law would apply only when a procuring entity, no matter it is public or private, voluntarily chose to procure through tendering. These

⁵ See further Cao, (c), fn.2 above, Wang, fn.2 above and Tian, fn.2 above.

⁶ See further Wang, fn.2 above, pp292-294; Cao, (c), fn.2 above, pp65-67.

⁷ See further Tian, Jianbin, "The New Bidding Law of the People's Republic of China" (2000) 1 *P.P.L.R.* pCS5.

⁸ Other objectives are to standardise bidding activities, to protect the States' interests, the public interest and the lawful rights and interests of the parties involved in tendering activities.

⁹ Tendering may not be required in certain circumstances such as emergency or for national security consideration under Article 66.

provisions undermine the status of this Law as a piece of government procurement legislation, as it applies to not only public procurement but also private procurement not covered in a modern government procurement regulation.¹⁰

3) Detailed rules on tendering procedures. Modeled after modern international procurement legislation, the TL provides for a set of rules on (open and selective) tendering procedures, concerning invitation of tenders,¹¹ submission of tenders,¹² opening of tenders, evaluations of tenders and contract award,¹³ mainly for procurement of construction works.¹⁴ These provisions are generally in conformity with international practice, which is regarded as the most outstanding achievement of this Law.¹⁵ However, certain procedural rules are not detailed or clear enough.¹⁶

4) Enforcement of the law. To ensure effective enforcement of rules, the TL provides if the provisions are violated, the violators, be it procuring entities¹⁷ and their agents,¹⁸ bidders,¹⁹ members of the tender evaluation committee,²⁰ the winning bidder²¹ and other units and person,²² shall undertake the corresponding legal liability. These provisions indicate that this law heavily relies on administrative measures for implementation.²³ However, it does not establish an independent body to supervise and administer tendering activities²⁴ but ambiguously provides that the *relevant* administrative supervisions departments shall

¹⁰ See Wang, fn.2 above, p292 and Cao, (c), fn.2 above, p73.

¹¹ See Articles 8-24.

¹² See Articles 25-33.

¹³ See Articles 34-48.

¹⁴ See further Wang, fn.2 above, p293.

¹⁵ See Cao, (c), fn.2 above, p66.

¹⁶ See further Wang, fn.2 above, pp292-294.

¹⁷ See Articles 49, 51, 52, 55, 57and 59.

¹⁸ See Article 50.

¹⁹ See Articles 53 and 54.

²⁰ See Article 56.

²¹ See Articles 58-60

²² See Articles 62 and 63.

²³ See Tian, Jianbin, "Enforcement of Public Procurement Rules in China" in Arrowsmith and Trybus, fn.2 above, p85.

²⁴ . See further Cao, (c), fn.2 above, p66 footnote 19 and Wang, fn.2 above, pp293-294.

supervise tendering activities and impose administrative penalties.²⁵ This has caused confusion in practice, as further discussed in 3.4.

It should be noted that the TL itself does not set up a formal bid challenge mechanism except simply providing that bidders have the right to seek review by relevant authorities in Article 65, as further explained in section 4.

As was seen, although the TL was adopted, a comprehensive legal framework on government procurement was not set up at this stage. This is because the TL mainly deals with certain tendering procedures; many issues relating to government procurement such as alternative procurements methods and supplier review were put aside.

2.2 Stage II: Development of the government procurement system and enactment of the Government Procurement Law

This stage started in mid-1990s and culminated in the promulgation of the *Government Procurement Law* (GPL) in 2002.²⁶ In this phase, great efforts were made for the establishment of an overall government procurement system and the enactment of the GPL. Although this stage is overlapped in time with stage I, since the legislative efforts therein were initiated by a different institution, it bears distinctive features.

In the mid-1990s, the Ministry of Finance (MOF) initiated a national-wide fiscal and taxation reform, which provided an important incentive for local governments to seek value for money by conducting government procurement and enacting local rules on government procurement, as they were given more discretion in fiscal expenditure and tax retention.²⁷ For example, on 27 October 1998, Shenzhen adopted the *Government Procurement Regulation of*

²⁵ See Articles 7 and 61.

²⁶ See Wang, fn.2 above, p287.

²⁷ Ibid, p295.

Shenzhen Special Economic Zone, which is “the first legal decree in the field of government procurement in China”²⁸. However, until 29 June 2002, the GPL, drafted by the MOF, was promulgated. It came into effect on 1 January 2003. In contrast with the TL aiming at tendering activities in general, GPL is the first piece of national legislation specially dedicated to regulating government procurement,²⁹ which “marks another milestone for the Chinese Government Procurement Legislation.”³⁰ The GPL has nine chapters and 88 articles, which includes the following main rules:³¹

1) Objectives and principles. Article 1 states that the law is enacted for regulating government procurement activities, improving efficiency in the use of government procurement funds, safeguarding the interests of the State and the public, protecting the legitimate rights and interests of the parties involved in government procurement and promoting an honest and clean government. These objectives reflect policy objectives commonly sought by a modern procurement law. To ensure the achievement of these objectives, Article 3 provides that principles of openness and transparency, fair competition, impartiality and good faith shall be adhered to in government procurement activities.

2) Coverage. Article 2 states this law applies to all government procurement done within the territory of China.³² However, the GPL then provides a disappointingly narrow definition of the term “government procurement”. The definition of “government procurement” is narrow due to the following aspects: firstly, government procurement

²⁸ See Huang, Zhiqi, “The Development of Public Procurement Through Tendering in China” (2000) 1 *P.P.L.R.* pCS1 at pCS1.

²⁹ See Tong, fn.2 above, p140.

³⁰ See Cao & Wang, fn.2 above, pNA133.

³¹ See *ibid*; Tong, fn.2 above, pp154-165.

³² However, the emergency procurements for serious natural disasters and other force majeure incidents and procurement in relation to national security and State secrets and defence procurement are exempted from the application of the GPL under Articles 85 and 86. In addition, government procurement using loans from international organisations or foreign governments may follow provisions contained in the loan agreement under Article 84.

activities are conducted by government departments, institutions and public organisations at all levels; secondly, only procurement using fiscal funds is covered; and thirdly, the goods, construction and services concerned have to be *either* listed in the centralised procurement catalogue compiled according to the law *or* their value exceeds the respective prescribed procurement thresholds. This means that procurement not having the above three features such as procurement conducted by state enterprises is excluded from the GPL's coverage.

Another important issue of the coverage is the coordination between the GPL and the TL. Since the TL applies to "all tendering activities" conducted in China, in order to avoid potential conflicts in the scope of coverage between the TL and the GPL, the GPL Article 4 states that government procurement of works through tendering shall be covered by the TL. This arguably means that the procurement of works conducted with fiscal funds by government departments, institutions or public organisations would be regulated by the TL, if it were conducted through open or selective tendering.³³ This simple provision does not completely solve the clash of the two national laws in coverage,³⁴ as discussed further in section 3.

3) Government procurement methods and proceedings. The GPL Article 26 offers more modern procurement methods than the TL, including not only open tendering (as the principal procurement method) and selective tendering but also competitive negotiation, single source procurement, request for quotation and other methods to be approved by the MOF. Further, in relation to procurement of goods and services, it lays down criteria for alternative procurement methods other than open tendering to be used.³⁵ The GPL further provides

³³ See further Cao, (b), fn.2 above, pp45-47.

³⁴ See Wang, fn.2 above, p306; Cao, fn.2 above, pp74-75.

³⁵ See Articles 29-32. See further Wang, fn.2 above, p311.

detailed proceedings for competitive negotiation and request for quotation.³⁶ As detailed procedural rules for open and selective tendering have been made in the TL and its implementing regulations, the GPL offers limited provisions on competitive tendering as supplement.³⁷

4) Enforcement of the law. Like the TL, in the GPL, administrative supervision and sanctions are still important ways to enforce government procurement rules and more detailed provisions on these are stipulated respectively in chapters 7 and 8. Article 13 clearly empowers the finance departments of the governments at all levels to oversee government procurement practices. Further, the GPL makes clear the main contents of the supervision and inspection and requirements to the supervisory and administrative organisations.³⁸ Also, the GPL provides in detail legal liabilities for breach of government procurement rules. Procuring entities and their agents and their staff member,³⁹ suppliers,⁴⁰ officials of the supervisory authorities⁴¹ and any other units or individuals⁴² shall be liable to disciplinary, administrative or criminal sanctions for their wrongdoings related to government procurement.

It is worth noting, in order to promote effective enforcement, the GPL (chapter 6) establishes a formal supplier review system. As discussed further in section 4, this new system is similar to review systems found in many national procurement regimes and recommended in the UNCITRAL Model Law.⁴³

The enactment of the GPL provides a basic legal framework for China's government

³⁶ See Articles 38 and 40.

³⁷ See Articles 34, 35 and 36.

³⁸ See Articles 59, 60, 65 and 66. In addition to the finance departments, Article 68 states that the auditing authorities shall exercise auditing supervision over government procurement.

³⁹ See Articles 71-76 and Articles 78 and 79.

⁴⁰ See Article 77.

⁴¹ See Articles 80-82.

⁴² See Article 83

⁴³ See Cao and Wang, fn.2 above, pNA137.

procurement reform. However, it is far from completed because of the following two major problems:

Firstly, the GPL failed to incorporate the existing rules on tendering into this Law. As revealed above, a uniform Chinese government procurement legal framework has not been established due to the narrow definition of “government procurement” contained in the GPL. Instead, a dual law system of government procurement – the cross application of the TL and the GPL – exists in reality due to different government institutions’ creeping of competence explained further in 2.3.

A clear demarcation line between the TL and the GPL cannot be drawn although legislators tried to do it by providing that the TL applies to government procurement of works through tendering in the GPL Article 4. In particular, it is unclear whether or not government procurement of works-related goods and services through tendering should be governed by the GPL. It may be argued that such procurement should be governed by the TL, as the TL Article 3 provides that works subject to tendering include ground exploration, design, construction and supervision of the projects *as well as the procurement of important equipment or materials for the construction*. However, under the GPL Article 2, the term “works” refer to all construction projects (including construction, reconstruction, etc.) themselves but do not concern any equipment or materials and any services such as design; “goods” refers to objects of every kind and form, including but not limited to *raw materials, fuel, equipment and products*. Thus, it can be argued that government procurement of goods and services for a construction project through tendering should be regulated by the GPL. Such ambiguity has caused MOF and NDRC adopting conflicting secondary regulations as

explained in 2.3

Secondly, some GPL provisions are not detailed and clear enough and require further elaboration and clarification. For example, Article 11 requires publication of government procurement information but does not make clear what kinds of information should be published. Also, the GPL provides merely basic rules on supplier review, as further explained in section 4.

2.3 Stage III: Enactment of implementing regulations after the entry-into-force of the GPL

After the entry-into-force of the GPL in 2003, the third phase of development of the government procurement regime started. Its main feature is that many ministerial regulations, based on the TL or the GPL respectively, were adopted to implement the above two laws.

As already mentioned, some GPL provisions are not concrete and clear enough, which needs to be clarified in the implementation of the law. The GPL (Article 87) gives this task to the State Council. However, it is the MOF that has enacted extensive implementing rules to implement the GPL. The MOF has issued, independently or jointly with other central government departments, a number of ministerial regulations.⁴⁴ For example, on 11 August 2004, the MOF issued three sets of implementing regulations, effective on 11 September 2004.⁴⁵ They are: the *Measures on the Administration of Tendering in Government procurement of Goods and Services* (hereafter the “*MOF Tendering Measures*”) discussed further below, the *Measures on the Handling of Complaints of the Government Procurement Suppliers* (hereafter the “*MOF Review Measures*”) considered further in section 4, and the

⁴⁴ See further Cao, (d), fn.2 above.

⁴⁵ See further Wang, fn.4 above; Cao, *ibid.*

Measures on the Administration of the Publication of Government Procurement Information (hereafter the “*Publicity Measures*”) which defines “government procurement information” and clarifies information to be published and offers detailed rules on the administration of the publication.

Parallel to the GPL, the TL is still used to regulate tendering activities especially in the area of government procurement of works after the enactment of the GPL. To implement the TL, a series of ministerial rules were adopted by the NDRC and other central government departments, including for example *Measures on Tendering in Procurement of Goods in Construction Projects* (hereafter the “*Tendering Measure on Works-related Goods*”)⁴⁶ and the *Measures on the Handling of Complaints on Tendering Proceedings in Construction Projects* (hereafter the “*NDRC Review Measures*”),⁴⁷ which will be further discussed below.

It is worth noting that different government departments, mainly the MOF and the NDRC, based on the GPL and the TL respectively, sometimes competitively adopted rules for regulating certain aspects of government procurement. A typical example concerns government procurement of goods through tendering, as explained below.

As mentioned above, the MOF issued its *Tendering Measures* in August 2004, to offer detailed procedural rules for tendering in government procurement of *goods and services*, since there are very few procedural rules on tendering in the GPL. Similar to the UNCITRAL Model Law chapter 3 on tendering procedures, the *MOF Tendering Measures* provide detailed

⁴⁶ It was issued by the NDPC, Ministry of Construction (the current Ministry of Housing and Urban-Rural Development), Ministry of Railways, Ministry of Communications (the current Ministry of Transportation), Ministry of Information Industry (the current Ministry of Industry and Information Technology), Ministry of Water Resources and General Administration of Civil Aviation of China on 18 January 2005, effective on 1 March 2005.

⁴⁷ It was issued by the NDRC, together with Ministry of Construction, Ministry of Railways, Ministry of Communications, Ministry of Information Industry, Ministry of Water Resources and General Administration of Civil Aviation of China, on 21 June 2004, effective on 1 August 2004.

rules on solicitation of tenders,⁴⁸ submission of tenders⁴⁹ and opening, evaluating and comparison of tenders and awarding of contracts respectively.⁵⁰ To enforce these rules, it also offers detailed provisions on legal liabilities (disciplinary, administrative sanctions or criminal punishment) that shall be imposed on violators including the procuring entity and its agency, suppliers and members of the tender evaluation committee, etc.⁵¹ Five months later after the MOF adopted the above *Measures*, for regulating tendering activities in procuring goods (important equipment and materials) related to works subject to mandatory tendering requirements, the NDRC together with other six central government departments enacted the “*Tendering Measure on Works-related Goods*” mentioned earlier. It mainly provides detailed rules on the procurement of works-related goods through open and selective tendering and basic rules on two-stage tendering. Also, the Ministry of Commerce (MOC) adopted the *Implementing Measures on International Tendering in Procurement of Mechanical and Electronic Products*⁵² (hereafter the “*MOC Measure on Tendering*”), specially for regulating international tendering activities in procuring mechanical and electric products in China.⁵³

With respect to handling suppliers’ complaints, as mentioned earlier, the MOF and the NDRC (together with other six central government departments) respectively issued their ministerial regulation - the *MOF Review Measures* and the *NDRC Review Measures*, as further considered in section 4.

The adoption of these implementing regulations, to certain extent, clarifies and substantiates some provisions of the GPL and the TL. However, because many central

⁴⁸ See Articles 11-28.

⁴⁹ See Articles 29-37.

⁵⁰ See Articles 38-67.

⁵¹ See Articles 68-84; see further Wang, fn.3 above.

⁵² See MOC Order No.13. It was issued on 1 November 2004 and came into force on 1 December 2004.

⁵³ See Article 2 of the *MOC Measure on Tendering*.

government departments in charge of administering different areas are involved in enacting implementing regulations and they often scramble for powers, rather than coordinating and cooperating with each other, there are many clashes among these implementing rules and between the implementing rules and the two primary laws on government procurement.⁵⁴ Under Article 82 of the *Litigation Law*, these ministerial rules have the same legal effect.⁵⁵ As a result, more confusion rather than clarity have been caused in practice in certain aspects, especially when the boundary between the GPL and the TL is concerned.⁵⁶

Because the TL applies to all tendering activities conducted in China and the GPL offers no detailed rules on tendering, it may be argued that government procurement of goods and services *through tendering* should be regulated by the TL. As noted above, the MOF, based on the GPL, issued the *Tendering Measures* which provides detailed procedural rules on open and selective tendering in government procurement of *goods and services*, arguably, this clarifies that government procurement of goods and services through tendering are covered by the GPL. However, the adoption of the *Tendering Measures on Works-related Goods* by the NDRC and other departments means that government procurement of works-related goods through tendering is excluded from the GPL's coverage but subject to the TL. Further, government procurement of mechanical and electric products through international tendering may be argued to be also excluded from the GPL's coverage, although there is no any special provision on the above government procurement activity in the GPL. This is because the *MOF Measures on Tendering* Article 86 states that government procurement of imported mechanical and electric products through tendering is regulated by the *relevant national measures*, which

⁵⁴ See further Wang, fn.3 above.

⁵⁵ Under Article 86, where there is inconsistency between the provisions in the rules of different departments, the State Council will make a ruling on it.

⁵⁶ See Wang, fn.3 above, pp18-24.

implies that the aforesaid procurement is excluded from the application of this regulation; and the Ministry of Commerce adopted the *MOC Measures on Tendering* mentioned earlier specially regulating the above procurement.

Therefore, after the adoption of the implementing rules discussed above, it is still unclear which law and rules should be used to regulate tendering activities in government procurement of work-related goods. Further, when government procurement of mechanical and electric products through international tendering is concerned, which law and implementing regulation should apply becomes confusing.

In relation to the supplier review system, because the MOF and the NDRC respectively adopt ministerial regulation dealing with it, uncertainty is caused as well when certain kinds of government procurement competition is concerned, as explained further in section 4.

3. Main characteristics of China's legal framework on government procurement

China's legal framework on government procurement has the following main features; these are of course reflected in the area of supplier review, as revealed in section 4 and in the following three chapters.

3.1 A dual system of government procurement law

As was seen from the above that China's government procurement legislation features two distinct strands of development – the GPL and the TL have developed independently and have their own unique characters, which does not harmonise each other, since they have been driven by different government departments and by different philosophies and policies.⁵⁷

Consequently, a dual law system of government procurement – the coexistence of two primary

⁵⁷ See Cao, (c), fn.2 above, p61.

laws regulating government procurement (the GPL and the TL) which lacks a clear demarcation line between them -, has been established in China. This is the most outstanding feature of China's legal framework on government procurement.

The coexistence of two national laws regulating government procurement cannot be changed in a short time, although many academics and practitioners have strongly called on the establishment of a unified legal framework on government procurement,⁵⁸ even although China has initiated the GPA accession negotiation in December 2007. This is because, certain government authorities, led by NDRC, still try to further amplify the legal impact of the TL⁵⁹ in parallel with the development of the GPL system championed by the MOF. Now both the GPL and the TL are under review, and their implementing regulations, which will be State Council regulations in contract with existing ministerial measures with lower authority, are being prepared by the national legislature.⁶⁰ It is unclear whether these two laws will be able to be integrated.

3.2 The existence of numerous supplementary regulations

Another feature is that, as introduced above, numerous supplementary ministerial rules were enacted by the MOF, NDRC, MOC and other central government departments to respectively implement the two national laws.⁶¹ This makes rules on government procurement more fragmented and more complicated. Because of overlaps and conflicts existed among these regulations, more confusion in the application of the relevant rules in certain cases have been

⁵⁸ See Cao, *ibid*; Wang, *fn.2 above*; Gu, Liaohai, *Government Procurement Under the Law* (Beijing: Qunzhong Press, 2005).

⁵⁹ See Speech given by Peiyan Zeng (Vice-Premier) and presentation given by Deming Cheng (Vice-Director of the NDPC) in the First High Level Forum on Tendering in China, available at http://www.sdpc.gov.cn/ldjh/t20061117_94049.htm (published on 27 October 2006).

⁶⁰ See Cao, (d), *fn.2 above*, pNA213.

⁶¹ In addition, almost all local governments have established local regulations to implement the two primary laws, which will not be further discussed due to word limits.

caused, as discussed in 2.3.

3.3 The enforcement of rules heavily relies on administrative measures

As noted earlier, the GPL and the TL and their implementing regulations mentioned above all have detailed provisions on legal liabilities.⁶² They use either one chapter or at least several articles to provide in detail what kinds of legal liabilities, mainly disciplinary and administrative sanctions, shall be imposed on the wrongdoer, including not only the procuring entity and suppliers but also others involved in government procurement such as procurement/tendering agencies and supervisory authorities. It is worth noting that there are overlaps and inconsistencies among these regulations.⁶³ As a result, a private enforcement mechanism – a supplier review system – has not been given enough attention, especially in the first development stage, as further explained in section 4.

3.4 The lack of a unified supervisory body

There is no a unified supervisory body in China's legal framework on government procurement. In the two national laws and their implementing regulations, supervision responsibility is entrusted to different departments and local authorities,⁶⁴ as further explained below.

The TL does not make it clear which department is responsible for supervision over tendering activities but leaves it to be decided by the State Council.⁶⁵ According to the State

⁶² See the TL chapter 5 and the GPL chapters 7 and 8; the *MOF Tendering Measures* chapter 5; the *Publicity Measures* chapter 5; the *MOF Review Measures* chapter 4; the *MOC Measures on Tendering* chapter 9; the *Tendering Measures on Works-related Goods* chapter 5; and the *NDRC Review Measures* Articles 26 and 27.

⁶³ For example, if a supplier colludes with other suppliers or the procuring entity, under the GPL Article 77, it shall be blacklisted and prohibited, within 1-3 years, from participating in government procurement activities; *if the circumstances are serious*, its business license shall be revoked; under the TL Article 53, *if the circumstances are serious*, supplier's bidding qualifications for projects shall be suspended for 1-2 years. Obviously, administrative sanctions in the GPL are stricter than in the TL.

⁶⁴ See Cao, (c), fn.1 above, p80.

⁶⁵ See Article 7.

Council's opinions issued in 2000,⁶⁶ administrative supervisory duties regarding tendering activities were allocated to various administrative departments. For example, railways departments oversee tendering activities in railways construction; the MOC and the local and sectoral offices managing the importation and exportation of mechanical and electronic products supervise tendering activities in importation of mechanical and electric equipments. In addition, the NDRC is empowered to supervise tendering activities in major national construction projects and to guide and coordinate matters related to tendering nationwide. Such decentralised supervisory system in the area of tendering remains after the promulgation of the GPL. In the subsequent implementing regulations based on the TL, such as the *NDRC Review Measures* (Article 4) discussed further in chapter 8, administrative supervision and investigating and handling illegal conducts and complaints is still undertaken by different government departments at all levels.

The GPL Article 13 clearly states that the financial departments of the governments at all levels are departments for supervision over government procurement, performing the duty of supervision over government procurement activities under law. Also, they are empowered to handle suppliers' complaints.⁶⁷ In those ministerial rules issued by the MOF to implement the GPL, for example the *MOF Review Measures* Article 3 considered further in chapter 8, the duty of supervision is also entrusted to the financial departments above the county level. However, such unification has limited impact since the GPL provides a narrow definition of "government procurement". The decentralised supervision system is still in use when government procurement of works through tendering is concerned. This has caused many

⁶⁶ See "Opinions on the Division of Duties and Obligations among Relevant Organs of the State Council in Conducting Administrative Supervision upon Tendering Activities", No. 34, May 3, 2000. See further Wang, fn.2 above, pp293-294.

⁶⁷ See the GPL Article 55.

contradictions in the process of administrative supervision of tendering activities, since sometimes it is unclear which department should be responsible for supervising a government procurement activity.

The problem of the decentralised supervision system has caused attention from the State Council; it issued “*Opinions on Further Regulating Tendering Activities*”⁶⁸ on 15 July 2004, requiring supervisory bodies concerned in tendering legislation to closely coordinate with each other and strengthen supervision over tendering activities.⁶⁹ In 2005, an inter-ministerial coordination mechanism was established under the *Interim Measures on Inter-Ministerial Coordination Mechanism on Tendering Proceedings*⁷⁰ with a view to resolving the problem of poor coordination by establishing a formal communication channel among government departments concerned. Whether this mechanism can improve administrative supervision upon tendering activities remains to be seen.

3.5 The existence of many overlaps, ambiguities and clashes in regulations

Due to the dual law system and poor legislation techniques, many overlaps, ambiguities and serious clashes have been caused among legislation at the same level and between the higher level and the lower level. A typical example on this concerns coverage.⁷¹ As introduced in 2.2, the provisions on coverage of the TL and the GPL caused an overlap when government procurement of works, goods and services is conducted through tendering. The implementing regulations cannot solve this problem; rather, they have caused more confusion than before, as there are clashes among these ministerial rules issued by different central government

⁶⁸ See General office of the State Council, No.56.

⁶⁹ Ibid, Article 7.

⁷⁰ It was issued by the NDRC on 14 July 2005, effective on 1 September 2005. See further Wang, fn.3 above, pp23-24.

⁷¹ See further Wang, *ibid*, pp18-24.

departments, as analysed in 2.3.

Because of these overlaps and ambiguities, it is unclear: which law and implementing regulation should apply while procuring works-related goods and services through tendering; and whether all TL provisions apply to government procurement of works through tendering (in other words, whether the relevant GPL rules, such as provisions on publicity and review system, should apply to government procurement of works through tendering.)⁷² In practice, it is very difficult for the procuring entity to decide which rules should be followed in certain cases, say when imported mechanical and electric equipments needed for a major infrastructure are procured through international tendering.

4. Existing rules regulating supplier review

As elaborated below, rules on supplier review can be found in two national laws (the TL Article 65 and the GPL Articles 51-58) and various ministerial regulations – mainly the *NDRC Review Measures*, the *MOF Review Measures* and the *MOC Measures on Tendering* (Articles 45-51) discussed further below. However, it is worth noting at the outset that these provisions are not coordinated components of a carefully designed supplier review system; overlap and inconsistencies regarding their application exist because of the lack of a demarcation line between the GPL and the TL; and the application of these inconsistent and ambiguous provisions in practice is arguably even more problematic due to the tension among different government departments.

To facilitate further discussion on the main aspects of the Chinese supplier review system in chapters 8-10, this section elucidates existing Chinese regulation on supplier review by

⁷² Ibid, p20.

examining separately how the following issues are dealt with, namely i) complaints regarding government procurement of works; and ii) complaints regarding government procurement of goods and services. This second category is further sub-divided into: a) general goods and services, b) works-related goods and services and c) mechanical and electric products. Due to conflicting provisions contained in different ministerial regulations, the current situation is very complex, as shown in the diagram 7.1 in the last page of this chapter.

4.1 Rules on handling complaints arising from government procurement of works

As introduced in 2.2, the GPL Article 4 provides that the TL shall apply to government procurement of works through tendering. The implications of this brief provision, as already discussed, are unclear, especially the issue of jurisdiction.

One view is that the GPL Article 4 only allows the TL to regulate tendering procedures in government procurement of works and thus other rules on other matters contained in the GPL, including the rules on supplier review, should apply to government procurement of works through tendering. This is arguably because:

Firstly, TL does not provide a formal supplier review mechanism. The TL Article 65 simply states that bidders and other interested parties have the right to lodge an objection with the procuring entity or complain to the *relevant* administrative supervision department if they believe that tendering activities are not conducted in conformity with the TL. There is no further provision on basic aspects of a formal supplier review system, such as forum for review, procedure, time limit, interim measures or available remedies. This Article provides little guidance for bidders to file complaints in a timely and effective manner.

In contrast, GPL contains a special chapter, including 8 articles, laying down basic rules

on supplier review. These rules concern suppliers' rights to make queries and complaints,⁷³ forum for review,⁷⁴ time limits for various stage of review⁷⁵ and the possibility of suspension of procurement process.⁷⁶ In order to ensure uniformity, it is desirable to enable grieved suppliers to file a complaint to the competent financial department both when government procurement of goods or services, and government procurement of works through tendering is concerned.

Secondly, the GPL challenge system grants "the suppliers" the right to make complaints.⁷⁷ Article 21 defines the term "suppliers" as the legal persons, other organisations or nature persons that provide goods, *works* or services to the procuring entity. This arguably implies that the legislative intention of the GPL is to apply rules on challenge to handling supplier's complaints about *all* government procurement activities, including government procurement of works through tendering regulated by the TL.

The other view, on the contrary, is that government procurement of works through tendering, as a whole, has been excluded from the scope of the GPL by virtue of GPL Article 4. Therefore, the TL, instead of the GPL provisions on supplier review, shall apply to complaints arising from such procurement.

This view is supported by the fact that although the TL failed to provide a supplier review mechanism, such a mechanism has been nevertheless established through secondary legislation by the NDRC and other central governments after the entry-into-force of the GPL (the *NDRC Review Measures* (for construction projects) mentioned in 2.3)), based on the TL

⁷³ See Articles 51 and 52.

⁷⁴ See Articles 52, 55 and 58.

⁷⁵ See Articles 52, 53, 55 and 56.

⁷⁶ See Article 56.

⁷⁷ See Articles 52 and 55.

Article 65, on 21 June 2004. This ministerial regulation contains 31 articles, mainly involving general principles of handling complaints,⁷⁸ forum for review,⁷⁹ procedural rules on filing of complaints and handling of complaints,⁸⁰ decision-making⁸¹ and legal liabilities that shall be imposed on the personnel of the procuring entity, the complaining bidder and the personnel of the administrative review body when they act unlawfully.⁸² Article 2 states that the present Measures apply to complaints about *tendering activities of construction projects* and handling of complaints. Therefore, the *NDRC Review Measures* provided itself with a mandate enabling it to be applied to handling complaints regarding tendering activities in government procurement of works, including tendering activities in major national construction projects discussed further in chapter 8.

4.2 Rules on handling complaints arising from government procurement of goods and services

According to the GPL provisions on supplier review, as explained below in 4.2.1, supplier complaints regarding government procurement of goods and services should be handled under the GPL and the *MOF Review Measures* introduced below. However, as further analysed in 4.2.2 and 4.2.3, provisions contained in ministerial regulations adopted by the NDRC together with other central governments and MOC suggest that suppliers' complaints regarding government procurement of works-related goods *through tendering* and government procurement of mechanical and electric products *through international tendering* are handled

⁷⁸ For example, Article 5 provides that administrative supervisory bodies shall adhere to the principles of fairness, impartiality and high efficiency while handling complaints so as to safeguard the national and public interest and the legal interest of parties involved in tendering activities.

⁷⁹ See Articles 4 and 25.

⁸⁰ For example, Article 7 makes clear the main contents of the statement of complaint. In Articles 14, 15 and 18, provisions on investigation and evidence collection are specified. Time limits for accepting complaints and making decisions are found respectively in Article 11 and Article 21.

⁸¹ See Articles 20 and 2.

⁸² See Articles 24, 26 and 27.

according to their own ministerial regulations respectively. Therefore, the situation for government procurement of general goods and services, that of works-related goods and services and that of mechanical and electric products are discussed separately.

4.2.1 Rules on handling complaints arising from government procurement of general goods and services

As noted in 2.2, the GPL merely excludes government procurement of works through tendering from its coverage. This means that, under the GPL, government procurement of goods and services should be regulated by the GPL. Thus, the GPL rules on supplier review are generally applied while suppliers make complaints regarding government procurement of goods and services.

As the GPL contains only basic rules on supplier review, the MOF issued its *Review Measures*⁸³ mentioned earlier, providing further detailed rules on administrative review, one month after the adoption of the *NDRC Review Measures* introduced above. It has 32 Articles divided into five chapters, concerning general provisions (Articles 1-6),⁸⁴ filing complaints and acceptance (Articles 7-13),⁸⁵ handling of complaints and making decisions (Articles 14-24),⁸⁶ legal liabilities (Articles 25-28)⁸⁷ and supplementary provisions (Articles 29-32).

Article 2 states that these *Measures* shall be used when suppliers complain to the

⁸³ See further Wang, fn.3 above, pp16-18; Cao, (d), fn.2 above, pNA212.

⁸⁴ For example, Article 5 stipulates that the financial departments, while handling complaints, shall adhere to the principles of fairness, impartiality, convenience and high efficiency so as to safeguard the national and public interest. Article 4 requires the financial departments at all level to publicise telephone number, fax and other matters that may facilitate the suppliers' filing the complaints. Article 6 requires that a supplier shall make a complaint in its real name and provide specific matters to complain about and factual basis in its complaint.

⁸⁵ For example, Article 10 makes clear which conditions should be satisfied when a supplier initiates a complaint. Article 8 requires that the complainant shall submit a statement of complaint while initiating a complaint and makes clear the main contents of such a statement. Articles 11 and 12 concern how the financial departments handle a complaint after receiving it.

⁸⁶ For example, how the financial departments conduct review and make an investigation is provided in Article 14.

⁸⁷ Articles 25-27 empower the financial departments to impose sanctions on the procuring entity and its personnel, members of the bid evaluation committee and suppliers where their unlawful acts are found. Article 28 concerns imposing administrative sanction on the personnel of the financial department who abuses his official capacity.

financial departments and the latter accept the case and make decisions. The *MOF Review Measures* does not limit its scope of application. Since the financial departments are designated in the GPL as administrative review body responsible for handling government procurement complaints, this means that the *MOF Review Measures* should be applied while complaints concern government procurement of general goods and services clearly covered by the GPL.

4.2.2 Rules on handling complaints arising from government procurement of works-related goods and services

As to complaints regarding government procurement of works-related goods and services, one view is that, since they relate to a type of goods or services, such complaints should also be handled under the GPL and the *MOF Review Measures*, whether the procurement of such goods and services is conducted through tendering or through other procurement methods. This is because neither the GPL nor the *MOF Review Measures* explicitly exclude complaints regarding government procurement of works-related goods and services from the coverage, as analysed above.

However, for complaints concerning government procurement of works-related goods and services *through tendering*, because of the TL provision on the scope of works discussed below, another view is that the *NDRC Review Measures* should apply.

As noted in 2.2, the TL Article 3 stipulates that not only the construction itself but also works-related goods and services, such as important equipment used for a construct project, must be purchased through tendering. Since complaints regarding government procurement of works through tendering can be arguably handled under the TL and the *NDRC Review*

Measures, as discussed in 4.1, it may be argued that complaints regarding government procurement of works-related goods and services through tendering should also be handled according to the TL and the *NDRC Review Measures*.

In the first Chinese government procurement case – the *Modern Wo'er* cases⁸⁸ discussed in detail in chapter 11, for example, the issue of whether complaints regarding tendering activities in procuring goods for a major national construction project should be regulated by the GPL or the TL is the focus of the case. However, the court did not directly address this issue, as further explained in chapter 11. Thus it remains unclear which implementing regulation - the *NDRC Review Measures* or the *MOF Review Measures* - shall apply to suppliers' complaints regarding government procurement of works-related goods through tendering.⁸⁹

4.2.3 Rules on handling complaints arising from government procurement of mechanical and electric goods

As to complaints regarding government procurement of mechanical and electric products, because there is no special provision on such products in the GPL and the *MOF Review Measures*, one view is that the GPL and the *MOF Review Measures* should apply to complaints regarding procurement of these products.

However, because of the following two reasons, it may be argued that complaints regarding government procurement of mechanical and electric goods should be handled under the *MOC Measures on Tendering* mentioned in 2.3, if such goods are procured through

⁸⁸ *Beijing Modern Wo'er Trading Co. Ltd. V. Ministry of Finance of the People's republic of China*, No.1 Intermediate People's Court of Beijing Municipality, First Level Administrative Division Decision No.432 (2005) and No. 433. See further Mitterhoff, D.J., "Beijing Court Orders Ministry Of Finance To Rule On Supplier's Complaints, But Skirts Broader Issue of Schism in China's Procurement Supervision" (2006) Vol.3, No.12 *International Government Contractor*, p98.

⁸⁹ See Mitterhoff, *ibid*.

international tendering.

First, according to the State Council's *Opinions* on the division of administrative supervision duties over tendering activities mentioned in 3.4, the MOC and the relevant local and sectoral offices were entrusted with the supervisory duty over tendering activities in government procurement of imported mechanical and electric equipment. Then, the MOC issued its own *Measures on Tendering*, which applies to international tendering activities of mechanical and electric products conducted within China. In this regulation, Articles 45-51 offer special rules on how the bidders make complaints arising from the above procurement and how the competent administrative authority handles complaints.

Next, Article 86 of the *MOF Tendering Measures* (for goods and services) mentioned in 2.3 allows that government procurement of imported mechanical and electric products through tendering can be conducted *under relevant national measures*. This might imply that complaints regarding government procurement of imported mechanical and electric goods through tendering are handled under the ministerial regulation specially dealing with international tendering activities of mechanical and electric products – rules on supplier review of the *MOC Measures on Tendering*.

It should be noted, since the *MOC Measures on Tendering* Article 2 states that the applicable scope of these *Measures* is limited to “international tendering activities of mechanical and electric products”, government procurement of mechanical and electric products *not* through international tendering is not regulated by the *MOC Measures on Tendering*. Thus complaints regarding the above procurement not through international tendering should be handled under the GPL and the *MOF Review Measures*.

4.3 Summary

To sum up, the current situation on the application of rules on supplier review is:

i) The position for works:

- For complaints regarding government procurement of works *not* through tendering,

it is clear that the GPL and the *MOF Review Measures* shall apply.

- For complaints regarding government procurement of works *through tendering*, it is unclear whether the GPL and the *MOF Review Measures* or the TL and the *NDRC Review Measures* shall apply.

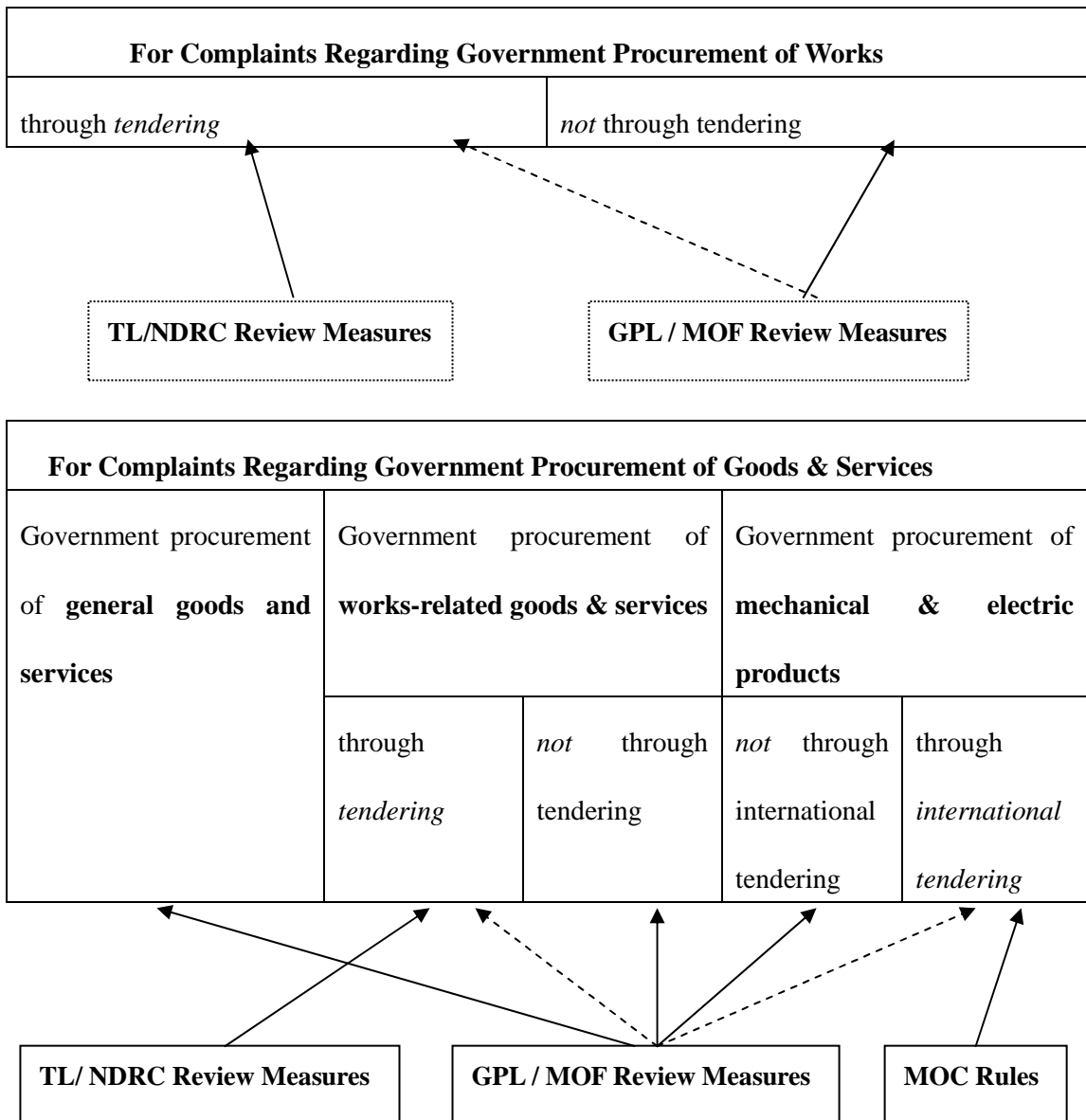
ii) The position for goods and services:

- For complaints regarding government procurement of general goods and services through any procurement method, government procurement of works-related goods and services *not* through tendering and government procurement of mechanical and electric products *not* through international tendering, it is clear that the GPL and the *MOF Review Measures* shall apply.

- For complaints regarding government procurement of works-related goods and services *through tendering*, it is unclear whether complaints shall be handled under the GPL and the *MOF Review Measures* or the TL and the *NDRC Review Measures*.

- For complaints regarding government procurement of mechanical and electric products *through international tendering*, it is unclear whether the *MOF Review Measures* or the *MOC Measures on Tendering* shall apply.

Diagram 7.1. The current situation of application of rules on supplier review



Chapter 8 The Current Chinese Supplier Review System (I)

- - Forum for Review

1. Introduction

Due the enforcement of Chinese procurement rules heavily relying on administrative supervision/inspection, a supplier review system has not received adequate attention at the beginning. As noted above in chapter 7, the TL only contains one brief article (Article 65) providing supplier may seek review. A formal challenge system was established in the GPL, in which basic rules on supplier review were provided. Based on the GPL and the TL respectively, implementing regulations – mainly the *MOF Review Measures* which apply to complaints regarding government procurement of general goods and services through any procurement method and government procurement of works not through tendering¹ and the *NDRC Review Measures* which apply to complaints regarding government procurement of works through tendering under this regulation itself² - were adopted. These ministerial rules, to certain extent, clarify and substantiate some TL and GPL provisions on supplier review such as rules on forum for review. However, due to the overlap of the scope of GPL and the TL, these implementing rules have also caused more confusion in certain aspects of the supplier review system, such as which administrative body should be responsible for administrative review in certain cases.

Based on the discussion in chapters 4-6, this chapter and the following two chapters consider respectively provisions in the Chinese laws and regulations on forum for review,

¹ As explained in chapter 7(4.1), the *Measures* arguably apply to complaints regarding government procurement of works and works-related goods and services through tendering as well.

² The *Measures* arguably also apply when complaints concern government procurement of works-related goods and services through tendering, as explained in chapter 7(4.2.2).

standing and procedures, and available remedies. The following discussion will focus on these main aspects of the two co-existing supplier review systems established by the GPL / the *MOF Review Measures* and the TL /the *NDRC Review Measures*.³

This chapter considers issues related to forum for review of the current Chinese supplier review system. Similar to chapter 4, forum and avenue for review, the extent of powers of the main review body, and the legal effect of decisions of external review bodies will be discussed respectively.

2. Forum and avenue for review

As noted in chapter 7(3.1), the most outstanding characteristic of Chinese government procurement legislation is the co-existence of the GPL and the TL, which do not harmonise with each other in many aspects. This feature of course is reflected in the current Chinese supplier review system. As far as forum and avenue for review are concerned, provisions contained in the GPL and the TL and their respective implementing regulations are often different. This section considers the availability of procuring entity review, administrative review and judicial review, under the TL / the *NDRC Review Measures* and under the GPL / the *MOF Review Measures*.

As explained further below, procuring entity review, under the GPL / the *MOF Review Measures*, is compulsory; whereas under the TL / the *NDRC Review Measures*, it is optional. Administrative review in China includes the first instance administrative review, which is undertaken by different government departments under the GPL / the *MOF Review Measures*

³ Rules on supplier review contained in the *Implementing Regulation on International Tendering in Procurement of Mechanical and Electric Products* (the *MOC Measures on Tendering*) introduced in chapter 7(4.2.3) will not be further discussed in this thesis, because of its limited applicable scope and word limits.

and the TL / the *NDRC Review Measures*, and further administrative reconsideration. In China, suppliers may seek judicial review by initiating an administrative litigation and possibly also by initiating a civil litigation, as discussed further below.

2.1 Procuring entity review

The TL Article 65 states that a bidder or other interested party who considers tendering activities are not in conformity with the relevant TL provisions has the right to lodge an objection with the procuring entity *or* to complain to the relevant administrative supervision department. This arguably means that the supplier concerned can choose to file a complaint with *either* the procuring entity itself *or* the competent administrative review body directly. Further, in the *NDRC Review Measures* enacted based on the TL Article 65, submitting a complaint to the procuring entity is not even mentioned. Therefore, procuring entity review is not a compulsory prerequisite for the supplier to seek an administrative review under the TL / the *NDRC Review Measures*.

On the other hand, the GPL provides in Articles 52 and 54 that, a grieved supplier *may* submit a written challenge to the procuring entity or its procuring agency within the time limit. Furthermore, Article 55 states, “[W]here the supplier that has made a challenge is not satisfied with the procuring entity or its agent’s reply, or the latter fails to make a reply within the specified time limit,” the supplier may lodge a complaint with the competent financial department. These provisions can arguably be construed as procuring entity review is not prerequisite for administrative review since Article 52 uses the word “*may*” which indicates the complainant has discretion to decide whether to first lodge the complaint with the

procuring entity before resorting to an administrative review.⁴

However, Cao argues that the person who has the right to seek an administrative review is only *the supplier who has submitted a challenge to the procuring entity*, and procuring entity review is a compulsory stage before administrative review; the supplier is allowed to seek administrative review only after it has made a challenge to the procuring entity and has not received satisfactory remedies.⁵ If Articles 52 and 55 were to be read together, the first sentence of Article 55 arguably indicates that only the supplier who has made a complaint to the procuring entity or its agent under Article 52 or 54 but has not been satisfied with the latter's response or received no response will gain the right to initiate the administrative review. Therefore, the intention of the GPL is arguably to set seeking procuring entity review as a prerequisite for seeking administrative review.

This issue is clarified by the *MOF Review Measures* implementing the GPL which provides in Article 7 that a grieved supplier “*shall*” “*first*” submit a challenge to the procuring entity or its agent. If it is unsatisfied with the response of the procuring entity or of the agency or no response is given within the prescribed time limit, the supplier may file a complaint with the financial department at the same level - the administrative review body discussed further in 2.2. This provision clearly indicates that procuring entity review is required as a prerequisite for seeking administrative review.

2.2 Administrative review

As revealed above, administrative review is explicitly provided in the TL Article 65 and the GPL Article 55. If the complaining supplier disagrees with the administrative review body's

⁴ See further Gu, Liaohai, (eds.) *Analysis of Chinese Government Procurement Cases* Vol.1, 2 & 3) (Beijing, Qunzhong Press, 2005, 2006).

⁵ See Cao, Fuguo, *Annotation to the Chinese Government Procurement Law* (Beijing, Mechanical Industry Press, 2002) p268 and p277.

decision or the latter fails to make a decision in due time, under the relevant rules of the GPL / the *MOF Review Measures* and of the *NDRC Review Measures*, it may apply for further “administrative reconsideration”⁶, as further discussed in 2.2.2. The administrative reconsideration is an appeal procedure conducted by a higher administrative body instead of the court under Chinese administrative law.⁷ Therefore, in the current Chinese supplier review system, there are actually two levels of administrative review: the first instance administrative review and the second instance administrative reconsideration, as elaborated below.

2.2.1 The first instance administrative review

The TL Article 65 provides little guidance on forum for administrative review which simply states that a bidder may complain to “*the relevant administrative supervision department*”; the TL Article 7 left the issue to be decided by the State Council later. On 3 May 2000, the State Council issued the *Opinions on the Division of Duties and Obligations among Relevant Organs of the State Council in Conducting Administrative Supervision upon Tendering Activities*⁸ (hereafter the “*Opinions*”) mentioned in chapter 7(3.4), which established a decentralised system for administrative supervision and review. The *Opinions*, based on the structure of the administrative system, authorise various government departments to supervise tendering activities and handle complaints associated with procurement by entities under their control respectively. For example, railways departments are responsible for handling complaints about tendering activities in railways construction; and Ministry of Commerce (MOC) and the relevant local and sectoral offices are empowered to handle complaints

⁶ Alternatively, the supplier can initiate an administrative litigation, as further considered in 2.3.

⁷ See further Ying, Songnian, (eds.) *Administrative Law and Administrative Litigation Law* (Beijing: Law Press, 2005).

⁸ It came into effect at the same day.

regarding tendering of imported mechanical and electric equipments; the NDRC handles complaints about tendering activities in major national construction projects.⁹ This decentralised system was implemented by central government departments through ministerial regulations.¹⁰ For example, on 10 January 2002, the NDRC issued the *Interim Measures for Supervising Tendering Activities in Major National Construction Projects* (hereafter the “*Interim Measures*”),¹¹ which provides that NDRC is responsible for handling complaints regarding illegal activities occurred in tender process of major national construction projects.¹²

In contrast, the GPL Article 13 explicitly designates the financial departments at all levels as the competent authority for supervising government procurement and handling government procurement complaints. Further division of responsibilities between central and local financial departments is provided in the *MOF Review Measures* (Article 3). However, the seemingly unified administrative review system is limited because of the following reasons:

Firstly, because government procurement of works through tendering is excluded from the GPL’s coverage by virtue of Article 4, as explained in chapter 7(4.1), complaints regarding government procurement of works through tendering can arguably be handled according to the TL / the *NDRC Review Measures*. Article 4 of the *NDRC Review Measures* issued after the adoption of the GPL states that the administrative supervision branch over tendering activities of the development and reform departments, railways departments etc. at all level, according to the division of duties made under the State Council’s *Opinions* and the division of duties

⁹ See further Wang, Ping, “China’s Evolving Legal Framework on Public Procurement” (2004) 6 *P.P.L.R.* p285 at pp293-294.

¹⁰ The MOC adopted the *MOC Measures on Tendering* introduced in chapter 7(4.2.3).

¹¹ Order No. 18 of the NDRC, 2002, effective on 1 February 2002. Article 3 defines major national construction projects as construction projects invested or financed by the State and approved by the NDRC or by the State Council after the NDRC’s check.

¹² See Article 7.

among local governments, are responsible for handling complaints regarding tendering activities and making decisions. Complaints about tendering activities in major national construction projects, including industrial projects, are handled by the NDRC. Therefore various administrative departments mentioned in the State Council's *Opinions*, instead of the financial departments, remain the administrative review body for handling complaints regarding government procurement of works through tendering.

Furthermore, even complaints concerning government procurement of goods and services are not undoubtedly handled by the financial departments. As explained in chapter 7(4.2.2), complaints regarding government procurement of works-related goods and services through tendering, if subject to the TL / the *NDRC Review Measures*, may be handled by other administrative departments concerned or NDRC instead of financial departments. For example, if the procurement of certain equipments is to be used for a construction project under the jurisdiction of the Ministry of Railways, complaints concerning procurement of such goods may be handled by the Ministry of Railways. Similarly, complaints involving procurement of goods needed for major national construction projects may be handled by the NDRC.

2.2.2 Administrative reconsideration

The TL does not mention administrative reconsideration at all which creates uncertainty as to whether the complainant may apply for administrative reconsideration of the first instance administrative review body's decision if unsatisfactory. This issue was clarified in the *NDRC Review Measures* (Article 25) which allows the complainant to apply for administrative reconsideration.

In contrast, the GPL Article 58 explicitly states if the complaining supplier disagrees with the competent financial department's decision, or the latter fails to make a decision within the time limit, the supplier may further apply for administrative reconsideration. A similar provision is also found in the *MOF Review Measures* Article 24. Therefore, under both systems (the GPL / *MOF Review Measures* or the TL / the *NDRC Review Measures*), the complainant unsatisfied with the decision of the first instance administrative review body, be it a financial department or any other government department involved in handling complaints, may apply for administrative reconsideration.

Administrative reconsideration is a system of administrative remedies, which is undertaken by a higher administrative body or other organs empowered by law, at the request of the person who believes that his lawful rights and interests have been infringed upon by an administrative organ's specific administrative act, to reconsider under legal procedures whether the specific administrative act is legal and appropriate and make a decision.¹³ "It is of an administrative nature as it is an administrative organ at the same level or the next higher level that will, through reconsidering the original decision, maintain, rescind or change an illegal or inappropriate specific administrative act so as to effectively protect the legitimate interests of the aggrieved parties."¹⁴ In addition, administrative reconsideration body may rectify illegal or inappropriate administrative acts made by the administrative body at the lower level. Thus, as far as an administrative reconsideration case is concerned, the respondent of the application is the administrative body undertook the specific administrative

¹³ See Ying, fn. 7 above, p416.

¹⁴ See Lin, Feng, "Administrative Law" in Wang, Chenguang & Zhang, Xianchu, (eds.) *Introduction to Chinese Law* (Hong Kong: Sweet & Maxwell Asia, 1997), p78.

act¹⁵, i.e. the first instance administrative review body handling government procurement disputes, rather than the procuring entity. This means parties to the administrative reconsideration procedure are no longer the supplier and the procuring entity but the supplier and the first instance administrative review body.

Which administrative body is responsible for administrative reconsideration is set out in *Administrative Reconsideration Law* (ARL).¹⁶ Article 12 provides that an applicant, who refuses to accept a specific administrative act of the departments under local people's governments at or above the county level, may apply for administrative reconsideration to the people's government at the same level or to the competent authority at the next higher level. Further, Article 14 provides that an applicant who disagrees with a specific administrative act of a department under the State Council shall apply for administrative reconsideration to the department under the State Council that undertook the specific administrative act. According to these provisions, for example, if the complaining supplier is unsatisfied with the decision upon a government procurement complaint made by the Finance Bureau of Beijing Municipality, it may apply for administrative reconsideration either to People's Government of Beijing Municipality or to the MOF. If the MOF acts as the first instance administrative review body handling a government procurement complaint, the MOF shall still be responsible for administrative reconsideration. Where the applicant is unsatisfied with the outcome of the administrative reconsideration, it may bring an administrative lawsuit before a competent court.¹⁷

¹⁵ See the *Administrative Reconsideration Law* Article 10.

¹⁶ See further Zhang, Zhengzhao, (eds.) *Administrative Law and Administrative Litigation Law*, 3rd ed. (Beijing: Renmin University of China Press, 2007), pp377-390; Luo, Haocai & Zhan, Zhongle., (eds.) *Administrative Law*, 2nd ed. (Beijing: Peking University Press, 2006) ch.11.

¹⁷ See the ARL Article 5. If the applicant is unhappy with the administrative reconsideration decision of the department under the State Council (such as the MOF's decision), under the ARL Article 14, it may instead choose

2.3 Judicial review

For suppliers seeking judicial review in China, they can initiate an *administrative litigation* against the decision of the first or second instance administrative review body, as explained further in 2.3.1; and arguably, they can directly file a *civil litigation* against the procuring entity, as discussed further in 2.3.2.

2.3.1 Judicial review: *administrative litigation*

As with administrative reconsideration, administrative litigation is not mentioned in the TL but made clear in the *NDRC Review Measures* (Article 25) that the complainant, instead of applying for administrative reconsideration, may bring an administrative litigation before the court, if it disagrees with the first instance administrative review body's decision or the latter fails to make a decision in due time. The GPL Article 58 and the *MOF Review Measures* Article 24 expressly state that the complaining supplier who disagrees with the financial department's decision or receives no response may initiate an administrative litigation *or* apply for administrative reconsideration discussed above. Thus, administrative litigation can be brought by the supplier to seek judicial review of the first instance administrative review body's decision, under the GPL / the *MOF Review Measures* as well as under the *NDRC Review Measures*.

In addition, administrative litigation may be raised after administrative reconsideration by the supplier unsatisfied with the administrative reconsideration decision, as noted in 2.2.2.

There are no special administrative courts in China but courts at various levels contain special administrative divisions. An administrative lawsuit is adjudicated by the administrative

to apply to the State Council for a final ruling.

division of the court, according to Article 3 of the *Administrative Litigation Law* (ALL),¹⁸ effective on 1 October 1990. Administrative litigation is “a kind of judicial control over the exercise of administrative power by the executive branch of the government.”¹⁹ Thus, in the above administrative litigation instituted by the complaining supplier, the defendant is the administrative organ that undertook the specific administrative act – the financial department concerned or other administrative bodies handling complaints about tendering activities - or the administrative reconsideration organ,²⁰ rather than the procuring entity.

2.3.2 Judicial review: civil litigation

Judicial review may arguably be, and has been in practice, sought by the aggrieved supplier by directly initiating a civil litigation against the procuring entity, although no such right was clearly granted by the TL or the GPL.

The TL does not mention whether suppliers may file a civil lawsuit against the procuring entity. The GPL Article 79 states where a party to government procurement, which commits illegal acts prescribed in the GPL Articles 71,²¹ 72²² and 77²³ and thus causes losses to other parties, shall, in addition to being imposed administrative sanctions, *bear civil liability*

¹⁸ See further Zhang, fn.16 above, chapters 9-12; Fang, Shirong, Xu, Yinghua and Ding, Lihong, (eds.) *Administrative Litigation Law* (Beijing: Tsinghua University Press, 2006); Cheung, A.K.C., “China’s Administrative Litigation Law” (2005) *AUT P.L.* p549; Lin, fn.14 above.

¹⁹ See Lin, fn.14 above, p87.

²⁰ See the ALL Article 25.

²¹ It provides that a procuring entity or agency shall be ordered to rectify within a time limit and given a disciplinary warning, and may also be fined, if it commits one of the following acts: 1) adopting, without authorisation, other procurement methods, instead of open tendering; 2) elevating, without authorisation, the criteria for procurement thresholds; 3) entrusting procurement matters to an agency without qualification for conducting government procurement; 4) treating suppliers differently or discriminately by using unreasonable requirements; 5) negotiating with bidders in the procurement process; 6) failing to conclude a contract with the successful bidder after sending the award notice; and 7) refusing supervision conducted by the relevant department under law.

²² Article 72 prescribes that the procuring entity or its agency or its staff member shall be fined, confiscated the illegal gains or investigated for criminal responsibility where applicable, if it (or he) commits one of the following acts: 1) colluding, in bad faith, with a supplier or a procuring agency; 2) accepting bribes or obtaining other illegitimate interests in the course of procurement; 3) providing false information to the relevant department conducting supervision under law and 4) divulging the base price of a bid before opening bids.

²³ This Article provides sanctions that should be imposed on suppliers in breach of rules such as collusion with other suppliers.

pursuant to the provisions of relevant civil laws. Some academics and practitioners argue this means that suppliers may seek civil remedies.²⁴ Based on Article 79 and the relevant civil laws, suppliers may arguably claim that the procuring entity shall be liable for negligence in concluding the contract or the liability for infringement of rights. However, due to the lack of explicit provisions on the resolution of government procurement disputes through civil procedures in national procurement laws and secondary implementing legislation, while some courts accept civil cases concerning government procurement activities, other courts do not.

Under the *Civil Procedures Law* adopted in 1991,²⁵ civil cases concerning government procurement activities may be handled by the economic or civil division of the court. There have been some successful procurement cases claiming compensation of lost profits on the basis of the *Contract Law* Article 42 on the liability for negligence in *concluding* a contract, since a government procurement contract is regarded as a civil contract under the GPL Article 43. Furthermore, the principle of good faith, the foundation for a civil relationship, is clearly required to be followed in government procurement and tendering activities as required in the GPL Article 3 and the TL Article 5. The procuring entity may be liable for breach of good faith in the process of concluding procurement contracts. For example, in *Xincheng*,²⁶ the court ruled that the procuring entity that conducted tendering under the TL and had chosen Xincheng as the winning bidder but failed to conclude the contract with Xincheng has violated the principle of good faith in concluding the contract; and thus ordered it to

²⁴ See Cao, fn.5 above, p231 and p321; Wang, Yaqin, *Government Procurement and Administrative Remedy* (Beijing: The People's Court Press, 2004), p241; Gu, Liaohai, "Is it right that the court refuses to accept a government procurement case?", published at www.chinabidding.com (22 May 2006).

²⁵ This Law was revised on 28 October 2007.

²⁶ *Lishui City Xincheng Machinery and Electrical Equipment Ltd v. the Electricity Power Bureau of Suichang County of Zhejiang Province*. See further Gu, fn.4 above, (Vol.1) pp172-182.

compensate Xincheng's loss of possible profits. In *Yidi*²⁷ discussed further in chapter 11, the complaining supplier instituted a civil litigation against the procuring entity on the ground of infringement of rights and the case was accepted by the competent court.

However, since there is no explicit provision in primary or secondary legislation stating that suppliers have the right to initiate a civil litigation against the procuring entity, some courts refuse to accept such a case on the ground that the dispute over government procurement activities between the procuring entity and the supplier concerned should be treated as an administrative case and accordingly should be first handled by the competent administrative review body and then be adjudicated by administrative division of the court under the ALL. For example, it was reported that the people's court of Fengtai District of Beijing Municipality dismissed a supplier's action claiming that it was a qualified supplier and its bid should not be treated as a void bid and thus the procuring entity should pay compensation to it, on the ground that the dispute between the supplier and the procuring agency occurred in tendering process was out of the jurisdiction of civil litigation. The decision was upheld in appeal by the Second Intermediate Court of Beijing Municipality.²⁸

2.4 Summary

It is difficult to draw a clear picture on forum and avenue for review in China. As revealed above, it appears there are two review channels available to suppliers in China. One is to directly bring a civil litigation against the procuring entity before the court. However, because of the lack of express provision on such a civil litigation, in practice, it is uncertain whether a

²⁷ *Jinhua City Yidi Medical Apparatus Factory v. General Station of National Animal Husbandry and Veterinary*, Chaoyang District People's Court of Beijing Municipality, First Level Economic Division Decision No.4362 (2001). See further Gu, *ibid*, pp1-34.

²⁸ See Cheng, Yuhang and Wang, Yue, "Claiming 200,000.00 for participating in bid for ambulances" in *Huaxia Newspaper*, 12 May 2006. It was reported that a Medical Apparatus Sale Company bid for a contract for 100 ambulances and spent RMB 200,000 to design and supervise manufacture of the sample. However, the procuring agency treated its bid as void on the ground that it did this out of its scope of business.

court will accept such a civil case. The other is to seek remedies through administrative procedures – resorting to administrative review and administrative litigation, after a compulsory or optional procuring entity review.

Under the GPL / the *MOF Review Measures*, as procuring entity review is compulsory, broadly, a three-tiered review mechanism similar to those recommended in the UNCITRAL Model Law discussed in chapter 4, including compulsory procuring entity review, the first instance administrative review and a further administrative reconsideration or judicial review, is in place. Therefore, complaints concern procurement regulated by the GPL / the *MOF Review Measures*, such as procurement of general goods and services may go through 3 instances of review. However, under the TL / the *NDRC Review Measures*, since procuring entity review is optional, for complaints regarding government procurement of works through tendering, maybe only a two-tiered review – administrative review and a further administrative reconsideration or judicial review – are needed.

Although the first instance administrative review is an important review stage in China, there is no a unified administrative review body handling all complaints related to government procurement activities. Rather, the financial departments and many other relevant administrative departments are involved in handling complaints. Further, the division of duty of disputes resolution among the financial departments and other relevant administrative departments is unclear as explained above. This has caused confusion on which administrative body should be responsible for handling the case when a specific complaint is filed in practice, as happened in the two *Modern Wo'er* cases²⁹ discussed further in chapter 11.

²⁹ *Beijing Modern Wo'er Trading Co.Ltd. v. Ministry of Finance of the People's Republic of China*, No.1 Intermediate People's Court of Beijing Municipality, First Level Administration Division Decisions No. 432 and 433 (2005). See further Mitterhoff, D., "Beijing Court Orders Ministry of Finance to Rule on Supplier's

3. The extent of review powers

Chapter 4(section 4) analysed the power possessed by “the main review body” – the judicial review body or an administrative review body as the appeal body in a tiered review system. In the current tiered Chinese supplier review system, administrative review bodies, including the first instance administrative review body and administrative reconsideration organ, and the courts in administrative litigation work as the appeal body, as revealed above. Thus, this section looks at review powers possessed by administrative review bodies and the courts in administrative litigation as appeal authorities in China.

3.1 Powers possessed by administrative review bodies as the appeal body

3.1.1 Powers possessed by the first instance administrative review body

As explained in chapter 4 (section 4), the judicial review body or administrative review body as the appeal body in the hierarchical review system commonly has the power to review the original decision on issue of law; but it may have no power to review original decision on issue of fact. It is unclear, under the GPL and the TL, whether the administrative review body as the appeal body has the power to deal with the issue of fact, since there is no provision on the extent of the administrative review power in the aforesaid laws. However, based on the relevant provisions of the *MOF Review Measures* and of the *NDRC Review Measures* discussed below, it can be argued that the administrative review body has the power to review both legal questions and the factual issues contained in the procuring entity’s decision. The *NDRC Review Measures* Article 14 clearly states that the administrative review body shall

Complaints, But Skirts Broader Issues of Schism in China’s Procurement Supervision” (2006) December, Vol.3 No.12 *International Government Contractor* p98.

collect and consult the relevant documents, investigate and check the relevant information after receiving complaints. Also, the above two regulations provide rules on evidence collection and cross-examination³⁰ and stipulate that the complaint will be dismissed if it lacks the factual basis.³¹ These indicate that the administrative review body can deal with the factual issues.

3.1.2 Powers possessed by administrative reconsideration organ

As noted above, the supplier can apply for administrative reconsideration of the first instance administrative review body's decision. As noted in 2.2, the administrative reconsideration organ mainly deals with the supplier's complaint against the first instance administrative review body's decision on the dispute between the supplier and the procuring entity, rather than the original dispute itself. The administrative reconsideration organ, under the ARL Article 3, examines the legality and appropriateness of specific administrative acts. While examining whether the administrative review body handles the complaint properly, under the relevant provisions considered below, the administrative reconsideration organ has the power to review not only legal errors but also the finding of facts contained in the first instance administrative review body's decision.

The ARL Article 28 provides that the administrative reconsideration organ may annul or alter the administrative body's specific act or find it illegal in the following situations: essential facts are unclear; evidence is insufficient; incorrect grounds are applied; legal procedures are not properly followed; limits of the authority of the administrative review are exceeded or abused or the act is obviously inappropriate. Article 47 of the *Implementing*

³⁰ See the *NDRC Review Measures* Articles 15 and 16; the *MOF Review Measures* Article 14.

³¹ See the *NDRC Review Measures* Article 20; the *MOF Review Measures* Article 17.

Regulation to the Administrative Reconsideration Law adopted by the State Council in May 2007³² further makes clear that the administrative reconsideration organ may *alter* specific administrative act if facts ascertained in the act are unclear and evidence is insufficient but the administrative reconsideration organ has ascertained facts and obtained sufficient evidence after review. These provisions mean that the administrative reconsideration organ is empowered to review and substitute the original findings of facts with its own.

Because the administrative reconsideration organ has the power to “alter” the first instance administrative review body’s ruling, it can in fact deal with the original dispute between the supplier and the procuring entity, although the ARL does not state that the administrative reconsideration organ can deal with the original dispute that causes the administrative reconsideration in question. For altering the first instance administrative review body’s ruling, the administration reconsideration organ has to ascertain facts and collect evidence, which arguably implies that it can review issues of both law and fact related to the procuring entity’s decision.

3.2 Powers possessed by the courts in administrative litigation as the appeal body

As explained in 2.2 and 2.3, the supplier unhappy with the first instance administrative review body’s decision may initiate an administrative litigation, instead of applying for administrative reconsideration for further review. Also, under the ARL Article 5, the supplier is usually allowed to seek judicial review if it applied for administrative reconsideration first but disagreed with the administrative reconsideration decision. In administrative litigation, the courts, according to the ALL Article 2, deal only with specific administrative acts of administrative bodies and their personnel. Thus the competent court examine only the

³² It came into effect on 1 August 2007.

administrative review body's act of making rulings over a government procurement dispute, when the aforesaid administrative litigation is initiated by the supplier; it has no power to deal with the original dispute between the supplier and the procuring entity. This means that the court has no power to review all matters related to the procuring entity's decision. As revealed below, the court can review both legal and factual issues *contained in the administrative review body's decision*.

The ALL Article 5 states that "in handling administrative cases, the people's courts shall examine the legality of specific administrative acts." Its legislative intention is that the courts deal only with the legality of specific administrative acts while hearing administrative cases; the appropriateness of specific administrative acts shall be handled through administrative reconsideration in principle; and the courts cannot make decisions on replacement of decisions of administrative bodies.³³ To carry out administration, administrative organs often need to exercise discretion entrusted by law. It is often thought that the courts should generally not interfere with the question of whether administrative organs' decisions made within their discretion are reasonable or appropriate.³⁴

Further, under the ALL Article 54(1) and (2), the courts may determine the legality of specific administrative acts through checking the following aspects of specific administrative acts: i) whether there is sufficient essential evidence; ii) whether laws and regulations are correctly applied; iii) whether legal procedures are properly followed; iv) whether the administrative body concerned exceeds its competence and v) whether the administrative body concerned abuses its authority. If the answer to one of above questions is negative, the

³³ See Wang, Hanbin, *Explanation on the Draft of the Administrative Litigation Law of the People's Republic of China*, available at <http://www.law-lib.com/fzdt/newshtml/20/20050722172925.htm>

³⁴ See Fang, *et al.*, fn. 18 above, p27.

specific administrative act shall be annulled or partly annulled by judgement. The first aspect mentioned above and other provisions concerning evidence collection of the courts contained in the ALL³⁵ and in the *Explanatory Notes of the Supreme People's Court on Some Issues Related to the Implementation of the Administrative Litigation Law* (hereafter “*Explanatory Notes*”)³⁶ may imply that, while reviewing the legality of specific administrative acts, the courts also deal with factual issues concerned in the administrative body's decision in addition to reviewing the application of law in that decision. It is arguably inappropriate to regard the review of legality as merely examining legal issues concerned in a specific administrative act. While examining the legality of specific administrative acts, the courts need to examine whether the application of law and regulation is correct and whether facts - the basis of the specific administrative act - have been clearly ascertained and evidence is sufficient, as reviewing factual issues is one aspects of the review of the legality.³⁷

As far as the aforesaid administrative cases initiated by suppliers are concerned, typically, the competent court needs to determine the legality of the ruling of the first instance administrative review body over a dispute between a supplier and the procuring entity.³⁸ To this end, under Article 54(1) and (2) noted above, it can be argued that the court needs to examine whether the first instance administrative review body's ruling has been made on the basis of sufficient evidence, whether the application of law and regulation in the ruling is correct and whether the proper legal procedures were followed while making the ruling. Thus,

³⁵ See for example Article 34 provides that a people's court has the authority to request parties to provide or supplement evidence, and to obtain evidence from the relevant administrative organs, other organisations or citizens.

³⁶ It was effective on 10 March 2000. See Articles 29-31.

³⁷ See Jiang, Mingan, *Administrative Law and Administrative Litigation Law* (Beijing: Law Press, 2003) p323.

³⁸ If the case is an appeal case against the administrative reconsideration decision, the court needs to determine the legality of the ruling made by the administrative reconsideration organ over the appeal against the first instance administrative review body.

the finding of facts and the application of laws concerned in the first instance administrative review body's decision may be both reviewed by the court.

4. Legal effect of decisions

This section discusses whether decisions of external review bodies, including the first instance administrative review body, the administrative reconsideration organ and the courts, are legally binding and enforceable.

4.1 Legal effect of the first instance administrative review body's decisions

Both the GPL and the TL offer no clear provision on the legal effect of decisions of the first instance administrative review body. However, it can be argued that their decisions are legally binding, as explained below.

The *MOF Review Measures* Articles 17-19 provide if the financial department determines that the procuring entity has breached the relevant procurement rules after examination, it can, under different circumstances, determine the procurement activity as illegal and order the procuring entity to correct the procurement documents, to carry out afresh the procurement activity, or to bear the corresponding compensation liabilities under the relevant law. This clearly demonstrates that the financial departments' decisions are legally binding.

The *NDRC Review Measures* do not directly make clear what kind of decisions the administrative review body can make where illegal tendering activities has been proven. Article 20 merely states that, in the above case, the administrative supervision body makes administrative sanctions under the TL and other relevant regulations. Checking the relevant

TL provisions, for example Article 51, it is provided if the bid inviting party imposes unreasonable conditions to restrict or preclude potential bidders, it shall be *ordered* to make amendments and may be imposed a fine by the administrative supervision body. This implies that the administrative review body's decision should be legally binding.

However, the above two ministerial regulations offer no provision on how to enforce the administrative review body's decision where the procuring entity does not voluntarily enforce it.

4.2 Legal effect of the administrative reconsideration organ's decisions

The administrative reconsideration organ's decisions are binding and enforceable under the ARL Article 28(3). It provides that the administrative reconsideration organ shall decide to annul, alter or confirm the specific administrative act – the ruling of the first instance administrative review body when a government procurement dispute is concerned – as illegal, in certain circumstances such as violation of legal procedures. In the case that the administrative body fails to perform the statutory duties, the administrative reconsideration organ shall require the aforesaid body to perform its duties within a fixed time by decision.³⁹ If the specific administrative act is proved to be legal, it shall be upheld by the administrative reconsideration organ by decision.⁴⁰ Further, Article 31 clearly states that “once the written administrative reconsideration decision is served, the decision is instantly legally effective.”

The administrative reconsideration organ's decisions are enforceable under the ARL Article 32 explicitly requiring the respondent of the application – the first instance administrative review body - to perform the administrative reconsideration decision. Further,

³⁹ See Article 28(2).

⁴⁰ See Article 28(1).

it stipulates if the latter does not perform or delays performing the administrative reconsideration decision without due reasons, the administrative reconsideration organ or a relevant higher level administrative organ shall order it to perform the decision within a fixed time. For example, if the MOF sets aside the handling decision of the Financial Bureau of Beijing Municipality on a procurement dispute and orders the Financial Bureau to make a new handling decision but the latter does not implement the MOF's decision as required, the MOF can order the latter to perform the decision within a fixed time.

4.3 Legal effect of decisions of the courts

Judgments or orders⁴¹ of the courts over administrative cases concerning government procurement disputes are legally binding and enforceable under the ALL provisions introduced below. The ALL Article 54 states that the competent court shall, according to the varying conditions, make judgments. For example, the court may decide to annul the first instance administrative review body's decision or order it to perform its statutory duty within a specified period. Judgments or orders of the first instance courts' shall be legally effective if no appeal is initiated within the prescribed time limit.⁴² Judgments over appeals made by the courts are final judgments,⁴³ which are of course legally binding.

To ensure enforcement, the ALL Article 65 explicitly requires that parties must perform the legally effective judgements or orders of the courts. Further, it stipulates if an administrative organ refuses to do so, the first instance court may adopt the following measures: imposing a fine on the administrative organ or putting forward a judicial proposal to the administrative organ superior to the administrative organ in question or to the

⁴¹ Orders are mainly used to deal with such issues as the rejection of acceptance of the case and suspension of execution. See further Article 63 of the *Explanatory Notes*.

⁴² See the ALL Article 58.

⁴³ *Ibid*, Article 60.

supervisory or personnel department; imposing criminal responsibility on the head of the administrative organ and the person directly in charge, if the circumstances are very serious.

Similarly, decisions of the courts over civil cases concerning government procurement disputes between the procuring entity and suppliers are also legally binding and enforceable under the *Civil Procedures Law* (CPL). Under Article 141, if the complaining supplier does not file an appeal against the first instance court's judgment within the prescribed period, such a judgment shall be legally effective. Judgments or orders of the second instance are final,⁴⁴ which means they are legally binding. Further, Article 212 explicitly provides that the parties concerned must comply with legally effective judgments or orders. If a party refuses to do so, the other party may apply to the court for execution, or the judge may refer the matter to the execution officer for enforcement. This clearly indicates that the decisions of the courts over civil disputes, including judgments over disputes regarding government procurement activities, are enforceable.

⁴⁴ See the CPL Article 158.

Chapter 9 The Current Chinese Supplier Review System (II)

-- Standings and Procedures

1. Introduction

This chapter discusses, in the current Chinese supplier review system, who has the right to review and which procedural rules should be followed while handling procurement disputes. Similar to chapter 5, the issue of standing will be first discussed and then certain procedural issues concerning time limits and the publication of the review body's decisions will be considered.

2. Standing

In a supplier review system, as discussed in chapter 5(2.2.1), it is common to grant the right to review to actual and potential suppliers, main contractors referred to in chapter 5. Subcontractors and others including trade associations, the supervisory authority or the public may also be granted a standing to bring an action against the procuring entity in some regimes. This section considers who can exactly enjoy the right to review in China. Since, as explained in chapter 8(2.4), suppliers may seek review through administrative procedures (administrative review – administrative reconsideration and/or administrative litigation) after a compulsory or optional procuring entity review or through civil procedures, the issue of standing in these two procedures will be discussed separately.

First, who has the right to review in administrative procedures will be considered by discussing who can raise a complaint to the first instance administrative review body – the

financial department or other relevant administrative bodies -; since complaining to the first instance administrative review body is the precondition to seek further administrative reconsideration or judicial review under both the GPL and the TL, as revealed in chapter 8(2.2). Then, who can bring a civil case against the procuring entity directly to the court under the civil procedures law will be discussed.

2.1 The issue of standing in administrative procedures

Before exploring who has the standing to complain to the first instance administrative review body, it should be noted first, as showed in diagram 9.1 below, there are different provisions on standing in the GPL / the *MOF Review Measure* and in the TL / the *NDRC Review Measures*. Thus, for different kinds of government procurement activities which may be regulated by different primary laws and the implementing regulations explained in chapter 7(section 4), the answer to the question of who enjoys the right to review is different, as revealed below.

In addition, unlike the UNCITRAL Model Law which imposes some restrictions on the right to review explained in chapter 5(2.2), there is no similar limitation in the current Chinese laws and regulations concerning supplier review. Under the GPL Article 52 and the *MOF Review Measures* Article 7, the supplier has the right to challenge the procurement documents, procurement process or the results. Under the TL Article 65 and the *NDRC Review Measures* Article 3, the supplier may make a complaint regarding any tendering activity of construction projects deemed incorrect. These provisions arguably imply that all decisions made by the procuring entity in the procurement contract award can be challenged by suppliers.

This section discusses whether main contractors, subcontractors and others have the

standing to seek review under the *GPL /MOF Review Measures* and the *TL /the NDRC Review Measures*.

Diagram 9.1. Who has the right to review in China?

Subject		In Administrative Procedures		In Civil Procedures
		TL/NDRC Rules	GPL/MOF Rules	
Main contractors	Actual suppliers	Yes	Yes	Yes
	Potential suppliers	Yes	No	No
subcontractors		Yes (possibly)	No	No
Others		Yes (possibly)	No	No

2.1.1 Position of main contractors

Main contractors defined in chapter 5 include both actual suppliers and potential suppliers. In China, the former is given the right to review in the *GPL* and the *TL* and their respective implementing regulations; i.e. actual suppliers have the standing to seek review under both systems. Potential suppliers arguably have the right to review under the *TL /the NDRC Review Measures* but have no such a right under the *GPL /MOF Review Measures*, as discussed below.

The *TL* Article 65 provides that “bidders and other parties with interests” shall have the right to complain to the relevant administrative supervision department if they believe that tendering activities are not in conformity with the law. Furthermore, the *TL* Article 25 defines

the bidder as “a legal person or other organisation which responds to an invitation of bids and participates in the bidding competition.” This implies that the term “bidder” refers only to an actual supplier; it does not include potential suppliers.

However, as revealed above, the TL also gives “other parties with interests” the standing to seek review. The *NDRC Review Measures* Article 3 provides that “other parties with interests” refer to legal persons, other organisations and individuals, except the bidders, who have a direct or indirect interest in the project conducting through tendering or in the tendering activities. This definition of “other parties with interests” is a broad one since both “direct” and “indirect” interest will be taken into account without further limitation. Therefore, arguably, potential suppliers can be regarded as “other parties with interests” with the standing to seek review, since they have a direct interest in the tendering activities which might have been harmed by the procuring entity’s unlawful acts such as discriminatory specifications.¹ Cao argues even further that “other parties with interests” may be understood as “potential suppliers” and they may have the right to review as they are excluded from the competition because of the procuring entity’s illegal activities.²

Therefore, arguably, both actual bidders and potential bidders have the standing to seek review where the TL and the *NDRC Review Measures* apply – e.g when the procuring entity violates tendering rules in procuring works, as explained in chapter 7(4.1). In practice, in *Daosi*,³ both the first instance court and the appellant court admitted that the potential bidder concerned has the right to review, even before the adoption of the *NDRC Review Measures*, as

¹ See discussion on the issue of “other parties with interests”, available at www.machineinfo.com.cn/e_magzine

² See Cao, Fuguo, *Annotation to the Chinese Government Procurement Law* (Beijing: Mechanical Industry Press, 2002) p273.

³ *Daosi Environmental Protection Science and Technology (Hong Kong) Ltd v. City Management Office of Nanshan District of Shenzhen*. This case was handled before the entry-into-force of the GPL. See further Gu, Liaohai, *Analysis of Chinese Government Procurement Cases* (Vol. 2) (Beijing: Qunzhong Press, 2005) pp208-231.

explained below.

In this case, the procuring entity – Nanshan District Government of Shenzhen, procured a construction project and related services directly from a company in August 1999 without competitive tendering as required in the *Government Procurement Regulation of Shenzhen Special Economic Zone* mentioned in chapter 7(2.2). *Daosi*, a Hong Kong company, first complained to Nanshan District Government of Shenzhen and its financial department claiming that the above project should have been conducted through open tendering. The financial department of Nanshan District Government made a written reply asserting that the project was not within the scope of its government procurement. Then, *Daosi* brought an administrative lawsuit against the above two before the Intermediate Court of Shenzhen, requesting that the court should rectify illegal activities in the government procurement. The defendants were changed to the City Management Office of Nanshan District of Shenzhen in the process of lawsuit because the procurement contract was signed by this Office. The court ruled in favor of *Daosi* that the contract was void on the ground that the contract awarded without competition deprived *Daosi* of its right to participate in the tendering and infringed its right to fair competition. The defendant appealed to the High Court of Guangdong Province. The appellant court annulled the first instance court's judgment and dismissed *Daosi*'s complaint on the ground that *Daosi* failed to prove that it had obtained the qualification of a foreign supplier for government procurement required by the applicable regulation⁴ and thus could not be regarded having legal interests in the disputed government procurement activity. Arguably, this judgment implies that *Daosi* would have the right to sue if it were a potential domestic supplier or a legally qualified potential foreign supplier.

⁴ Article 18(1) of the *Interim Regulations on Government Procurement* issued by the MOF in 1999.

The GPL Article 55 and the *MOF Review Measures* Article 7 give the standing to “suppliers” to challenge against the procuring entity. The GPL Article 21 states that “the suppliers refer to the legal persons, other organisations or natural persons that provide goods, works or services to the procuring entity.” It is unclear from this definition whether suppliers referred to in the GPL include potential suppliers.

However, the *MOF Review Measures* explicitly requires that an eligible complainant must, first of all, be a supplier who *has participated* in the government procurement activity in question.⁵ Further, the MOF reinforced this point in the guideline issued to its subordinates,⁶ requiring that the complaint made by a complainant that did not participate in the disputed government procurement activities shall be deemed invalid and dismissed. This means that regarding government procurement covered by the GPL / the *MOF Review Measures*, only actual suppliers have the standing to seek review from the financial department; potential suppliers have no right to make a complaint.

2.1.2 Position of subcontractors

As noted in chapter 5(2.1), subcontractors have an interest in the procurement process by contracting with main suppliers and may be given the right to review. Both the TL and the GPL permit subcontracting, although with different limitations, as explained below. Under the TL / the *NDRC Review Measures*, subcontractors arguably have the standing to seek review; however, they have no right to review under the GPL / *MOF Review Measures*, as considered below.

⁵ See Article 10, under which, a complainant must also meet the following conditions: it has made a challenge to the procuring entity or its agency before initiating a complaint; the contents of the complaint are consistent with the present *Measures*; the complaint is initiated within the time limit; the complaint is within the financial department’s jurisdiction; the same matters complained about have not been handled as a complaint by the financial department concerned; and other conditions as prescribed by the MOF.

⁶ See *Notice of the MOF on Strengthening the Examination of Acceptance of Suppliers’ Complaints*, Treasury Department of the MOF [2007] No.1.

The TL Article 30 states if a bidder, on the basis of the actual circumstances of the project as specified in the bid invitation documents, intends to subcontract out some of the non-principal, non-key parts of the work after its bid is accepted, it should specify it in the bid documents. This implies when government procurement of works through tendering is concerned, the winning bidder is permitted to subcontract some of the work to subcontractors, provided it has indicated its intention of subcontracting in advance in the bid documents, and the subcontracted part is not the principal or key parts of the work.

The TL does not explicitly provide whether subcontractors have the right to challenge against the procuring entity. However, as revealed earlier, the TL Article 65 confers the right to review to “other parties with interests”; and the *NDRC Review Measures* further clarify that such parties should have “a direct or indirect interest” in the tendering project or tendering activities. Arguably, by way of contracting with the main supplier, subcontractors have an indirect interest in the process of government procurement of works through tendering; thus, they should have the right to complain to the competent administrative supervision body against the procuring entity.

The GPL Article 48 provides that subject to consent of the procuring entity, the winning supplier may perform the contract by subcontract. This clearly indicates that the winner of the contract can subcontract provided the procuring entity approves so. Unlike the TL, the GPL does not limit the subcontracted part to the non-principal, non-key parts of the work.

Regarding the standing of subcontractors, since the GPL confers the right to review only to the “suppliers” and the complaining suppliers are limited to actual suppliers in the *MOF Review Measures*, it is clear, like the UNCITRAL Model Law discussed in chapter 5(2.1.2),

the GPL and its implementing regulation excludes subcontractors from the ambit of complainants.

2.1.3 Positions of others

As mentioned in chapter 5(2.1), others including trade associations, the supervisory authority and the public may also be granted a standing to seek review in some regimes. In China, others mentioned above may have the right to review under the TL and the *NDRC Review Measures*; however, they have no such a right under the GPL /the *MOF Review Measures*, as explained below.

As noted above, the TL gives the right to review to “other parties with interests” and offers no further explanation on “other parties with interests”. In 2002, the NDRC, based on the TL, issued the *Interim Measures* dealing with supervisory over tendering activities in major national construction projects.⁷ Article 7 of the *Interim Measures* provides that “any unit and individual” has the right to complain or report to the NDRC illegal activities occurred in tendering process of major national construction projects, which means that others mentioned above have the right to review under this regulation. Also, as discussed earlier, the *NDRC Review Measures* define “other parties with interests” very broadly as other parties with “direct or indirect interest” in the project conducted through tendering. Therefore, it may be argued that the supervisory authority and members of the public under this definition have the right to review, as the public interest would be harmed if tendering activities in the disputed project were irregular and thus they have an indirect interest in the project. It may also be argued that a trade association has an indirect interest in a particular construction project because its member(s) have participated or interested in the competition. However, in

⁷ See chapter 8(2.2.1).

China trade associations have no right to make a complaint in its name for protecting its members' interests.

As noted above, the GPL gives the right to review only to the “suppliers” and defines the “suppliers” narrowly as those that provide goods, works or services to the procuring entity. Furthermore, the *MOF Review Measures* clarify that the complaining supplier should have participated in the disputed government procurement activities. Obviously, others mentioned above such as the public are not “suppliers” participated in a particular government procurement process. Thus they have no right to review.

2.2 The issue of standing in civil procedures

As discussed in chapter 8(2.3.2), suppliers may bring the case against the procuring entity directly to the civil division of the competent court under the *Civil Procedures Law* (CPL). The CPL Article 49 states that any citizen, legal person and any other organisation may become a party to a civil action. Article 108 further provides for conditions for bringing a lawsuit, namely “the plaintiff must be a citizen, legal person or any other organisation that *has a direct interest in the case* (emphasis added)”. The concept of “direct interest” is not defined in the CPL. Academics' common understanding is that the “direct interest” includes the following three requirements: the person or organisation initiates civil proceedings in his (its) own name; he (it) has the direct interest in the case and he (it) is subject to the effective judgement of the court.⁸ In practice, the person having direct interest in the case is understood as the person whose civil rights and interests was harmed or was disputed.⁹ Based on Article 108, while deciding whether to accept a civil case, the court examines whether the plaintiff

⁸ See Ma, Hongmin, “Empirical Analysis of Systems of Parties to Civil Litigation and Qualified Parties”, works cited in footnote.15, available at <http://www.civillaw.com.cn/article/default.asp?id=21873>

⁹ Ibid.

has substantive rights in the disputed case.¹⁰

As far as government procurement cases are concerned, actual suppliers often have the right to bring a civil action, as the fact that they have participated in the procurement competition and have been affected by the procuring entity's decision can establish a direct interest in both form and substance in a specific case. For others discussed above such as the public, they have no substantive right in the disputed case and thus have no standing to sue.

2.3 Further discussion

As considered in chapter 5(2.1.1), the GPA, APEC NBPs and the EU regime provide that complaining suppliers should have an "interest" in the procurement concerned. A similar interest requirement is found in the TL / the *NDRC Review Measures*, as revealed above. Thus, arguably, certain actual and potential suppliers are excluded from seeking review due to the lack of interest. For example, a supplier legally excluded at the early procurement stage and unqualified potential suppliers arguably have no standing to challenge the application of unlawful award criteria. However, as showed above, there is no interest requirement in the GPL / the *MOF Review Measures*. Thus, arguably, the actual supplier mentioned in the above example has the right to review. This actual supplier may have no standing to sue in civil procedures, since the CPL requires that the plaintiff must have "direct interest" in the case and the court often examines whether the plaintiff has *substantive* rights in the disputed case while deciding whether to accept a complaint, as noted above.

3. Procedural arrangements

¹⁰ See Mao, Junmin, "Re-constructing necessary conditions for initiating civil proceedings", available at <http://www.civillaw.com.cn/article/default.asp?id=31678>

3.1 Time limits

Current Chinese supplier review system contains detailed time limits for each review stage (see Diagram 9.2 below). This section considers time limits for initiating complaints and completing the review process in stages of procuring entity review, administrative review and judicial review.

Diagram 9.2 Time limits for various stage of review

i) Time limits – procuring entity review

	TL/ NDRC Rules	GPL/MOF Rules
Initiation	No provision	7 workdays
Completion	No provision	7 workdays

ii) Time limits – administrative review

	First instance administrative review		Administrative reconsideration
	TL/NDRC Rules	GPL/MOF Rules	
Initiation	10 days	15 workdays	60 days
Examination	5 days	5 workdays	5 workdays
Completion	30 days (with extension)	30 workdays (no extension)	60 days (with 30 days extension)

iii) Time limits – judicial review

	Administrative litigation		Civil litigation	
	First instance	Appeal	First instance	Appeal
Initiation	i) directly to the court – 3 months ii) after administrative reconsideration –15 days	15 days	2 years	15 days
Examination	7 days	N/A	7 days	N/A
Completion	3 months (with extension)	2 months (with extension	6 months (with 6 months extension; even longer in special cases)	3 months (with extension)

3.1.1 Time limits for procuring entity review

Since, under the TL Article 65, procuring entity review is not a compulsory step for review, there is no further provision, including time limits, on procuring entity review.

As noted, procuring entity review is compulsory under the GPL; correspondingly, there

are provisions on time limits for it. The GPL Articles 52 and 54 state that a supplier may, within 7 workdays, make a challenge in writing to the procuring entity or its agent. Further, Article 53 provides that the procuring entity or its agent shall, within 7 days from the date of receipt, make a reply and notify in writing to the supplier.

3.1.2 Time limits for administrative review

3.1.2.1 Time limits for the first instance administrative review

Under the GPL and the TL, administrative review is an important stage of review. There are detailed rules on time limits in the GPL / the *MOF Review Measures* and in the *NDRC Review Measures*. However, as revealed below, these time limits are different, which means that possibly different time limits apply when complaints concern government procurement of general goods and services or involve government procurement of works through tendering.

Under the GPL Article 55 and the *MOF Review Measures* Article 7, the supplier unsatisfied with the procuring entity's reply or receiving no reply may lodge a complaint with the competent financial department within *15 workdays* following the expiration of the time limit for responding. Further, the *MOF Review Measures* Article 11 requires the financial department to examine whether the complaint has satisfied conditions for initiating complaints¹¹ within *5 workdays* after receiving it. However, the time limit for raising complaints provided in the *NDRC Review Measures* Article 9 is shorter. It provides that the complainant shall raise a written complaint within *10 days* after it knows or should have known that its rights and interests are harmed. The time limit for examining complaints specified in the *NDRC Review Measures* Article 11 is also shorter: the administrative review body is required to check up the complaint, within *5 days* after receiving it, to decide whether

¹¹ See Article 10 noted in fn.5 above.

to accept the complaint.

The above provisions on time limits imply that the supplier has more time to make a preparatory work for initiating a complaint before the administrative review body and the latter has more time to examine and decide whether to accept the complaint, when a complaint concerns government procurement of general goods and services governed by the GPL, rather than government procurement of works through tendering regulated by the *NDRC Review Measures*.

As to the time limit for completing administrative review process, the GPL Article 56 and the *MOF Review Measures* Article 20 require the financial departments to make a decision within 30 *workdays* after receiving the complaint. There is no provision on the extension of this time limit, which means complaints regarding government procurement of general goods and services must be handled within the above time limit. However, the aforesaid time limit specified in the *NDRC Review Measures* is shorter if the case is not complex and is longer if the case is complicated. The *NDRC Review Measures* Article 21 provides that the administrative review body shall make a decision within 30 *days* starting from the day when it receives the complaint; if the review body is unable to make a decision within the above time limit because circumstances are complex, this time limit may be extended after approval of the head of the administrative review body. This provision is ambiguous, since it does not further explain what cases are complicated and how long the time limit can be extended. This makes it easy for the administrative review body to extend the above time limit. Thus, while handling complaints regarding government procurement of works through tendering, more time may be used.

3.1.2.2 Time limits for administrative reconsideration

As discussed in chapter 8(2.2.2), under the GPL / the *MOF Review Measures* and the *NDRC Review Measures*, the supplier unsatisfied with the first instance administrative review body's decision or receiving no reply may apply for administrative reconsideration. The time limits for making an application for administrative reconsideration and for completing this process are provided in the *Administrative Reconsideration Law (ARL)*.

The ARL Article 9 states that any citizen, legal person or any organisation, who considers that a specific administrative act has infringed upon his (its) lawful rights or interests, may file an application for administrative reconsideration within 60 days from the day when he (it) knows the specific administrative act. This means that the supplier may apply for an administrative reconsideration within 60 days after receiving the administrative review body's decision. Article 17 further provides that the administrative reconsideration organ shall examine the application within 5 workdays after receiving it to decide whether to accept it.

The ARL Article 31 requires administrative reconsideration organs to make an administrative reconsideration decision within 60 days from the day of acceptance of the application, unless otherwise provided. If circumstances are complex and the administrative reconsideration organ is unable to make a decision within the above time limit, the responsible person of the administrative reconsideration organ may approve to give extra 30 days at the most to make a decision; and this extension should be informed to the supplier applying for administrative reconsideration and the first instance administrative review body. This implies that the administrative reconsideration organ may spend 90 days maximally to make a decision.

3.1.3 Time limit for judicial review

3.1.3.1 Time limit for administrative litigation

As noted in chapter 8(2.3.1), administrative litigation may be invoked in the following cases: i) the supplier unsatisfied with the first instance administrative review body's decision or receiving no reply chooses to bring an administrative lawsuit to the court, instead of applying for an administrative reconsideration; or ii) the supplier refuses to accept the administrative reconsideration decision and decides to seek judicial review.

In the first case, under the *Administrative Litigation Law* (ALL) Article 39, the supplier shall initiate administrative proceedings within 3 months from the day it knows that a specific administrative act has been undertaken, that is from the day it receives the first instance administrative review body's decision. This time limit for initiating an administrative litigation is much longer than the aforesaid time limit for applying for administrative reconsideration. For the supplier concerned, if it fails to apply for an administrative reconsideration within 60 days as required, it still has time to initiate an administrative litigation against the first instance review body's decision to the court.

In the second case where the supplier has applied for an administrative reconsideration first but refuses to accept the administrative reconsideration decision, under the ALL Article 38, it may initiate administrative proceedings within 15 days from the day of the receipt of the decision, or within 15 days after the time limit for reconsideration expires if the administrative reconsideration organ fails to make a decision within the specified period. Further, Article 42 clearly requires that the court accepts the case or rules to reject it within 7 days after receiving the statement of complaint.

As to the time limit for completing review proceedings, the ALL Article 57 stipulates that the court shall make a judgment of first instance within 3 months from the day of docketing the case. After approved by the higher court, this time limit may be extended in special circumstances. Since the first instance court's judgment may be appealed to the court at the next higher level, Article 58 further provides for detailed time limits for appellant procedures; under which, if a party, the supplier or the administrative review body or the administrative reconsideration organ, refuses to accept the first instance court's judgment, it has the right to file an appeal within 15 days of the serving of the written judgment.¹² Article 60 requires the appellant court to make the final judgment within 2 months from the day of receiving the appeal, unless it is approved that the time limit can be extended in special circumstances.

As showed above, the ALL does not make clear how many more time the first and the appellant court may be given to deal with the case in special circumstances and what "special circumstances" are. Thus, in what circumstance the extension will be given and how long it will be are at the discretion of the court. Consequently, the supplier may have to wait for extreme long time for the judgment, as happened in the *Modern Wo'er* cases discussed further in chapter 11.

3.1.3.2 Time limit for civil litigation

The time limit for initiating a civil litigation is stipulated in the *Civil Code*, which provides that the limitation of action regarding applications to the court for protecting civil rights is two years starting from the person concerned knows or should have known his rights have been infringed.¹³ For example, if the supplier with the lowest bid price attends the bids opening

¹² Under this Article, the time limit for appealing against the first instance court's ruling rejecting to accept the supplier's complaint is 10 days.

¹³ See Articles 135 and 137.

and the contract is awarded to the other supplier; it should bring the case to the court within 2 years from the day of opening of bids. Further time limit on the acceptance of the case is provided in the CPL Article 112, which requires the court to decide whether to accept the case within 7 days after receiving a statement of complaint or an oral complaint.

Under the CPL Article 135, the above civil case shall be handled with 6 months after docketing the case; in special circumstances, a 6 months extension may be allowed subject to the approval of the head of the court; further extension, if needed, may be given after the approval of the higher court. If the complaining supplier refuses to accept the first instance court's judgment and decides to appeal to the higher court, it has the right to file an appeal within 15 days after the day of the serving of the judgment, under the CPL Article 147. The CPL Article 159 requires the appellant court to make the final judgment within 3 months after docketing the case. An extension needed in special circumstance may be given after approval of the head of the appellant court.

As was seen from the above, as to the time limits for handing the civil cases by the first and appellant courts, similar to the ALL discussed above, although the CPL specifies the time limits within which the case shall generally be handled, it is uncertain how many time will be spent to make a judgment in certain cases; as the aforesaid time limit may be extended at the discretion of the court. In *Yidi* case discussed further in chapter 11, the first and the appellant court respectively spent 13 months and more than 4 months to make its judgment.¹⁴

3.2 Publication of the decision

As discussed in chapter 5(3.2), publication of the review body's decision is very useful for

¹⁴ This case was brought to the court on 22 October 2001; the court made its judgment on 18 December 2002. On 28 December 2002, *Yidi* appealed; the appellant court issued its judgment on 21 May 2003. See further Gu, Liaohai, *Analysis of Chinese Government Procurement Cases* (Vol.1) (Beijing: Qunzhong Press, 2005), pp1-71.

ensuring transparency of the review proceedings and the enforcement of government procurement rules. The issue of publication of the review bodies' decisions in the current Chinese supplier review system is considered below.

3.2.1 Publication of the administrative review bodies' decisions

3.2.1.1 Publication of the first instance review bodies' decisions

As showed below, there are different requirements on the publication of the review body's decision in the *NDRC Review Measures* and in the *MOF Review Measure*. Accordingly, different requirements on publication impose on the financial departments handling at least complaints regarding government procurement of general goods and services and other competent administrative review bodies responsible for handling, for example, complaints regarding government procurement of works through tendering.

The *NDRC Review Measures* Article 29 provides that the administrative review body *may* publish its decision in the relevant media to accept supervision of public opinion, *if the matter to be complained is abominable in nature and circumstances are serious*. This provision is obviously not strict; as, first, the requirement on publication is not compulsory, and second, decisions on general complaints are not required to be published at all.

There is much strict requirement on publication of decisions in the *MOF Review Measures* Article 23, explicitly requiring that the financial departments *shall* publish its decisions in the media designated by the financial departments above the provincial level. There is a similar requirement in Article 8(5) of the *MOF Measures on the Administration of the Publication of Government Procurement Information* (the "*Publicity Measures*" mentioned in chapter 7(2.3)). Further, the "*Publicity Measures*" Article 15 makes clear contents that should be published, including the name of the procuring entity and its agency,

the name of the procurement project and the date of procurement, the complainant's name and the matter to be complained, the review body's name and the main contents of the decision. These provisions clearly indicate that it is a duty for the financial departments to publish their decisions.

3.2.1.2 Publication of the administrative reconsideration decisions

The ARL offers no provision on publication of administrative reconsideration decisions. However, the State Council issued the *Measures on the Publication of Government Information* in April 2007¹⁵, in which Article 9(1) requires administrative organs to publish government information involving interests of citizens, legal persons and other organisations; and Article 18 states that the above information shall be published within 20 workdays from the formation of such information. This arguably indicates that administrative reconsideration organs should publish their decisions within 20 days after they are made, as they always concern interests of citizens, legal persons and other organisations.

3.2.2 Publication of judicial review bodies' decisions

Judgments of the court should be published. Both ALL (Article 6) and the CPL (Article 10) require the court to apply the system of public trial while handling cases. This system requires not only public trial but also publication of the judgments. However, except the above requirements in principle, it lacks detailed rules, such as the time limit for publication, to ensure the publication of all judgments and their timely publication. On 4 June 2007, the Supreme Court issued *Some Opinions on Strengthening Public Trial of the Courts*, requiring the courts at all level, based on its circumstances, to adopt specific measures on the publication of judgments and rules in publications or internet.¹⁶ Currently, some cases are published in cases books compiled by the Supreme Court. Also, some judgments can be found

¹⁵ See the State Council Decree, N0.492; it was effective on 1 May 2008.

¹⁶ See Article 22.

online. However, sometimes, it is still difficult to find judgments concerning government procurement.

Chapter 10 The Current Chinese Supplier Review System (III) - Remedies

1. Introduction

This chapter considers remedies available to the aggrieved supplier in the current Chinese supplier review system. Similar to chapter 6, this chapter will first give an overview of remedies provided in every review stage, including procuring entity review, administrative review and judicial review; and then consider remedies of suspension, setting aside and damages in detail.

2. An overview of remedies provided in every review stage

2.1 Remedies available in procuring entity review

As discussed below, both the TL and the GPL do not make clear what kinds of remedies should be available to aggrieved suppliers in procuring entity review. As noted in chapter 8(2.1), under the only Article concerning supplier review (Article 65) of the TL which regulates government procurement of works through tendering, procuring entity review is merely optional. Thus, the procuring entity may even decline to provide a reply to the complaining supplier, let alone to grant remedies. In other words, if the TL applies, for example to complaints regarding tendering activities in procuring works, there is no guarantee that the aggrieved bidder will get any remedy at all from the procuring entity.

As noted in chapter 8(2.1), procuring entity review is compulsory under the GPL which regulates government procurement of general goods and services and government procurement of works not through tendering. The GPL Articles 53 and 54 thus further require

that the procuring entity or its agency shall make a written reply within 7 workdays after receiving the supplier's complaint. However, unlike the UNCITRAL Model Law clearly requiring the procuring entity to indicate the corrective measures to be taken in its written decision when the complaint is upheld,¹ the GPL does not require that the procuring entity must take any measure once the violation alleged has been admitted. Under Articles 53 and 54, it seems enough for the procuring entity or its agency to merely give the complaining supplier a simple response, for example, a response confirming the existence of irregularity and ambiguously stating that the person responsible for it would be imposed administrative sanction under the *relevant* law. Thus, when the GPL applies, whether the complainant can be given any remedies in procuring entity review depends on the procuring entity as well. This significantly affects the role of procuring entity review, as further analysed in chapter 11.

2.2 Remedies available in administrative review - the first instance administrative review and administrative reconsideration

2.2.1 Remedies available in the first instance administrative review

2.2.1.1 Remedies available in the TL / the NDRC Review Measures

There are no detailed rules on administrative review in the TL, although Article 65 provides that bidders or other interested parties have the right to complain to the relevant administrative department. Further rules on how these administrative bodies handle complaints regarding tendering activities in procuring works are provided in Article 20 of the *NDRC Review Measures* implementing the TL. It provides that administrative review bodies shall make decisions according to the following provisions: i) it shall dismiss the complaint if the complaint lacks factual or legal grounds; ii) it shall impose sanctions under the TL and other

¹ See Article 53(4)(b) discussed in chapter 6(2.1).

relevant laws and regulations, if the complaint is found to be true and illegal tendering activities did exist. This indicates that the *NDRC Review Measures* stress the imposition of sanctions on the procuring entity or its agency that has violated rules, rather than providing effective remedies to the aggrieved supplier.

The relevant TL provisions mainly deal with the imposition of administrative sanctions, such as warning and fine, on the procuring entity or its agency or the responsible person; they also concern remedies of correction,² setting aside³ and compensation,⁴ which can benefit the aggrieved supplier. For example, under Article 51, the administrative review body shall order the procuring entity to make correction if it restricts or precludes potential bidders by imposing unreasonable conditions, discriminates against potential bidders, or compulsorily requires bidders forming a consortium or restricts the competition among the bidders. Also, correction of irregularity shall be ordered when the procuring entity avoids compulsory tendering by dividing contracts into parts or using other methods;⁵ and when the procuring entity and the winning bidder fail to conclude a contract according to the solicitation documents, or they conclude an agreement which contravenes the substantive terms of the contract.⁶ The provisions on the annulment of the procuring entity's decision and compensation are further discussed in sections 4 and 5.

2.2.1.2 Remedies available in the GPL and the *MOF Review Measures*

As introduced in chapter 8(2.1), the GPL states that the complaining supplier can complain to the financial department and the latter shall make a decision within the specified time limit.⁷

² See Articles, 49, 51, 57 and 59.

³ See Articles 52, 55 and 57.

⁴ See Article 50.

⁵ See Article 49.

⁶ See Article 59.

⁷ See Articles 55 and 56.

It also stipulates a simple provision on suspension further considered in section 3. Further, under the GPL Article 73, if the procuring entity or its agency (or its personnel) commits certain acts like below, which affect or are likely to affect the results in respect of the winning supplier, in the case that i) the winner has not been determined, the procurement proceeding shall be terminated; ii) the winner has been determined but the procurement contract has not been performed, the contract shall be set aside and a new winner shall be selected from among the remaining qualified candidates; iii) the procurement contract has been performed, which causes losses to the supplier, the procuring entity or its agency shall bear the responsibility to pay compensation. The acts to which Article 73 applies include: adopting, without authorisation, procurement methods other than open tendering; treating suppliers differentially or discriminately by raising unreasonable requirements; in the course of procurement through tendering, holding consultation or negotiation with bidders; failing to conclude a procurement contract with the winner after the award notice is sent out;⁸ colluding, in bad faith, with a supplier or a procuring agency; accepting bribes or obtaining other illegitimate interests in the procurement process; and divulging the base price of a bid before opening of bid.⁹ This means that, under the GPL, remedies of setting aside concluded contracts, damages and suspension are available to suppliers.

In the *MOF Review Measures* implementing the GPL, how the financial departments handle complaints and make decisions is provided in detail. Under Article 18(1), in the case that the procurement documents show obvious preference or discrimination and have resulted in or likely cause damages to lawful rights and interests of the complainant or other suppliers,

⁸ See the GPL Article 71.

⁹ Ibid, Article 72.

the financial departments shall order the procuring entity to amend the procurement documents and conduct procurement activities under the corrected procurement documents, if the procurement activity has not been completed yet. Also, the financial department shall, under different circumstances explained later, set aside the award decision and order the procuring entity to carry out afresh the procurement activity,¹⁰ or even set aside a concluded contract,¹¹ or order the procuring entity to bear the compensation liability.¹² In addition, the financial departments may suspend the procurement activity before the complaint is handled.¹³ Provisions on setting aside, compensation and suspension are further considered in sections 3-5.

2.2.2 Remedies available in administrative reconsideration

As noted in chapter 8(2.2.2), the supplier unsatisfied with the first instance administrative review body's decision or receiving no decision can apply for administrative reconsideration. Under the *Administrative Reconsideration Law (ARL)* Article 28, the administrative reconsideration organ, after examining the specific administrative act – the first instance administrative review body's decision on the supplier's complaint, may take one of the following actions.

i) It shall sustain the first instance review body's decision, if in the decision the facts are clearly ascertained, conclusive evidence are provided, grounds are correctly applied and correct procedures are followed while making the decision, and the decision's contents are proper.¹⁴

¹⁰ See Articles 18(2) and 19(1).

¹¹ See Article 19(2).

¹² See Articles 18(3) and 19(3).

¹³ See Article 22.

¹⁴ See Article 28(1).

ii) If the first instance administrative review body fails to perform its statutory duties, i.e. making a decision, the administrative reconsideration organ shall order it to make a decision within a fixed time.¹⁵

iii) It shall annul, alter¹⁶ or find the decision in question illegal (and may order the first instance administrative review body to make a new decision within a fixed time if the decision is annulled or found illegal¹⁷); if, in the aforesaid decision a) essential facts are ambiguous or evidence is insufficient; b) application of grounds is incorrect; c) legal procedures are violated; d) powers are exceeded or abused; or e) the decision is obviously inappropriate.¹⁸

iv) If the first instance administrative review body fails to reply in writing or provide evidence, grounds and other materials related to its decision-making, its decision shall be considered as having no evidence and grounds and be annulled by the administrative reconsideration organ.¹⁹

The above provisions mean that the administrative reconsideration organ can maintain the first instance administrative review body's decision, or order the above review body to perform its duty, or alter the decision, or annul or find the decision illegal then order the first instance review body to make a new decision.

Under the ARL Article 21, during the reconsideration period, the execution of the first instance administrative review body's decision may be suspended if i) suspension of execution is deemed necessary by the first instance administrative review body or by the administrative reconsideration organ; ii) the applicant applies for suspension and the

¹⁵ See Article 28(2).

¹⁶ This will be further discussed below.

¹⁷ Under Article 28(4) the first administrative review body should not make a new decision essentially identical to the original one, if it is ordered to make a decision anew.

¹⁸ See Article 28(3).

¹⁹ See Article 28(4).

administrative reconsideration organ considers its application to be reasonable and decides to suspend; or iii) suspension of execution is required by laws.

It should be noted that since administrative reconsideration organ handles the supplier's complaint against the first instance administrative review body's decision, rather than the dispute between the supplier and the procuring entity, as explained in chapter 8(2.2.2), the aforesaid remedies are used to correct, set aside or suspend the first instance administrative review body's decision. This is totally different from the remedies discussed in chapter 6, in which it is the procuring entity's decision that can be set aside or corrected by the review body, and the contract award procedures that can be suspended.

However, because the administrative reconsideration organ is empowered to alter the specific administrative act; it may be argued that the administrative reconsideration organ can make a new decision on the supplier's complaint to substitute the first instance review body's decision, under the law and regulation applying to the complaint. For example, if the administrative reconsideration organ determines to alter the financial department's decision on the complaint concerning government procurement of general goods or services, it might, under the *MOF Review Measures* Articles 18 and 19 discussed further in 4.1, set aside the procuring entity's illegal decision or even concluded contracts, or order the procuring entity to correct on irregularity or bear compensation liability.

2.3 Remedies available in judicial review

2.3.1 Remedies available in administrative litigation

When a case against the first administrative review body or the administrative reconsideration organ is brought before the court, under the *Administrative Litigation Law* (ALL) Article 54,

the court shall make a judgment to uphold, or annul wholly or partly the administrative review body's decision, or order it to perform its duty to make a decision on the complaint within a fixed time, depending on the following circumstances.

i) The court shall sustain the administrative review body's decision, if the evidence for making the decision is conclusive, the application of laws and regulations is correct, and the legal procedure is complied with.

ii) The court shall annul wholly or partly the administrative review body's decision, and may order the administrative review body to make a new decision,²⁰ if the decision is found having one of the following flaws: a) inadequacy of essential evidence; b) erroneous application of the law or regulations; c) violation of legal procedure; d) exceeding competence; or e) abuse of powers.

For example, in *Beichen Ya'ao*,²¹ the court annuls the MOF's review decision. In June 2005, Beichen Ya'ao bid for a contract procuring oxygen-making machine for the Ministry of Health but failed. It then challenged the winning bidder's qualification before the procurement agency but received no satisfactory response; then it complained to the MOF pleading that the winning bidder did not meet qualification requirements. The MOF decided that the materials certifying qualification for bidding provided by the winning bidder were valid and the Beichen Ya'ao's complaint was dismissed. This first instance review decision was upheld by the MOF after administrative reconsideration. Beichen Ya'ao then brought an administrative litigation against the MOF before No.1 Intermediate People's Court of Beijing Municipality in February 2006. On 28 July 2006, the court made its judgment, in which it set aside the MOF's

²⁰ Under the ALL Article 55, the above administrative review body must not, based on the same fact and reason, undertake a specific administrative act essentially identical with the original act.

²¹ *Beijing Beichen Ya'ao Science & Technology Ltd. v. the Ministry of Finance.*

decision on the ground that the MOF did not comment on the matter of complaint whether the bid products meet the specification and thus failed to ascertain the facts of the case.²²

iii) The court shall order the administrative review body to make its decision within a fixed time if it fails to do so or fails to make it in due time,. For example, in *Modern Wo'er* cases discussed further in chapter 11, the court order the MOF failure to formally respond to the *Modern Wo'er's* complaints to handle the complaints and give response to the complainant in the judgments.

Like the ARL, there is also a similar provision on suspension in the ALL Article 44. It stipulates that execution of the specific administrative act – the administrative review body's decision – shall only be suspended under the following exceptional circumstances: i) suspension is deemed necessary by the administrative review body; ii) the complaining supplier applies for a suspension, and the court considers that execution of the administrative review body's decision would cause irremediable losses and suspension of execution would not harm public interests; or iii) suspension is required by laws or regulations.

However, it should be stressed, as explained in chapter 8(3.2), the court merely handles the supplier's challenge against the administrative review body; it has no power to rule on the substantive issues underlying the administrative dispute.²³ Thus, the remedy of annulment mentioned above is used to *set aside the administrative review body's decision*, rather than annulling the procuring entity's decision. Moreover, *the award procedure* cannot be suspended during the period of administrative litigation. This makes the current Chinese supplier review

²² See further Guo, Jingxia, "Failure to review completely, the Ministry of Finance lost the case", available at <http://bjgy.chinacourt.org/public/search.php> (published on 1 September 2006).

²³ See further Mitterhoff, D.J., "Beijing Court Orders Ministry of Finance To Rule On Supplier's Complaint, But Skirts Broader Issue of Schism In China's Procurement Supervision" (2006) Vol.3, No.12, *International Government Contractor*, p98-6.

system ineffective, as further analysed in chapter 11.

2.3.2 Remedies available in civil litigation

As analysed in chapter 8(2.3.2), the complaining supplier may initiate a civil litigation against the procuring entity, based on the *Contract Law* Article 42 on the liability for negligence in concluding a contract or on the *Civil Code* Article 106 on civil liability for infringement of rights.

In the former case, under the *Contract Law* Article 42, if the procuring entity violates the principle of good faith in concluding the procurement contract, such as selecting the successful bidder without following the pre-stated criteria, which consequently causes losses to the supplier, it shall be liable for damages. This means that the aggrieved supplier can be awarded the damages remedy in the above case. In the latter case, what kinds of remedies are available is provided in the *Civil Code* Article 134. It provides ten methods of bearing civil liability, including compensation for losses.²⁴ If the procuring entity is proved to have infringed the complaining supplier's rights, the remedy of compensation may be given to the supplier.

3. Suspension

As discussed in chapter 6(3.1), if the procurement process cannot be suspended during the review proceedings, the procurement contract may be concluded or even performed before the proceeding concludes. This can make it very difficult or impossible to provide effective remedy to the aggrieved supplier and achieve the objectives of the procurement policy. As

²⁴ Other methods of bearing civil liability are cessation of infringements, removal of obstacles, elimination of dangers, return of property, restoration of original condition, repair, reworking or replacement, payment of breach of contract damages and extension of apology.

revealed in chapter 9(3.1), in China, the review body may spend quite long time on handling suppliers' complaints, especially in judicial review. However, suspension of the award procedure is not available in every review stage; it is only available in the first instance administrative review when the GPL and the *MOF Review Measures* apply to complaints, as explained further below.

Procuring entity review is compulsory under the GPL; however, unlike the UNCITRAL Model Law suggesting the procuring entity to suspend the procurement proceedings for a short period after receiving a complaint,²⁵ the GPL does not require the procuring entity to suspend its award process before making a reply. The procuring entity often does not voluntarily suspend the procurement process for avoiding delay.

In the first instance administrative review stage, when complaints concern government procurement of works through tendering and apply the *NDRC Review Measures*, the procurement process will not be suspended before the administrative review body makes a decision, since the *Measures* offer no provision on suspension. Without explicit rules on suspension, it is impossible for the aggrieved supplier to ask for a suspension when *NDRC Review Measures* apply.

However, as noted earlier, if complaints concern government procurement of general goods and services and other government procurement activities to which the GPL and the *MOF Review Measures* apply, suspension may be available. The GPL Article 57 states that “[u]nder specific circumstances, the department in charge of supervision over government procurement may, during the period in which it is dealing with the complaint, require in writing the procuring entity to suspend its procurement activities, provided that the period of

²⁵ See Article 56 considered in chapter 6(3.2).

suspension does not exceed a maximum of 30 days.” The *MOF Review Measures* Article 22 further requires that the procuring entity shall immediately suspend its purchase upon receiving the suspension notice and shall refrain from resuming procuring activities prior to the expiry or cancellation of the notice. These provisions show that the remedy of suspension provided in the GPL / the *MOF Review Measures* has the following features.

Firstly, the automatic suspension approach adopted in some regimes (for example in the EU regime in certain circumstances) and the semi-automatic suspension approach suggested in the Model Law considered in chapter 6(3.3 and 3.2) have not been adopted in China. Under the above provisions, the initiation of the complaint cannot result in the automatic suspension of the procurement proceedings. Secondly, while the financial departments are empowered to award suspension, neither the GPL nor the *MOF Review Measures* make clear under which circumstances such remedy of suspension shall be awarded. The *MOF Review Measures* failed to clarify what can be regarded as “specific circumstances” contained in the GPL Article 57 that mandates suspension. Therefore, the financial departments have a large margin of discretion in granting or declining suspension. For example, they may refuse to order a suspension for urgent public interest consideration, even though, unlike the Model Law, neither the GPL nor *MOF Review Measures* provides explicitly for such exclusion of the application of suspension. Thirdly, the maximum period of suspension is 30 days. Because conditions for suspension are ambiguous and the financial departments generally lack incentive to suspend the procurement proceedings, in practice, suspension is rarely granted.

When the complaint is brought before the higher administrative review body for administrative reconsideration or the court for administrative litigation, as explained above,

the administrative reconsideration organ or the court may suspend the execution of the first instance review body's decision (or of the administrative reconsideration decision). Since they do not handle the dispute between the procuring entity and the supplier, the award procedure cannot be suspended by them during the period of administrative reconsideration and/or administrative litigation. Thus, it is common in practice that the contract has been awarded or even performed after lengthy dispute resolution process. For example, in *Beichen Ya'ao* case mentioned earlier, before the court delivered its judgment, the contract had been awarded and performed.²⁶

The suspension remedy is not available in civil litigation, since there is no provision on suspension of the award procedure in the relevant Chinese laws including the *Contract Law*, the *Civil Code* and the *Civil Procedures Law*, although the court directly handles the dispute between the procuring entity and the supplier in civil litigation.

The lack of the remedy of suspension of the award procedure has caused many criticisms, especially from suppliers,²⁷ as it makes the supplier review system ineffective to a certain extent, as elaborated in chapter 11.

4. Setting aside unlawful decisions

As analysed in chapter 6(section 4), setting aside the procuring entity's unlawful decisions can effectively protect the aggrieved supplier's interest and benefit the enforcement of the procurement rules, which is available in many domestic regimes and international instruments on government procurement, such as the Model Law. However, because the annulment of

²⁶ See Zeng, Liangliang, & Liu, Huixian., "For the first time the Ministry of Finance loses a government procurement case", available at www.xinhuanet.com (31 July 2006).

²⁷ Ibid.

concluded contracts may adversely affect the public interest and the winning supplier's interest, in some regimes, setting aside concluded contracts is prohibited.

In China, the remedy of setting aside the procuring entity's unlawful decision is mainly available in the first instance administrative review, as further considered below. The administrative reconsideration, as mentioned above, mainly handles the complaint against the first instance administrative review body, rather than the complaint against the procuring entity. However, when the administrative reconsideration organ decides to alter the first instance administrative review body's decision, it may determine to set aside the procuring entity's unlawful decision under the relevant provisions of the GPL / the *MOF Review Measures* or the TL discussed below in 4.1 and 4.2.

During administrative litigation, since the court does not handle the dispute between the supplier and the procuring entity; it has no power to annul the procuring entity's wrongful decision, although it can set aside the administrative review body's decision. When the complaining supplier brings the case regarding the procurement process directly to the court through civil litigation, the remedy of setting aside is not available to the supplier, as revealed in 2.3.2. Thus, the following section only considers provisions on setting aside available in the first instance administrative review. As further explained below, at this stage, annulling concluded contracts is also allowed under the GPL and the *MOF Review Measures*.

4.1 Setting aside unlawful decision under the GPL / the *MOF Review Measures*

As noted in 2.2, the GPL Article 73(2) clearly provides that concluded contracts can be annulled provided they have not been performed. The *MOF Review Measures* provides more detailed provisions on the remedy of setting aside. Article 18 (2) and (3) states that in the case

that the procurement documents show obvious preference or discrimination and have resulted in or likely cause damages to lawful rights and interests of the complainant or other suppliers, if the procurement activity has already been completed but the contract has not been concluded, the financial department shall determine the procurement activities as illegal and order the procuring entity to re-commence procurement. If the procurement activity has already been completed and the contract has been concluded, the financial department shall determine the procurement activity illegal and order the procuring entity to bear the corresponding compensation liability according to the relevant law. Further, Article 19(1) and (2) state if the financial department, after examination finds that the procurement documents or process has affected or may affect the award decision, or there is any illegal act in the process of bid award or transaction, in the case that the procurement contract has not been concluded, the financial department shall determine the whole or part of procurement as illegal under different circumstances and order the procuring entity to carry out afresh procurement activity. If the contract has been signed but has not been performed yet, the financial department shall determine to annul the contract and order the procuring entity to carry out anew procurement activity.

The above two Articles are not clear enough and they are overlapping so far as defective procurement documents are concerned. These provisions seem to mean that setting aside the procuring entity's unlawful decision shall be granted in the following two cases, if the contract has not been signed: first, the procurement documents are defective, which has caused or may cause loss to the complaining supplier; second, the defective procurement documents or irregular procurement process has affected or may affect the award of the contract, or there is

illegal act in the process of tendering or transaction. For example, in *Xuzhou Xintiandi Digital Appliance Projects Ltd. v. the Centre of Prevention and Control Diseases of Xuzhou*, the Financial Bureau of Xuzhou City, according to the *MOF Review Measures* Article 19(1), set aside the procuring entity's award decision and ordered the procuring entity to re-run procurement activities.²⁸ As to concluded contracts, under Articles 18(3) and 19 (2) of the *MOF Review Measures*, the financial department can annul them, provided they have not been performed. However, it is unclear when a contract will be deemed as performed.

4.2 Setting aside unlawful decision under the TL

As noted in section 2, the *NDRC Review Measures* do not directly provide what kinds of remedies are available to the aggrieved supplier once illegal activity is found in tendering activities. The administrative review department is required to make a decision in the above case under the relevant TL provisions under which it shall set aside the award decision in certain cases discussed below.

First, under the TL Article 52, if the procuring entity, in a project subject to compulsory tendering, discloses to others the names or number of potential bidders which have received the solicitation documents or other details that could affect fair competition, or discloses the reserve price, which has an impact on the determination of the winning bid, the award decision shall be ineffective. This is also the case when the agency discloses details or materials which relate to tendering activities and are subject to confidentiality requirement, or when it colludes with the procuring entity or bidders, which has an impact on the result of the

²⁸ The decision made by the Finance Bureau of Xuzhou City on 18 October 2004 can be found in Gu, Liaohai (eds.) *Analysis of Chinese Government Procurement Cases* (Vol. 2) (Beijing: Qunzhong Press, 2005), pp182-182. However, it is quite simple and lacks detailed description on factual background of the complaint.

determination of the winning bid.²⁹ Secondly, under Article 55, if the procuring entity, in a project subject to compulsory tendering, negotiates with bidders on substantive contents such as bid prices, which has an impact on the determination of the winning bid, the award decision shall be ineffective. Thirdly, if the winning bidder determined by the procuring entity was not among the candidates lawfully recommended by the bid evaluation committee, or the procuring entity determines on its own authority the winning bidder after the bid evaluation committee rejects all bids in a project subject to compulsory tendering, the award decision shall be void.³⁰

These provisions indicate that if the above irregularities occurred in the process of government procurement of works through compulsory tendering, the unlawful award decision shall be set aside. Further, under the TL Article 64, in this case, the winning bidder shall be determined anew from the remaining bidders according to the conditions stipulated in the TL or through re-tendering.

As showed above, the relevant TL provisions merely state that the award decision shall be ineffective when the determination of the winning bid is affected by breaches introduced above. The TL does not provide that concluded contracts can be annulled by the administrative review body, if illegal activity is found in the process of tendering. Thus, arguably, when the complaint concerns government procurement of works through tendering, once the contract is signed, it cannot be annulled due to the lack of legal basis.³¹

²⁹ See the TL Article 50.

³⁰ Ibid, Article 57.

³¹ See Cao, Fuguo, Colling, J. and Trepte, P., "China's Accession to the Government Procurement Agreement and Opportunities for Domestic Reform: A Study in the light of EU Experience", available at www.euchinawto.org, p93.

5. Damages

As discussed in chapter 6(5.6), whether the damages remedy can play important role in protecting the aggrieved supplier's interest and deterring violations largely depends on how the two key issues related to the damages remedy - the conditions for damages and the extent of compensation – are addressed.

In China, provisions on the damages remedy are quite brief and unclear; there is no detailed provision on the conditions for damages or the extent of compensation. When the supplier decides to seek administrative remedy through administrative procedures – including the first instance administrative review, administrative reconsideration and administrative litigation, damages available in the first instance administrative review, but the relevant provisions are quite simple and vague, as explained further in 5.1. As to administrative reconsideration, similar to the situation when the remedy of setting aside is concerned explained above, when the administrative reconsideration organ decides to alter the first instance administrative review body's decision, it may decide to give compensation to the aggrieved supplier. The legal basis for such a decision is the *GPL* / the *MOF Review Measures* or the *TL* considered further in 5.1. As to administrative litigation, since the court deals only with the supplier's complaint against the administrative body's decision, it is not empowered to directly order the procuring entity to compensate the aggrieved supplier.

Damages available in civil litigation as provided in the *Contract Law* and the *Civil Code* will be discussed further in 5.2.

5.1 Provisions on damages in the first instance administrative review stage

As noted in 2.2.1, the *NDRC Review Measures* Article 20 merely provides that punishment

shall be imposed upon the procuring entity or its agency under the TL and other relevant laws and regulations, if an actual breach of law has been found. The damages remedy is mentioned in the TL Article 50, under which, if the procuring *agency* discloses details or materials which related to tendering and are subject to confidentiality requirement or it colludes with the procuring entity or a bidder, which has caused losses to others, *the agency* shall be liable to pay compensation. There is no provision in the TL requiring *the procuring entity* to bear compensation liability. Thus, it may be impossible for the complaining supplier to claim compensation from the procuring entity if the complaint concerns government procurement of works through tendering and the TL applies to the complaint, due to the lack of legal basis. In the circumstances stipulated in Article 50, the complaining supplier can claim compensation from the procuring *agency*.

Both the GPL and the *MOF Review Measures* clearly provide for the damages remedy. As noted in 2.2.1, the GPL Article 73(3) states if the procuring entity or its agency's illegal behavior (such as treating suppliers differentially) have affected or may affect the results of selecting the winning supplier, in the case that the contract has been performed and has caused loss to the supplier, the procuring entity or its agency shall bear the responsibility to pay compensation. Similarly, the *MOF Review Measures* Article 18(3) provides if the procurement documents show obvious preference or discrimination and have caused or may cause loss to the complainant, in the case that the contract has been concluded, the financial department shall determine the procurement activity illegal and order the procuring entity to bear compensation liability. Further, Article 19 (3) states if the financial department determines that the result of selecting the winning supplier has been affected by the defective procurement

documents or irregular procurement proceedings and the government procurement contract has already been performed, the financial department shall determine the procurement activity as illegal; and if loss has been caused to the complainant, the procuring entity or its agency shall be ordered to bear the compensation liability. These provisions mean when the complaint concerns government procurement of general goods and services, if the procuring entity's violation is proved, in the case that the procurement contract has been performed, the damage remedy shall be given to the aggrieved supplier.

It can be argued that these provisions imply certain conditions for awarding compensation arguably indicated in the Model Law and the other three international instruments as discussed in chapter 6(5.2-5.5), although these conditions are not explicitly stated. They are: i) the procuring entity has made violations; ii) the complaining supplier has suffered or may suffer losses; and iii) the supplier's loss is caused by the procuring entity's violation. However, due to the lack of clear provision on conditions for damages, it is unclear whether the supplier needs to prove its chance to win the contract and that the procuring entity or its agency's violation is serious.

The TL, the GPL / the *MOF Review Measures* provide no further provisions on the extent of compensation. Thus, it is unclear whether compensation is limited to tender or protest only or include lost profits.³² In practice, so far, no case that the administrative review body orders the procuring entity to pay compensation to the supplier is reported.

5.2 Provisions on damages in civil litigation

As noted in 2.3.2, when the unhappy supplier initiates a civil litigation against the procuring entity, on the ground that the procuring entity violates the principle of good faith in

³² See further Mitterhoff, fn.23 above, p98-7.

concluding the procurement contract or infringes the complaining supplier' rights in the procurement process, the damages remedy can be available to the supplier, under the *Contract Law* or the *Civil Code*. However, as far as government procurement disputes are concerned, neither the *Contract Law* nor the *Civil Code* makes clear the extent of compensation and the conditions for awarding compensation. Thus, it is unclear whether the compensation is only limited to bid costs or include profits and which conditions will be taken into account while deciding the award of compensation.

As noted in chapter 8(2.3.2), since there are different understandings on whether the supplier can initiate such a civil litigation, there are not many civil cases concerning government procurement in practice. It is rarer to find the case concerning the issue of compensation. In “*Xincheng*” mentioned in chapter 8(2.3.2), the court ordered the procuring entity to compensate *Xincheng*'s loss of possible profits, because it failed to sign the contract with *Xincheng*, which violated the principle of good faith in concluding the contract. In this case expectation damages were supported. It is argued that the loss of profits should be compensated.³³ However, it is uncertain in practice whether damages include lost profits, due to the lack of express provision in laws or in the Supreme People's Court's judicial explanation.

³³ See Gu, Liaohai, (eds.) *Analysis of Chinese Government Procurement Cases*, (vol.1), (Beijing: Qunzhong Press, 2005) pp181-182.

Chapter 11 Critical Analysis of the Current Chinese Supplier Review System

1. Introduction

This chapter critically analyses the main problems existing in the current Chinese supplier review system.

As discussed in chapter 2(2.1), an effective supplier review system, by deterring violations and redressing for specific breaches, can protect suppliers' interests and ensure the enforcement of the procurement rules. An effective supplier remedies system should be, as any remedies system, "well designed and clear in text and capable of offering protection in an accessible, uncomplicated, inexpensive and speedy manner in practice."¹ Unfortunately, the current Chinese supplier review system falls short of these essential features. As revealed in chapters 7-10, a uniform legal framework regulating government procurement does not exist in China, the current supplier review system is fragmented and complex, which has caused many problems in practice. The main problems include: 1) uncertainty on the application of legal rules on supplier review; 2) problems related to forum for review such as the lack of the independence of the review bodies; 3) problems related to standing and procedures such as inconsistency in standing and lengthy procedures; 4) problems related to remedies such as the lack of clear rules on damages; and 5) overly-strict sanctions on the complaining supplier. These problems will be analysed in sections 2-6 below. Finally, section 7 draws conclusions.

2. Uncertainty regarding the application of legal rules on supplier review

This section first analyses the origin of such uncertainty, then highlights its negative consequences through two landmark Chinese cases.

¹ See Craig, P. and De Burca, G., *EU Law: Texts, Cases and Materials* (2nd ed.) (Oxford: Oxford University, 1998), p235.

As revealed in chapter 7(3.1), in China, there is a dual law system in the area of government procurement: the coexisting and overlapping GPL and TL. This defect in the legal foundation of procurement regime, as the result of historical development and fragmented institutional framework, has deeply affected the supplier review system. Two sets of rules on supplier review, namely the GPL / the *MOF Review Measures* and the TL Article 65/ the *NDRC Review Measures*, coexist and are not mutually exclusive in their application. For example, due to the cross application, it is not clear which set of rules shall apply to complaints regarding government procurement of works-related goods and services through tendering, as revealed in chapter 7(section 4). It can be argued that the current Chinese supplier review system is a very complicated system with many ambiguous rules, which has resulted in many uncertainties. Such uncertainty may cause the following problems in practice:

Firstly, it will be very difficult for the aggrieved supplier to ascertain to which administrative department it should file its complaint regarding certain types of procurement such as government procurement of works-related goods and services through tendering. As explained in chapter 8(2.2.1), instead of the financial departments, various government departments are empowered to review suppliers' complaints regarding tendering activities in procuring works and possibly works-related goods and services as well. Sometimes, the supplier concerned may have to file complaints with several government departments. Furthermore, it is difficult for the supplier to predict how its complaint will be handled and which remedies it may receive, as the relevant provisions contained in different laws and regulations are different, as further analysed in sections 3-5. This can damage suppliers' confidence in not only the supplier review system but also the whole government procurement system.

Secondly, when the jurisdiction of the first instance administrative review bodies is

uncertain due to the overlapping legal rules, such bodies, especially MOF and NDRC and their local branches, may either compete for the jurisdiction for their own institutional interests, or instead in difficult cases, evade their responsibility of handling suppliers' complaints to avoid i) cleaning up the mess made by other government departments; or ii) offending other powerful government departments at the same level. It is common in China that several administrative departments decline to undertake the responsibility especially in cases with complex vested interest, high risk of error and low chance of profile enhancing, which is phrased as "kicking the ball". On the other hand, the aforesaid uncertainty can make the relevant government department at the risk of being sued due to non-performance of its duty.

Finally, under the legal rules on supplier review contained in different law and/or implementing regulations, the result of a particular case may be totally different. This can seriously harm certainty in proceeding and the authority of the relevant legal rules.

The above-mentioned problems can be illustrated by the following two landmark Chinese cases.

The first is the *Modern Wo'er 433* case.² In this case, Modern Wo'er bid for the government procurement contract purchasing portable blood gas analysers in November 2004, which was part of a major national project – Construction of a Public Health Rescue and Medical Treatment System - managed by the NDRC and the Ministry of Health (MOH), but failed to win, although it offered the lowest price. Modern Wo'er doubted the integrity and fairness of the tendering process and submitted inquiries to the procurement agency and the procuring entities - the MOH and the NDRC. The agency gave a reply lacking substance.

² *Beijing Modern Wo'er Trading Co. Ltd v. Ministry of Finance of the People's Republic of China*, No.1 Intermediate People's Court of Beijing Municipality, First Level Administrative Division Decision No. 433 (2005) (*Modern Wo'er 433*). See further Gu, Liaohai, (eds.) *Analysis of Chinese Government Procurement Cases* (Vol.3), (Beijing: Qunzhong Press, 2007), pp1-37 and pp44-49; Mitterhoff, D.J., "Beijing Court Orders Ministry of Finance To Rule On Supplier's Complaint, But Skirts Broader Issue of Schism in China's Procurement Supervision" (2006) Vol.3, No.12, *International Government Contractor*, p98.

However, neither the MOH nor the NDRC responded to Modern Wo'er. Then, Modern Wo'er made complaints to the MOF, NDRC and MOH at the same day but received no response from any of them. Thus Modern Wo'er initiated an administrative litigation against the MOF in March 2005, claiming that its legal rights and interests were damaged by the MOF's failure to perform its duty to respond to the complaint under the GPL and thus the court should order the MOF to perform its duty to handle the complaint within the specified time limit.

However, the MOF denied that it has such a duty to handle the above complaint. It argued that the disputed procurement was part of a major national construction project checked by the NDRC and approved by the State Council. Because it was conducted through open tendering, it should be regulated by the TL. Thus the complaint should be handled under the TL Article 65 providing that the *relevant department* is responsible for handling bidders' complaints. Since the State Council has empowered the NDRC to handle complaints regarding tendering activities in major national construction projects, the complaint should be handled by the NDRC. Moreover, the MOF has performed its duty by communicating with the NDRC and the MOH and referring the complaint to the NDRC after receiving it, thus the court should dismissed Modern Wo'er's claim.

The first instance court rejected the MOF's argument; it supported Modern Wo'er's claim, ordering the MOF to handle and respond to Modern Wo'er's complaint within the specified time limit in its judgment made on 8 December 2006. The court held the view that the MOF has responsibility for providing response to Modern Wo'er, based on the following grounds: first, the GPL Article 13 designates the financial departments as the departments responsible for supervising and administering government procurement. Furthermore, Article 10 of the *Measures on the Administration of Tendering in Government Procurement of Goods and Services* issued by the MOF³ itself provides that the financial departments above the county

³ See the *MOF Tendering Measures* discussed in chapter 7(2.3).

level shall carry out duties of supervision and administration over tendering activities in procuring goods and services. Secondly, the disputed goods fall within the ambit of goods defined in the GPL Article 2. The court also held that the MOF's argument that it has performed its duty by referring the case to the NDRC and informing it to Modern Wo'er lacked factual support and legal basis.

The MOF disagreed with this judgment and appealed to the higher court.⁴ In its appeal, the MOF stressed that the above judgment would seriously affect the future administrative management work in the field of government procurement; since it denied a work model currently used in practice – the MOF and the NDRC manage procurement funds separately –, and every year, billions of procurement funds are managed in this manner. The appeal is being handled by the High Court of Beijing Municipality. After one and half year, the appeal is still being heard by the High Court of Beijing Municipality at the time of writing, undoubtedly in breach of the time limit for an appeal adjudication.

As discussed above in Chapter 7(4.2.2), it is unclear which set of rules, GPL or TL, shall apply to procurement of goods associated with a construction project. However, in this case, it can be argued that the MOF shall be responsible for handling Modern Wo'er's complaint in accordance with the doctrine of *lex posterior derogat priori* and the supremacy of national laws adopted by the National Peoples' Congress over the instruments of State Council and its ministries. In the GPL which was promulgated later than the TL, the MOF is expressly empowered to handle procurement complaints without explicitly excluding government procurement of works-related goods through tendering from its coverage. In the TL, the administrative review body is not designated. Furthermore, the State Council's *Opinions* and the NDRC's *Interim Measures* empowering the NDRC to oversee tendering activities in major

⁴ See, Zeng, Liangliang., "The First Government Procurement Case Continues: The MOF refuses to accept the judgment of the first instance court and has made an appeal" in *Economic Information Daily* (15 January 2007).

national construction projects (discussed in chapter 8(2.2.1)) were issued before the enactment of the GPL. More importantly, unlike the GPL, the aforesaid *Opinions* and the *Interim Measures* are not laws established by the Standing Committee of the National People's Congress. Thus, it can be argued that the relevant provisions of the new law – the GPL – should apply in this case and accordingly the MOF should be responsible for handling the complaint. Regrettably, the first instance court ruled that the MOF was responsible for handling the complaint by simply characterising the subject of disputed procurement as “goods” defined in the GPL. It did not clarify the applicable scope of the two national laws on government procurement and the legal effect of the relevant ministerial regulations on the basis of the above two principles. As Mitterhoff comments, it missed an opportunity to “rule on fundamental issues plaguing public procurement in China.”⁵

This case shows, because of the uncertainty on the application of legal rules, the complaining supplier had to complaint to several government departments. The MOF tried hard to evade its duty of handling the supplier's complaint and was sued. As revealed above, the first instance court applied the GPL while making sure whether the MOF was responsible for handling the complaint and made a judgment not in favour of the MOF. If the appellate court decides to apply the TL and accepts the MOF's view introduced above, Modern Wo'er, rather than the MOF, will lose the case.

A second case of relevance is *Yidi*⁶ handled before the adoption of the GPL. On 6 July 2000, the General Station of National Animal Husbandry and Veterinary (the “General Station”) published a notice for purchasing certain equipment for an animal protection project

⁵ See Mitterhoff, fn.2 above, p98-4.

⁶ *Jinhua City Yidi Medical Apparatus Factory v. General Station of National Animal Husbandry and Veterinary and Animal Husbandry and Veterinary Equipment Quality Test Centre of the Ministry of Agriculture*, Chaoyang District People's Court of Beijing Municipality, First Level Economic Division Decision No.4362 (2001); No.2 Intermediate People's Court of Beijing Municipality, Final Level Civil Division Decision No.03265 (2003). See further Gu, Liaohai, (eds.) *Analysis of Chinese Government Procurement Cases* (vol.1), (Beijing: Qunzhong Press, 2005), pp1-34.

through tendering. Yidi bid for one product. When attending bid opening, Yidi learnt that two bidders competed for this procurement and another bidder's price was higher than its bid. Then, Yidi heard that the General Station was contacting with another bidder and might award the contract to that bidder; Yidi complained to the General Station, arguing that another bidder did not meet the award criteria and Yidi should be awarded the contract. The General Station investigated problems raised by Yidi, and entrusted Animal husbandry and Veterinary Equipment Quality Test Centre of the Ministry of Agriculture (the "Test Centre") to examine 3 Yidi's sample machines in March 2001. The latter concluded that one of sample machines was unqualified. Yidi disagreed with that and asked for reexamination but was refused by the Test Centre on 15 October 2001. At that time, the General Station had signed the contract with another bidder.

In this case, Yidi made complaints to the Ministry of Agriculture (MOA), the MOF and the Disciplinary Committee of the Communist Party of China for more than 10 times, because it was not sure which government department had a duty to handle its complaint. However, none of them replied to Yidi.⁷ Because it was unclear whether the MOA had responsibility for handling such a complaint, Yidi was unable to initiate an administrative litigation against the MOA for its failure to perform its duty.⁸ Finally, Yidi had to initiate a civil litigation against the General Station and the Test centre on the ground of infringement of rights, which was not easy for Yidi to prove the causality between infringement of rights made by the procuring entity and its loss, and it lost the case.⁹ If the court refused to accept this civil litigation case,

⁷ See Gu, *ibid*, p3.

⁸ *Ibid*, p32.

⁹ Yidi asserted that the General Station made a series of violations in tendering process, for example, awarding the contract to the bidder whose products did not meet pre-stated requirements, and that the report issued by the Test Centre was ineffective because there were serious violations in test procedures and in applying law. Yidi claimed that they should compensate its financial loss. The General Station argued during investigation of Yidi's complaint it found that Yidi forged registration certificate of the product and its products were unqualified after examination. The Test Centre argued that it legally conducted examination and the examination result was objective, true, legal and effective. The first instance court ruled that Yidi's loss was caused by its own activity violated the principle of good faith – to provide false information while bidding; thus it should undertake the consequence. Therefore, the court dismissed Yidi's claims. This judgment was upheld in the appeal court's judgment issued on 21 May 2003.

due to the lack of clear provision on initiation of a civil litigation against the procuring entity in the TL and the GPL explained further in 3.4, Yidi would have no channel to seek review.

3. Problems related to forum for review

Problems related to forum for review considered below include: i) inconsistency and uncertainty on whether procuring entity review is compulsory and ineffectiveness of compulsory procuring entity review; ii) the lack of independence of administrative and judicial review bodies; iii) limitation of jurisdiction of administrative reconsideration organ and administrative division of the court; and iv) ambiguity in seeking civil remedies.

3.1 Inconsistency and uncertainty on the nature of procuring entity review and ineffectiveness of compulsory procuring entity review

As discussed in chapter 8(2.1), the TL and the GPL have different approaches to procuring entity review. Under the TL, procuring entity review is optional, which means that the supplier can make a complaint directly to the relevant administrative body. It is unclear from the GPL Articles 52 and 54 whether procuring entity review is compulsory or optional. The *MOF Review Measures* clarify that procuring entity review is a prerequisite for seeking administrative review. In practice, the financial departments often refuse to handle the complaint if the complaining supplier has not complained to the procuring entity first.¹⁰

As was seen, similar to the UNCITRAL Model Law,¹¹ the GPL and the *MOF Review Measures* require a *compulsory* procuring entity review. However, such a compulsory review is arguably ineffective in China, as explained below.

This is because the GPL simply requires the procuring entity to make a written reply within a specified time limit but does not require any indication of the corrective measures

¹⁰ See Gu, Liaohai, (eds.) *Analysis of Chinese Government Procurement Cases* (Vol.2) (Beijing: Qunzhong Press, 2005) p9.

¹¹ See Article 53 discussed in chapter 4(3.1.1).

(which is provided in the Model Law Article 53(4)(b)). Due to this omission, it is common in practice that the procuring entity or its agency ignores suppliers' queries or merely gives them a simple reply without any substance. A Chinese lawyer reported that out of more than 20 government procurement cases that he has dealt with, none was solved merely through complaining to the procuring entity or its agency.¹² This indicates that the procuring entity or its agency is often unwilling to actively respond to the supplier's complaint and take the initiative to correct its irregularity. Possibly, this is because the procuring entity or its agency is reluctant to challenge its own work;¹³ and when a procuring or tendering agency seeking profits¹⁴ is entrusted to conduct procurement, it is often unwilling to overturn the original award decision, to avoid bearing expenses occurred.¹⁵

In addition, unlike the Model Law Article 53(1) discussed in chapter 4(3.1.1), the GPL does not provide that compulsory procuring entity review is to be used merely *before* the contract is signed. This means that compulsory procuring entity review can be required even after conclusion of the contract. In this case, the procuring entity or its agency may be even more unwilling to change its decision, as the winning supplier may be affected which makes the situation even more complicated.

Thus, compulsory procuring entity review can delay the whole process of dispute resolution and harm suppliers' confidence in the current supplier review system. It has been widely criticised in China that such a mandatory review stage is useless.¹⁶

As analysed in chapter 4(3.1.1), the GPA and APEC NBPs do not require a compulsory procuring entity review. Thus, if a compulsory procuring entity review is not provided in

¹² See Gu, fn.6 above, p220.

¹³ See Tian, Jianbin, "Enforcement of Public Procurement Rules in China" in Arrowsmith, S. and Trybus, M., (eds.) *Public Procurement: Global Revolution* p85, at p91.

¹⁴ In China, only the institutes for centralised procurement responsible for procuring items listed in the centralised procurement catalogue are required to be non-profit legal persons, under the GPL Article 16. Other procuring or tendering agencies are all intermediary organisations seeking profits.

¹⁵ See further Gu, fn.2 above, p33.

¹⁶ *Ibid*, pp219-221.

China, it is not inconsistent with the relevant provisions of APEC NBPs and the GPA that applies or will apply to China. In contrast, with such a compulsory entity review regarded as useless in practice, it can be doubted whether the current Chinese supplier review system can satisfy the general requirement of effectiveness stipulated in the GPA and APEC NBPs discussed in chapter 3(3.3 and 5.3).

3.2 Lack of independence of administrative and judicial review bodies

Independence of the review body is crucial for ensuring the effectiveness of the supplier review system, as analysed in chapter 4. Independence is a matter of degree. For an administrative review body, the minimum requirement of independence - independence from the procuring entity, is acceptable. For judicial review body, higher level independence requirement – independence from government – is usually required, especially in western countries. However, in China, currently, the above independence requirements for administrative and judicial review bodies are not always satisfied, as explained below.

3.2.1 Lack of independence: administrative review bodies

As introduced in chapter 8(2.2.1), the GPL Article 13 designates the financial departments as the administrative departments overseeing government procurement and handling complaints. Further, to maintain the independence of the financial departments from the procuring entity, under Article 60, the financial departments are not allowed to establish an institution for centralised procurement or to be involved in government procurement (for example, to procure goods as the purchaser); or to have any subordinate relationship or other relationship of interest with the procuring agency.

However, in practice, sometimes, the financial departments are not independent from the procuring entity. They often have close relationship with the procuring agencies. In most cases in China, government procurement is conducted by a procuring agency; since the GPL Article 18 requires when procuring entities purchase items listed in the centralised procurement

catalogue, they must entrust the institution for centralised procurement to do that; when they purchase items not included in the above catalogue, they may also entrust the aforesaid institution to procure as a matter of discretion. Base on the GPL Article 16, institutions for centralised procurement have been established by local governments. Nevertheless, until now, 9 of 29 established centralised government procurement centres at provincial level, such as Government Procurement Centre of Tianjin Municipality, of Anhui Province and of Gansu Province, are still subordinate to the provincial financial departments.¹⁷ Also, although some government procurement centres have separated from the financial departments, they may still have close relationship with the relevant financial department in terms of personnel, finance and properties. For example, personnel of some government procurement centres come from the local financial department. Thus, whether the financial department concerned is really independent of the procuring entity/agency is often questioned by suppliers.

When complaints concern tendering activities in procuring works and works-related goods or services, which may be regulated by the TL and the *NDRC Review Measures* and accordingly be handled by the other government department concerned, rather than the financial department, as analysed in chapter 8(2.21), the problem of independence of the administrative review body is more serious. The review body concerned in this case either has no independence at all or has merely nominal independence, as discussed below.

First, the administrative review body concerned is often involved in the disputed procurement process as the procuring entity; i.e. it is not only the participant of the procurement process in question but also the administrative review body responsible for handling the complaint regarding the aforesaid procurement. As introduced above, in *Modern Wo'er 433* case, the MOF argued that, under the TL and the State Council's *Opinions* and the NDRC's *Interim Measures*, the NDRC should be the responsible body handling Modern

¹⁷ See Zeng Liangliang and Zhang Tao, "The strange situation that procurement centres coexist in eight different models is challenged" in *Economic Informational Daily* (2 July 2007).

Wo'er's complaint. However, the NDRC is one of the purchasers in this case. If the MOF's argument was supported, the NDRC would be not only "the referee in a competition" but also "the player of one side". That means that the complaint against the NDRC will be handled by the NDRC itself! In such a case, obviously, no independence can be mentioned for the review body.

Certainly, it is not always the case that the review body is also one party to a particular dispute. However, it is common that the relevant administrative review body has various relationships with the procuring entity or its agency. For example, in *Modern Wo'er 432* case,¹⁸ the Ministry of Health entrusted Guoxin Tenders Ltd. to procure. It is introduced on the website of this tendering agency¹⁹ that it was established by the Management Centre for Infrastructure and Property of the NDRC and other investors; and its director was former Deputy Director of the State Planning Committee (the current NDRC). Thus, if *Modern Wo'er's* complaint is handled by the NDRC, whether it can fairly deal with the complaint may be doubted because of its close relationship with the tendering agency.

3.2.2 Lack of independence: judicial review bodies

As discussed in chapter 4(3.3.2), independence from *government* as the core element of judicial independence is often required for judicial review bodies. To secure such a higher level of independence, certain measures, including appointing judges under selection procedures provided in the law, securing tenure of the judicial office and fixing judges salaries by act, and providing judicial immunity from suit, are often taken in many regimes, especially in western countries.

However, in China, the independence of the judicial review body is unsatisfactory because of a fundamental problem existing in the whole Chinese legal system - the lack of sufficient guarantees of the independence of the courts and of the judges. Independence of the

¹⁸ This case is slightly different from the *Modern Wo'er 433* case in the procuring entity, the tendering agency and the goods procured. See further Mitterhoff, fn.2 above; Gu, fn.2 above.

¹⁹ See <http://www.gxzb.com.cn>

courts is clearly required in the *Constitution* and other Chinese laws. The *Constitution* Article 126 stipulates that the People's Court exercises judicial power independently, under the provisions of law, and is not subject to interference by any administrative organ, public organisation or individual. Similar requirements are also found in the *Organic Law of the People's Courts* (Article 4) and *Administrative Litigation Law (ALL)* (Article 3) and the *Civil Procedures Law* (Article 6). However, in practice, the independence of the courts cannot be guaranteed mainly because of the problem of the management system of the courts. In fact, the local courts at all levels are not independent from local governments but attach themselves to the latter due to the reasons discussed below.²⁰

One reason is that the local courts²¹ were established on the basis of administrative regions. There is no circular court which has jurisdiction over a number of regions. The other is that the local Communist Party committee and local government actually control local courts in respects of personnel, finance and property management. For example, the head of the local courts are elected and removed and judges are appointed and dismissed by the local people's congress based on local communist party committee's recommendation.²² More problematically, expenses of the local courts are borne by the financial department of the local government at the same level.²³ All these make the local courts very difficult or sometimes are unable to adjudicate independently.²⁴ Localisation of the local courts and local protectionism has caused strong criticism from academics, practitioners and the public and they have made strong call for judicial reform.²⁵

²⁰ See Zhou, Daoluan., "Independent adjudication and judicial impartiality", available at http://www.hicourt.gov.cn/theory/artilce_list.asp?id=1831&l_class=

²¹ Local courts refer to all other people's courts, except the Supreme People's Court located in Beijing and those specialised courts such as maritime courts located merely in several cities with harbors.

²² See further Xia, Xianpeng, "How to strengthen Party's leadership over adjudication" available at <http://www.mingge.gov.cn/chinese/pprevo/intro/15699.htm> (published on 18 February 2008).

²³ See further Guo, Jisheng., "Some Problems on Reform of the System of Safeguarding Judicial Expenses" in Sun, Qian and Zheng, Chengliang., (eds.) *Judicial Reform Report* (Beijing: Law Press, 2004) p337.

²⁴ See Qiao, Shengbiao., "The Crux of Management System of the Courts and Reform" in Sun and Zheng, *ibid*, p265 at p265.

²⁵ *Ibid* and Zhan, Yunfa and Wang, Naxin., "Judicial Impartiality and Judicial Reform of Courts" in Sun and Zheng, *ibid*, p236.

In addition, independence of judges is crucial for keeping judicial independence. Nevertheless, although the independence of the court as a whole is explicitly provided in the *Constitution* and other laws mentioned above, personal independence of judges was not made clear in law. Until 2001, it is merely stipulated in the revised *Law of Judges* (LOJ) Article 8(2) that judges shall adjudicate according to law and are not subject to interference by any administrative organ, social organisation and individual. Furthermore, because of problems existing in the appointment of judges, tenure of judges and removal of judges and other aspects of management of courts explained below, independence of judges often cannot be guaranteed in practice.

Firstly, judges at the lowest level are selected from those who have passed national judicial examination and meet requirements on judges such as having Chinese nationality, supporting the *Constitution* and having legal knowledge.²⁶ However, the promotion of judges follow the procedures that they are nominated by the head of the court and appointed by the people's congress at the same level with the court. Thus the head of the court actually decides on promotion of judges, which can result in the situation that judges submit themselves to the head of the court and other leaderships for promotion.²⁷

Secondly, in China, there is no clear provision on lifelong tenure of judges. They can be removed under extensive grounds stipulated in the LOJ Articles 13 and 40, concerning for example health reason and refusal of work change caused by retrench of personnel of the court. In addition, judges' salaries are paid according to the salary standards of common civil servants, which are not high. Because salaries are paid by the financial department of local government, in the less developed regions, sometimes, judges' salaries cannot be paid on time.²⁸ This is regarded as one factor that affects independence of judges;²⁹ since in the

²⁶ See the LOJ Articles 9 and 12.

²⁷ See Ma, Huaide., (ed.) *Consummating Judicial Reform and Administrative Litigation System* (Beijing: China University of Political Science and Law Press, 2004), p3.

²⁸ See Liu, Jing., "A Study on Safeguard System for Judges" in Sun and Zheng, fn.23 above, pp353 at p367; Guo, fn.23 above, p340.

²⁹ *Ibid.*

above case, judges are easier to accept the parties' inducements, and it is more likely that judges and the head of the court cannot adjudicate independently and fairly under the pressure of the local government paying their salaries.

Thirdly, the LOJ Article 4 simply provides that judges perform their duties under law and are protected by law; a system of judicial immunity has not been established in China.³⁰

Finally, within the system of courts, an administrative model has been used since the adjudication system was established in China.³¹ In practice, a case adjudicated by judges often needs to be checked and approved by the chief judge of a division and the head of the court. This phenomena has not been completely changed, although in some courts that the aforesaid chief judge and the head of the court are encouraged to act as the leading judge to hear the case, with reform of the form of adjudication.³² For those major or difficult cases, under the *Organic Law of the People's Court* Article 11, they are often discussed by the Adjudication Committee of the court. All these have resulted in the situation that the presiding judges cannot make a judgment and the case is adjudicated by others such as the Adjudication Committee that does not hear the case. In addition, the adjudication activities of the lower courts can be affected by the higher court by asking for instruction to the latter while adjudicating a case. Such an executive-centred court system has caused the problem that judges of the higher court can illegally interfere with independent adjudication of the lower courts.³³

The above problems make it difficult for the courts to be independent of government and independently adjudicate. This is a fundamental problem of the overall Chinese legal system. It is more difficult to maintain independence of the court from government when administrative litigation is concerned, since the administrative organ with powers may impose

³⁰ Ibid, p369.

³¹ See Zhan and Wang, fn.25 above, pp245-246.

³² See Xu, Ruibai, "Reform of the work model of the collegial panel", available at <http://www.civillaw.com.cn/Article/default.asp?id=32470>

³³ See Ma, fn.27 above, p74.

executive interference on the court and the presiding judges. This is possible because the courts are often under the administrative jurisdiction of the local administrative organ concerned - the defendant of the administrative litigation, and the presiding judges are likely to be inferior in rank to the representative of the administrative organ concerned.³⁴ Thus, it is common in practice that under the pressure of the administrative organ concerned the courts themselves cannot deal with the case according to law; for example, the court may delay in hearing the case and making a judgment. This is possibly one reason why in the two *Modern Wo'er* cases lacking complicated factual issues, the first instance court spent more than 20 months, much longer than the 3 months time limit stipulated in the ALL, to make its judgments; the appellate court has not yet produce a judgment after more than 19 months.

3.2.3 Further analysis

As explained in chapter 4(3.3.1), under the current GPA, a court or an impartial and independent review body can be designated as the final review body. For the court referred in the GPA Article XX.6, it is assumed that the court should be independent and free from external influence, although this is not explicitly provided in the GPA.³⁵ If so, it is difficult to say that independence of the Chinese courts can satisfy the aforesaid requirements of independence of the courts, because of the problems discussed above. However, under the revised GPA (Article XVIII.5), independence of the Chinese courts seems acceptable, since it merely requires judicial authority of each Party to be “*independent of its procuring entities*”. This minimum requirement on independence of the courts can be satisfied by the Chinese courts.

Under both the current and revised GPA,³⁶ an administrative review body can be empowered to handle suppliers’ complaints. It can work as the final review body provided it

³⁴ See Cheung, A.K.C., “China’s Administrative Litigation Law” (2005) AUT. *Public Law* p549 at p558.

³⁵ See further Arrowsmith, S., “The Character and Role of National Challenge Procedures under the Government Procurement Agreement” (2002) 4 *P.P.L.R.* p235 at p247.

³⁶ See Article XX.6 [Article XVIII.4 and 6].

can satisfy the requirements on independence and has judicial type procedures required in the current or revised GPA considered in chapter 4(3.2.1.3). If it has no those judicial type procedures, its decision should be subject to judicial review. This administrative review body should be *independent of the procuring entity*, under the GPA Article XX.6 [Article XVIII.4]. This implies that, once administrative review is designed as a review stage prior to judicial review, the administrative review body should be independent of the procuring entity.

In China, as revealed above, administrative review is not designed as the final review in its tiered supplier review system; the administrative review body's decisions can be appealed against before the competent court. However, as showed above, the administrative review body is not always independent of the procuring entity when other administrative departments, rather than the financial departments, are involved in handling bidders' complaints. This makes it inconsistent with the above GPA requirements on independence for administrative review body and the relevant APEC provision³⁷ which arguably requires the administrative review body to be independent of the procuring entity, as analysed in chapter 4(3.2.1.4).

3.3 Limitation of the power of administrative reconsideration organ and administrative division of the court

As mentioned in chapter 8(2.2.2), the complaining supplier unsatisfied with the first instance administrative review body's decision or receiving no response may apply for further administrative reconsideration. Alternatively, it may initiate an administrative litigation in the above case or when it disagrees with the administrative reconsideration decision or receives no reply after appealing to the administrative reconsideration organ. As indicated in chapter 8(2.2.1 and 2.3.1), when the case is brought before the administrative reconsideration organ, especially before the administrative division of the court, the latter deals with the supplier's complaint against the administrative review body's decision, rather than the dispute between the supplier and the procuring entity or its agency, and thus does not touch on the substantive

³⁷ See Annex 3, 4.2.

issues underlying the administrative complaint. This is because, in China, the procuring entity's activities are not specific administrative acts subject to administrative reconsideration or administrative litigation.³⁸ Consequently, the complaining supplier often cannot obtain effective remedies from the administrative reconsideration organ and especially from the court, as analysed below.

As introduced in chapter 10(2.2.2), the *Administrative Reconsideration Law* (ARL) Article 28(2) provides that the administrative reconsideration organ shall order the first administrative review body to perform its duty, if the latter fails to do so. Article 28(3) states if the first instance administrative review body in its decision fails to ascertain facts or provide sufficient evidence, applies rules wrongly, violates legal procedures or its decision is obviously inappropriate, the administrative reconsideration organ shall *alter* the first instance administrative review body's decision, or annul it or find it illegal and order the first instance administrative review body to make a new decision within a fixed time.

Under Article 28(2), the administrative reconsideration organ has no authority to directly handle the suppliers' complaint in the case that the first instance administrative review body refuses to accept the complaint or fails to make a decision in due time. This means that the complaint has to be taken back to the first instance review body after spending at least two months for administrative reconsideration.³⁹ In the case that the supplier disagrees with the first instance administrative review body's decision and applies for administrative reconsideration again, if the latter thinks that the first instance administrative review body's decision has been made based on, for example, ambiguous key facts or inadequate evidence, the complaint may be brought back to the first instance administrative review body again. This is because, under Article 28(3), the administrative reconsideration organ can decide to annul the first instance administrative review body's decision and order the latter to make a

³⁸ See Xiao, Beigeng., *A Comparative Study on Procurement Rules of International Organisations* (Beijing: Fangzheng Press of China, 2003), p240.

³⁹ See the ARL Article 31.

decision anew, rather than directly altering its decision. In this lengthy process, it is highly possible that the contract has been awarded and even performed.

When the court is invoked to handle the supplier's complaint against the administrative review body's decision, the above problem may also exist, since the court has no power to "rule on the substantive issues underlying the administrative complaint"⁴⁰. Similar to the ARL, the ALL Article 54(4) stipulates that the court can only order the administrative review body to perform its duty if the latter fails to do so. However, unlike the ARL Article 28(3), in the case that the administrative review body's decision has been made in the circumstance that essential evidence is insufficient, laws and regulations are wrongly applied or legal procedures are violated, the court must rule to annul wholly or partly the decision, and may order the administrative review body to make a new decision⁴¹; it has no power to substitute the decision with one of its own.

The two *Modern Wo'er* cases can be used to illustrate the problem caused by the above provisions. As introduced earlier, these two cases were brought before the court because the MOF failed to perform its duty – to handle Modern Wo'er's complaint. After waiting for more than 20 months, the first instance court simply ordered the MOF to do what it should have done two years ago.⁴² Furthermore, as Mitterhoff analyses, "[t]his process conceivably can be repeated adinfinitum if the ministry neglects to provide an adequate ruling on the complaint"⁴³, as Modern Wo'er may initiate an administrative litigation again if it disagrees with the MOF's decision and the court may order the MOF to make a decision afresh.

As was seen from the above, when the court makes judgments under the aforesaid ALL provisions, it will leave those substantive issues underlying the administrative complaint untouched. This will inevitably harm the complaining supplier's interest, since it has to go

⁴⁰ See Mitterhoff, fn. 2 above p98-6.

⁴¹ See the ALL Article 54(2).

⁴² See Mitterhoff, fn.2 above, p98-6.

⁴³ Ibid

back to the doorstep of the administrative review body to seek remedy and thus needs to spend long time seeking review. During this lengthy process, the contract may be awarded and even performed and thus it is impossible to correct irregularities and allow the supplier to participate in the competition. In addition, the above problem may cause doubt on whether the current Chinese supplier review system can provide a timely and effective review procedures provided in the GPA and APEC NBPs.

3.4 Ambiguity in seeking civil remedies

As discussed in chapter 8(2.3.2), aggrieved suppliers *may* be allowed to bring a civil litigation against the procuring entity or its agency directly before the court. However, the GPL and the TL provide no clear provision on such a civil litigation and there is no further judicial interpretation on that. Thus there are different understandings on whether the supplier can initiate the aforesaid civil proceedings to seek civil remedies. Although many academics and practitioners argue that suppliers have the right to do so,⁴⁴ not all courts agree with this argument. Different courts adopt different approach to the admission of such a civil litigation, which has resulted in inconsistency in judicial practice.

For example, in *Yidi* and *Xincheng* discussed in chapter 8(2.3.2), which both happened before the entry-into-force of the GPL, the courts accepted the above two civil cases concerning tendering activities, although the TL offers no provision concerning the possibility of seeking civil remedies. However, after the entry-into-force of the GPL, of which Article 79 arguably indicates that the suppliers have the right to seek civil remedies, as explained in chapter 8(2.3.2), some courts still hold the view that disputes regarding tendering procedures fall within the scope of administrative litigation and thus should be first brought before an administrative review body. That is to say, disputes regarding government procurement

⁴⁴ See Wang, Yaqin., *Government Procurement and Administrative Remedies*, (Beijing: The People's Court Press, 2004), p241; Cao, Fuguo, *Annotation to the Chinese Government Procurement Law*, (Beijing: China Machine Press, 2002), p265; Gu, Liaohai., "Is it right that the courts refuses to accept government procurement case?", available at www.chinabidding.com; and Liu, Junhai., "The *Government Procurement Law* pays attention to the protection of legal rights and interests of the suppliers", available at <http://www.iolaw.org.cn/showarticle.asp?id=79>

process⁴⁵ cannot be settled through civil litigation; administrative litigation is the only way for them to seek judicial review and administrative review is the precondition for seeking judicial review. It is not rare in China that the courts refuse to accept the civil case on government procurement process initiated by the supplier.⁴⁶

4. Problems related to standing and procedures

4.1 Problems related to standing – inconsistency and narrow scope of the complainants

The first problem related to standing is inconsistency and uncertainty due to the differences in two sets of procurement rules on standing. Under the TL and the *NDRC Review Measures*, not only actual suppliers but also potential suppliers and possibly subcontractors and others have the right to review, as discussed in chapter 9(2.1). However, under the GPL and especially the *MOF Review Measures*, only actual suppliers have the standing to seek review from the competent financial department. Thus, for potential suppliers and subcontractors, whether they have the right to review depends on which law and the implementing regulation mentioned above apply to the particular case.

The second problem is that the scope of complainants is too narrow, under the GPL / the *MOF Review Measures* which apply undoubtedly to government procurement of general goods and services and arguably to all kinds of government procurement activities as explained in chapter 7(part 4). As noted above, only actual suppliers are given the right to review. This narrow scope of the complainants can avoid excessive disruption to the procurement process caused by other possible complainants such as potential suppliers and subcontractors. However, it is problematic to excluded potential suppliers from the scope of complainants, as it can lead to the following situations:

First, for certain kinds of irregularities made by the procuring entity or its agency, such

⁴⁵ The courts accept civil cases on *performance* of government procurement contracts, as the GPL Article 43 states that the *Contract Law* is applicable to government procurement contracts.

⁴⁶ See Gu, fn.44 above.

as illegal direct award, nobody can challenge it due to the lack of standing. If *Daosi* introduced in chapter 9(2.1.1.1) were handled under the GPL and the *MOF Review Measures*, the complainant, *Daosi*, would definitely have no standing to sue; since it did not actually participate in the competition, although this was caused by the procuring entity's illegal direct award. Consequently, it is highly possible that irregularities cannot be detected and corrected. Furthermore, the procuring entity may be encouraged to award the contract directly, rather than through tendering as required, to avoid complaints. These can affect the enforcement of procurement rules and the achievement of the objectives of the procurement policy.

Secondly, if potential suppliers have no right to review, some suppliers would be treated unfairly and their rights and interests would be injured. For example, if the procuring entity publishes its bid invitation announcement merely on a local newspaper, rather than on the designated national media as required, it is difficult for those potential suppliers located in other places to learn this opportunity. They would be excluded from the competition at the beginning and have no right to complain about that, which is certainly unfair for them.

In addition, to exclude potential suppliers from the scope of the complaints is inconsistent with the GPA and APEC NBPs, which give the right to review to both actual suppliers and potential suppliers, as analysed in chapter 5(2.1.1). Also, potential suppliers are given the standing to seek review in the Model Law and in the EU Remedies Directives. This indicates that it is widely acceptable to give the right to review to potential suppliers.

4.2 Problems related to procedures – time limits and publication of review decisions

4.2.1 Problems related to time limits

As revealed in chapter 9(3.1), current Chinese regulations provide for detailed time limits, including those for initiating a complaint and for completing the review process regarding almost every stage of the current Chinese supplier review system. The problems related to time limits mainly concern the following three points:

Firstly, different time limits for bringing a complaint before the first administrative review body and for completing the review process will be used by different first instance administrative review bodies to handle different kinds of government procurement disputes. As introduced in chapter 9(3.1.2.1), under the *NDRC Review Measures* Article 9, the time limit for initiating complaints to the relevant administrative review body is 10 days; however, under the *GPL* Article 55 and the *MOF Review Measures* Article 7, the time limit for complaining to the financial department is 15 workdays. These different requirements may cause confusion to the supplier concerned, since it may be unclear which law and implementing regulation should apply to its particular case. Accordingly, the supplier may be not sure within which time limit it should initiate its complaint and thus miss the deadline to make a complaint.

As to the time limit for completing the review process, as considered in chapter 9(3.1.2.1), under the *NDRC Review Measures* Article 21, the relevant administrative review body should make its decision within 30 days from the day that the complaint is accepted; if the circumstances are complex and the review body is unable to make a decision within 30 days, this time limit can be extended. However, under the *MOF Review Measures*, the aforesaid time limit is 30 *workdays*, longer than the provision of the *NDRC Review Measures*. This means that, for the financial departments and other government departments empowered to handle complaints, they are given different time limit to make decisions. In normal cases, the financial departments have more time than others to handle complaints. In the case that circumstances are complicated, the latter can have much more time to handle complaints, as the aforesaid time limit can be extended under the *NDRC Review Measures* and the maximum time limit for completion is not made clear.

Secondly, the time limit for initiating a complaint is inconsistent with the relevant GPA standard. As mentioned in 3.2, under the *GPL* and the *MOF Review Measures*, procuring

entity review is a compulsory initial stage for the supplier to seek review. The GPL and the *MOF Review Measures* clearly require the supplier to challenge to the procuring entity within 7 workdays from the date it knows or should have known that its rights and interests are harmed. This time limit is shorter than the GPA minimum time limit for initiation, which is 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.⁴⁷

To provide a short time limit for initiation can impel the supplier to initiate its complaint quickly and thus reduce the disruption to the procurement process. However, the above time limit of 7 workdays may be insufficient for the supplier to complete preparatory work for making a challenge.

Thirdly, the completion of the review procedures can be quite lengthy due to the reasons considered below.

In the first place, the basic time limit for completing the review process for almost all external review stages, except the first instance administrative review conducted under the GPL / the *MOF Review Measures*, can be extended in special cases, as introduced in chapter 9(3.1). However, there is often no further explanation in the relevant law and regulation and in judicial explanation on what special cases mean. Thus, it is sometimes easy for the review body to get more time to handle the case. Furthermore, the maximum time limits for completing the review procedures are not always clear. This can be found in the first instance administrative review when the TL and the *NDRC Review Measures* apply, in administrative litigation and in civil litigation.⁴⁸ This can result in the situation that the complaint is handled after extreme long time. For example, in the two *Modern Wo'er* cases, the first instance court spent more than 20 months to make its judgments, which is 17 months longer than the basic time limit for completing the first instance administrative litigation procedures provided in the

⁴⁷ See Article XX.5 [Article XVIII.3].

⁴⁸ See Diagram 9.2 of chapter 9.

ALL Article 57.

In the second place, the time limit for completion may not be observed by the review body even if it is clear. This is also the case in the two *Modern Wo'er* cases. The MOF appealed to the higher court on 12 December 2006 against the first instance court's judgments. Under the ALL Article 60, the appellate court shall make its judgment within 2 months after the case was filed, unless the above time limit is extended after the approval of the Supreme People's Court. However, the appeal was not heard until 7 June 2007 and the complaining supplier has never received any notice on adjournment;⁴⁹ no judgment has been produced so far. When the appellate court can make its judgments is unpredictable.

The above problems indicate that the current administrative and judicial review procedure in China is not rapid and effective enough, which is inconsistent with the requirements of GPA and APEC NBPs on timely and effective challenge procedures.

4.2.2 Problems related to publication of review decisions

Problems related to publication of review decisions discussed below concern i) inconsistency in the legal rules on publication for the first instance administrative review bodies, and ii) insufficient publication of the courts' judgments.

First, the requirements on publication for the first instance administrative review bodies are inconsistent and ambiguous. As discussed in chapter 9(3.2.1.1), the *MOF Review Measures* Article 23 and the *NDRC Review Measures* Article 29 have different requirements on publication to the financial departments and other administrative review departments concerned. The financial departments are required to publish their decisions on the media specially designated by the financial departments. Further, Article 15 of the *Measures on the Administration of the Publication of Government Procurement Information* (the *Publication Measures* introduced in chapter 7(2.3)) makes clear main contents that should be included in

⁴⁹ See Sun, Cheng, Long, Fei and Wu, Chengtao., "Puzzle on the First Government Procurement Case: Unqualified Supplier Won the Contract" in *China Business Newspaper* (13 July 2007).

the notice of decisions on handling complaints. However, *when* the aforesaid notice shall be published is not clarified until now. As a result, the suppliers and the public are often unable to learn the financial departments' decisions in time.

For other administrative departments involved in handling bidders' complaints, they can decide whether to publish their decisions; as the *NDRC Review Measures* Article 29 merely states that these departments *may* publish the decisions, *if the matter to be complained is abominable in nature and circumstances are serious*. Moreover, the *Publication Measures* mentioned above merely requires the financial departments to publish their decisions, not mention other administrative departments concerned.⁵⁰ As argued in chapter 9(3.2.1.1), this indicates, unlike the financial departments, other administrative departments concerned are *not* required to publish their decisions. Until now, there are no express requirements that these departments *should* publish their decisions. Thus, when they are responsible for handling complaints regarding government procurement of works and works-related goods and services through tendering, their decisions may not be published, even if they concern serious irregularities. In practice, it is very difficult to find other administrative review departments' decisions.

Next, publication of the courts' judgments on government procurement cases is insufficient. As noted in chapter 9(3.2.2), a concrete system of publication of the courts' judgments has not been established in China. Although the Supreme People's Court issued a judicial interpretation in June 2007, requiring that all high courts lay down the concrete measures on disclosure of judgments on internet and publications; until now, it is not made clear in laws, judicial interpretation and regulations when all judgments shall be published and within which time limit each judgment shall be published. Thus, in practice, only few

⁵⁰ See Article 8(5).

judgments on procurement dispute are published.

These problems can affect the effectiveness of the supplier review system. Review bodies may not handle the complaints under law, without the pressure of publication of their decisions or judgments. The procuring entity or its agency may lack incentive to correct its irregularities, if violations may be not exposed to the public and the supervisory authorities concerned. Other suppliers knowing that a complaint is raised may doubt the review body's ability in handling the complaint under law and lose confidence in the supplier review system, if the decision or judgment cannot be published or timely published.

In addition, if the administrative review bodies' decisions or the courts' judgments cannot be published, it will be inconsistent with the general requirement of transparency contained in the GPA and APEC NBPs which states that the domestic challenge procedures should be transparent.⁵¹

5. Problems related to remedies

As noted in chapter 6, remedies of suspension of the award process, setting aside unlawful decisions of the procuring entity or its agency and compensation to the aggrieved supplier are very important for the protection of the supplier's interest and the enforcement of the procurement rules. However, as analysed in chapter 10(2.2.1), in China, the above remedies are mainly available in the first instance administrative review. Because of problems related to the aforesaid three remedies respectively discussed below, it can be argued that the current Chinese supplier review system cannot provide effective remedies to the aggrieved supplier.

5.1 Problems on suspension

As revealed in chapter 10(part 3), there is provision on suspension in the current Chinese supplier review system; nevertheless, it is quite unsatisfactory because of the following reasons.

⁵¹ See the GPA Article XX.2 [Article XVIII.1]; APEC NBPs, Annex 3, 4.1

First, the remedy of suspension of the award process is not available in every review stage and cannot be used in all government procurement complaints. As analysed in chapter 10(section 3), currently in China, only in the first instance administrative review stage when the financial departments handle complaints regulated by the GPL and the *MOF Review Measures*, it is possible that the suspension remedy is available to the supplier. This remedy is not available in procuring entity review, the first instance administrative review stage when the TL / the *NDRC Review Measures* apply to complaints, administrative reconsideration, administrative litigation and civil litigation.

Second, the application of suspension in a particular case is at the discretion of the competent financial department. As revealed in chapter 10(section 3), the GPL and the *MOF Review Measures* do not adopt the semi-automatic suspension approach recommended in the Model Law Article 56(1). In China, the initiation of a complaint cannot result in the automatic suspension of the award process for a short period of time. The GPL and the *MOF Review Measures* provide that the financial departments *may, depending on the specific circumstances*, decide to suspend the procurement activities. Further, they do not provide for detailed conditions for suspension, except indicating that suspension should not exceed 30 days. Thus, under which conditions the suspension can be adopted is unclear. Although the financial departments arguably need to consider urgency of the procurement, public interests and other suppliers' interests while deciding a suspension,⁵² the conditions for using this remedy is still uncertain; as the concept of the public interests, for example, is quite flexible, often lacking accurate definition on it. Thus, in fact, whether to grant a suspension depends on the competent financial department's determination. It is rarely heard that the financial department orders a suspension in practice.

In practice, it is common that the complainant disagrees with the financial department's

⁵² See Cao, Fuguo, Colling, J. and Trepte, P., "China's Accession to the Government Procurement Agreement and Opportunities for Domestic Reform: A Study in the light of EU Experience", available at www.euchinawto.org, p98.

decision or receives no reply from the latter and has to seek further review. In this lengthy dispute resolution process, without suspension, it is highly possible that the contract has been awarded or even performed. For example, in the *Modern Wo'er* cases, before the substantive dispute on whether the contract was wrongly awarded to another supplier is touched by the administrative review body, the contract had been signed and started to be performed. Also, in *Beicheng Ya'ao* mentioned in chapter 10(2.3.1), before the court issued its judgment, the contract had started to be performed. Thus, *Beicheng Ya'ao* complained, although it has won the case, it cannot help; since it has no opportunity to participate in the competition.⁵³ In addition to harming the supplier's interest, it is also impossible to correct any irregularity if the contract has been performed, which will adversely affect the enforcement of procurement rules.

5.2 Problems on setting aside remedy

The remedy of setting aside the procuring entity's unlawful decisions is mainly used in the first instance administrative review stage in China, as explained in chapter 10(section 4). Problems related to this remedy concern the following three points:

The first one concerns the inconsistency on the use of this remedy in the GPL and the *MOF Review Measures*. As discussed in chapter 10(4.1), the GPL Article 73(2) provides when the procuring entity's violations affect or are likely to affect the result in respect of the winning supplier, if the winning supplier is determined but the contract has not been performed, the contract shall be annulled and *a new winner shall be selected from among the remaining qualified candidates*. This is problematic because this provision not requiring conducting procurement anew in the above case could maintain the effectiveness of the irregular procurement activities. The *MOF Review Measures* Article 19(2), however, provides where the contract has been concluded but not yet been performed, the contract shall be

⁵³ See Zeng, Liangliang and Liu, Huixian., "For the first time, the Ministry of Finance lost a government procurement case", *Economic Information Daily* (31 July 2006).

annulled *and the procuring entity shall be ordered to conduct a new procurement*. This requirement on reopening of procurement is more reasonable, as it completely makes the irregular procurement process ineffective. However, such a requirement contained in the implementing regulations is inconsistent with the relevant provision of the primary law.⁵⁴ In practice, this can make it difficult for the supplier to predict whether it can still have an opportunity to compete for the contract in the case the contract should be annulled under the above law and regulation.

The second point concerns inconsistency between different provisions on setting aside of the *MOF Review Measures*. As analysed in chapter 10(4.1), Article 18 specially dealing with remedies available to the aggrieved supplier when the procurement documents are defective is superfluous, as remedy for defective procurement documents is also provided in Article 19. More seriously, in the case that the procurement documents are defective but the contract has been signed, Article 18(3) merely requires the financial department to declare the procurement unlawful and *order the procuring entity to bear compensation liability under law*; however, under Article 19(2), the financial department must annul the contract and *order the procuring entity to re-run procurement activities*. These different provisions can cause confusion.

The third one is that, under the GPL / *MOF Review Measures* and the TL, whether concluded contracts can be annulled is different. As discussed in chapter 10(section 4), under the GPL Article 73 and the *MOF Review Measures* Articles 18 and 19, concluded contracts can be annulled, provided they are not performed. However, because the TL merely stipulates to annul *the award* when the procuring entity or its agency makes violations such as treating suppliers differently,⁵⁵ this arguably implies that concluded contracts are not allowed to be set aside.⁵⁶ This inconsistency can result in the following situation: if the supplier's complaint concerns government procurement of general goods and services regulated by the GPL / the

⁵⁴ See Cao, *et al*, fn.52 above, p97.

⁵⁵ See Articles 50, 52, 55 and 57.

⁵⁶ See Cao, *et al*, fn.51, p93.

MOF Review Measures, the competent financial department can annul a concluded contract which has not been performed; and thus the supplier can obtain an opportunity to compete for the disputed contract. Nevertheless, if the complaint concerns government procurement of works through tendering possibly covered by the TL, once the contract has been signed, even if it has not been performed, it cannot be annulled; and thus it is impossible for the supplier to have an opportunity to participate in the competition.

5.3 Problems on damages

Damages remedy is available in the current Chinese supplier review system. However, there are some problems related to this remedy as discussed below.

First, the damages remedy is actually only available to certain suppliers. As mentioned in chapter 10(section 5), the GPL Article 73(3) and the *MOF Review Measures* Article 19(3) clearly provide if the irregular procurement contract has been performed and has caused losses to the complaining supplier, the procuring entity or its agency shall bear compensation responsibility. This indicates that the damages remedy is explicitly required to be granted to the aggrieved supplier suffering losses after the contract has been performed. However, the TL and the *NDRC Review Measures* have no provision requiring that *the procuring entity* bears compensation liability if it violates procurement rules and has caused losses to the supplier, although the tendering agency is required to bear liability for compensation in certain cases such as collusion between the agency and the bidder.⁵⁷ This can result in inconsistency in practice. As analysed in chapter 10(5.1), it is impossible for the complaining supplier to apply for the damages remedy if its complaint concerns tendering activities in procuring works. However, if its complaint concerns government procurement of general goods and services regulated by the GPL, it would be able to apply for this remedy.

Second, provisions on the damages remedy contained in the GPL and the *MOF Review Measures* is not clear and detailed enough. As pointed out in chapter 10(5.1), they do not

⁵⁷ See the TL Article 50.

indicate the extent of compensation and provide clear conditions for damages, although certain conditions can be deduced from the relevant provisions. Thus, it is difficult for the suppliers to know whether it is hard to claim damages and how much compensation they are likely granted. The financial departments may merely award the minimum compensation, say compensation for protest, to the complaining supplier, which can discourage the suppliers from making complaints as analysed in chapter 2(2.2.1.3).

It should be noted, to merely compensate costs for tender preparation or protest is *not* inconsistent with the GPA provision. As introduced in chapter 6(5.4), both the current GPA (Article XX.7(c)) and the revised GPA (Article XVIII.7(b)) allow to limit compensation to the aggrieved supplier only to the costs for tender preparation or the costs relating to challenge.

6. Overly-strict sanctions on the complaining supplier

The Model Law does not recommend imposing sanctions on the complaining supplier making a false or malicious complaint. Similarly, there is no such provision in the GPA, the EU Remedies Directives and APEC NBPs. Possibly; this is mainly because the review system provided in the above models primarily aims at properly enforcing procurement rules by encouraging suppliers to make complaints. To impose sanctions on the complaining supplier can discourage suppliers' complaints, although it is helpful for avoiding or reducing interruption to the procurement process caused by supplier's vicious complaints. Another possible reason is that, for the Model Law, it merely serves as a blueprint for the States while establishing or reforming its procurement legislation; thus a State may provide to impose sanctions on the complaining supplier in certain circumstances if it wishes. For the other three international instruments, they intend to provide basic rules on supplier review and give discretion to its members to add legal rules deemed necessary in domestic law. However, such provisions should be subject to the effectiveness requirement contained in the international

instruments which apply to the State; i.e. provisions on imposition of sanctions on the complainant should not be so strict that the supplier concerned is unwilling to raise a complaint due to fear of being sanctioned easily.

In the current Chinese supplier review system, there are provisions on imposing sanctions on the complaining supplier. However, they are quite problematic, as they are not consistent and reasonable and clear enough, as explained below.

Firstly, provisions on the imposition of sanctions on the complainant contained in the GPL, the *MOF Review Measures* and the *NDRC Review Measures* are inconsistent. The TL offers no provision on imposing sanctions on the complaint. Such a provision is found in the *NDRC Review Measures* Article 26. It provides if the complainant intentionally invents facts and forges evidence, its complaint is false or malicious. The administrative supervision department shall dismiss its complaint and give warning to it; if circumstances are serious, the complainant may be fined of no more than 10,000 RMB at the same time.

However, the *MOF Review Measures* Article 26 provides a different definition of the malicious complaints. Under this Article, in addition to inventing facts and providing false information, if the complaining supplier has filed three cases within one year and all are found groundless, its complaint will be treated as a false or malicious complaint as well. This provision is totally unreasonable, as further analysed below. It should be noted that the GPL provides no restriction on times of complaints raised by the supplier.⁵⁸

Further, the *MOF Review Measures* and the GPL impose stricter sanctions on the complaining supplier. Under the *MOF Review Measures* Article 26, if the supplier makes a false or malicious complaint, the financial department shall dismiss its complaint, list it in the blacklist and punish it under the law. The GPL does not clearly provide how to punish the supplier making a false or malicious complaint. However, the GPL Article 77 stipulates that

⁵⁸ See Wang, Ping, "The Third Phase in the Evolution of China's Public Procurement Framework: A Critical Perspective" (unpublished), p26.

the supplier shall be fined between 0.5% and 1% of the total procurement value, included in the blacklist and prohibited from participating in government procurement activities within 1-3 year, if it defames or excludes other suppliers by illegal means. If the circumstances are serious, the supplier's business license shall be revoked. As making a false or malicious complaint is arguably one kind of activity aiming at defaming or excluding other suppliers, the above provisions on sanctions can be adopted when a supplier makes a false or malicious complaint. This means that, once a complaint is thought by the financial department as false or malicious, even if the circumstances are not serious, the complainant will be fined and listed in blacklist and prohibited from participating in competition for government procurement contracts for 1-3 years. However, under the *NDRC Review Measures* Article 26 mentioned earlier, the complainant is only given warning in the same case. In the case that circumstances are serious, under the GPL Article 26, the supplier making a false or malicious complaint may lose its business license which leads to the close of business; whereas in the same situation under the *NDRC Review Measures* Article 26, the supplier will be merely fined of 10, 000 RMB, which is usually trivial even for small-sized enterprises. Thus, when a supplier makes a malicious complaint concerning government procurement of general goods or services, overly-strict sanctions can be imposed on it.

A more serious problem is that the *MOF Review Measures* actually restrict that the suppliers make complaints, since it provides that the complainant will be sanctioned if it raised three cases of complaints within one year and all of them are found groundless. Such a provision is rather unreasonable because of the reasons discussed below.

First, a supplier has the right to make complaints as many as it likes within one year. Such right of the supplier has not been restricted in the GPL and other laws. Thus, the above restriction lacks legal basis. Next, as Wang points out, for a large national company which may frequently participate in procurement competitions, it is inconceivable that they are

allowed “only three ‘unsuccessful encounters’ with the financial departments.”⁵⁹ Finally, when a supplier makes a complaint, even if the procuring entity or its agency does have made violations, it may still lose the case, because it may be unable to provide sufficient evidence, most of which are possessed by the procuring entity or its agency, or because the financial department may not fairly handle the complaint.

As analysed in chapter 2(2.2.1.1), fear of retaliation is one important factor prohibiting the suppliers from raising complaints. The above express provision written in black and white makes the suppliers’ situation worse, as they can be easily blacklisted and excluded from participating in the procurement competition under this provision.

7. Conclusions

As revealed above, the current Chinese supplier review system is not well-designed. First, there is no a unified supplier review system applying to all complaints concerning government procurement process. Next, currently, when a complaint is handled under the *GPL* / the *MOF Review Measures*, a sequential tiered review system is used, which makes the current review system quite rigid and time-consuming. Then, since the court in administrative litigation handles only the administrative dispute raised by the supplier against the administrative review body’s decision, it merely checks whether the administrative review body had performed or properly performed it duties. It cannot deal with the supplier’s complaint against the procuring entity or its agency and thus has no power to order effective remedies to the supplier. Fourth, it lacks interdependence among systems of the current review mechanism. For example, the current tiered review system makes it hardly possible to resolve complaints in a timely manner; however, it is completely impossible to suspend the award process in stages of administrative reconsideration and administrative litigation. Thus, it is common in

⁵⁹ Ibid, p26.

practice that the contract has been performed before the complaint is handled. Finally, provisions on available remedies such as damages are unclear and incomplete, which makes it difficult for suppliers to obtain sufficient remedies.

Therefore, although the supplier review system has been established in China for several years and the basic rules on this system have been laid down, it is still hardly to say this system is effective and comply with provisions on domestic review system of the GPA and APEC NBPs.

Chapter 12 Proposals for improving the current Chinese supplier review system

1. Introduction

This chapter considers how to improve the current Chinese supplier review system to make it more effective and harmony with the relevant international standards which may apply or currently actually apply to China, namely the GPA and APEC NBPs. In drafting proposals for improvement, due regard has been given to its practicality and compatibility with the existing system; i.e. this chapter is not to design an ideal new supplier review system for China which is not practical in the short run.

The following outcomes are arguably achievable should the proposals elaborated below be implemented with the overall aim at enforcing properly the procurement rules and providing effective remedies to suppliers: i) the rules on supplier review are unified and clear; ii) it is easy for suppliers to access to the review process, especially to the external review; iii) the forum for review is clear and has the necessary authorities to effectively handle complaints; the levels of review are not complicated and can be decided by suppliers; iv) the review process is rapid; v) there are various remedies available in different circumstances to ensure effective remedies to the supplier; and vi) various systems of the supplier review mechanism are interrelated to a) ensure that the complaint is handled before the conclusion of the procurement contract and b) balance, at least to certain degree, the protection of the aggrieved supplier's interest and of the interests of the public and of other suppliers.

Proposals discussed in sections 2- 6 concern five substantial topics: i) applicable rules on supplier review; ii) forum for review; iii) standing and the time limits; iv) remedies and v)

sanctions on the complaining supplier.

2. Applying unified rules on supplier review to all government procurement disputes

As analysed in chapter 11(section 2), due to the cross application of the GPL and the TL and their respective implementing regulations which overlap in the coverage, where complaints concern government procurement of works and of works-related goods and services through tendering, which may be subject to the TL, there are different understandings on whether the GPL rules on supplier review should apply. This has resulted in uncertainties and inconsistencies in many aspects of the current supplier review system. For the above complaints, the application of two different sets of rules – the GPL / the *MOF Review Measures* or the TL / the *NDRC Review Measures* - will lead to different outcome regarding certain important issues. These include: i) whether the supplier should first complain to the procuring entity before seeking external review; ii) to which administrative review body – the financial department or other administrative body concerned – to apply for administrative review; iii) whether the potential suppliers, as with the actual suppliers, have the standing to seek review; iv) within which time limit the supplier should raise its complaint; v) how long the first instance administrative review body concerned is given to complete the review process; vi) whether the first instance administrative review body's decision should be published; vii) whether, in the first instance administrative review, it is possible that the remedy of suspension is granted, that the concluded contract is annulled and that the procuring entity is ordered to pay compensation to the supplier; and viii) under which circumstances and which kinds of sanctions can be imposed on the complaining supplier making a malicious

complaint. These inconsistencies indicate there is an urgent need in China to apply unified rules on supplier review to *all* government procurement disputes. To do so, there are two possible solutions explained further in 2.1 and 2.2. No matter which approach is adopted; the aforesaid inconsistencies can be eliminated.

2.1 To apply unified rules on supplier review to all government procurement disputes by unifying the two primary laws

The fundamental solution for the uncertainties and inconsistencies in the application of the rules on supplier review is to unify the GPL and the TL. These two laws can be unified i) by incorporating the TL into the GPL,¹ or ii) by taking away only *government procurement* of works from the TL's coverage and incorporating it into the GPL,² or iii) by consolidating the two laws into one uniform government procurement law.³ If a unified government procurement law can be adopted, rules on supplier review contained in this law will of course be used to handle *all* government procurement disputes, whether the dispute concerns goods, services or works and whether it is conducted through tendering or any other procurement method. Consequently, the problem of uncertainties and inconsistency can be completely solved. This is an ideal approach, since it can resolve the problem from the root. However, it might be difficult to achieve, in particular in the short run because of the following reasons.

The first reason concerns the battle of the power among government departments. As noted in chapter 7, the GPL and the TL has been driven by the MOF and the NDRC

¹ See Gu, Liaohai., "The battle of the power: How impatient it is", available at <http://www.chinabidding.com/dbjh/Detail.do?ServiceName=GLSZL&docid=1324259> (published on 8 March 2006).

² See further Yu, An., "Incorporating government procurement of works into Government Procurement Law benefits the nation and the people", available at www.chinabidding.com (published on 25 August 2003) and Zeng, Liangliang and Lu, Cheng: "Viewpoint: It is not appropriate to consolidate the Tendering Law and the Government Procurement Law" *Economic Information Daily*, 9 April 2007.

³ See Cao, Fuguo, "China's Government Procurement Reform: From the Bidding Law to the Government Procurement Law" in Arrowsmith, S. and Trybus, M., (eds.) *Public Procurement: The Continuing Revolution* (The Hague: Kluwer Law International, 2003), p61 at p72.

respectively.⁴ The NDRC seems unwilling to give up its administrative jurisdiction in management of government procurement through tendering. It was because the NDRC disagreed that the GPL regulates government procurement of works through tendering, a compromise allowing that the aforesaid procurement is subject to the TL was included in the GPL. Also, “[t]he NDRC consistently engages in propaganda to entrench the notion that the T/B [tendering] system is distinct from government procurement.”⁵ Currently, the NDRC is still engaged in further amplifying the legal impact of the TL and is preparing the draft of the specialised *Implementing Measures on the Tendering Law*, which will be a State Council regulation; although a State Council regulation on the implementation of the GPL - the *Implementing Measures on the Government Procurement Law* - is being drafted by the MOF at the same time. All these indicate that the battle for administrative territory in the field of government procurement mainly between the NDRC and the MOF still continues.

The second reason concerns different coverage of the TL and the GPL. As explained in chapter 7(section 2), the GPL regulates government procurement activities conducted by government departments, institutions and public organisations at all level; while the TL regulates not only government procurement of works through tendering conducted by the above subjects but also tendering activities conducted by other subjects not covered by the GPL, such as state enterprises and private purchasers. Because of this, it is very difficult to incorporate the TL into the GPL or consolidate them.

The third reason is that China may lack strong incentive to establish a unified legal framework on government procurement as soon as possible, since the GPA does not require

⁴ Ibid, p71.

⁵ See Mitterhoff, D.J., “Beijing Court Orders Ministry Of Finance To Rule On Supplier’s Complaints, But Skirts Broader Issue of Schism In China’s Procurement Supervision”, (2006) Vol.3 No.12, *International Government Contractor* p98 at p98-6.

that Parties must have a comprehensive government procurement law. That is to say, to have separate laws regulating government procurement of works and government procurement of goods and services respectively does not contravene the GPA, although it could complicate China's promise to join the GPA and affect its efforts to improve the whole government procurement system.⁶

2.2 To apply the GPL rules on supplier review to all government procurement disputes

Due to the difficulties highlighted, some academics argue it is unnecessary to reduce the TL and the GPL into a single legislative act but it would be helpful to amend the GPL and the TL to be mutually exclusive.⁷ Keeping separate laws regulating government procurement of goods and services and government procurement of works respectively seems a more realistic and practicable solution to solve the problem of uncertainties and inconsistencies in the application of procurement rules, *provided there is a clear-cut demarcation line between the two laws*, as explained below.

Firstly, currently in China, a generally accepted consensus is that the TL should continue to regulate government procurement of works through tendering while the GPL should continue to regulate government procurement of other goods and services.⁸ The demarcation of the two laws based on the aforesaid consensus is arguably easier to be accepted by legislators, government departments concerned, academics and practitioners. For legislators and government departments concerned, this solution can, to the maximum extent, maintain the allocation of powers in management and supervision of government procurement activities

⁶ Ibid, p98-5.

⁷ See Cao, Fuguo, Colling, J. and Trepte, P., "China's Accession to the Government Procurement Agreement and Opportunities for Domestic Reform: A Study in the light of EU Experience", p142, available at www.euchinawto.org

⁸ Ibid, 142-143.

among government departments. No matter which approach for demarcation discussed below is adopted, the relevant government departments such as the NDRC and the MOF lose only part of their powers; thus there will possibly be less resistance to amend the two laws to make them mutually exclusive than the unification of the two laws. For some academics, this approach can, to certain extent at least, eliminate uncertainties and inconsistencies, and consequently the whole government procurement law system can be gradually improved. For practitioners, for example, tendering agencies, this approach can make it possible for them to continually engage in certain government procurement activities,⁹ and it can be easier for them to know which rules they should follow in practice.

Secondly, as mentioned, the GPA does not require Parties to have a single legislative act regulating all government procurement activities. Rather, the development of the EU procurement legislation shows it is appropriate to have separate legislation to regulate government procurement of goods, services and works respectively at a certain stage of development of government procurement legislation. As mentioned in chapter 3(4.1), until 2004, three previous Directives regulating the procedures for the award of services, supply and works contracts was consolidated into a single directive – Directive 2004/18/EC. Such an approach that has separate laws regulating different kinds of procurement contracts first and then consolidates them into a single legislative act when the time is ripe seems also appropriate for China; as a gradual reform is actually the main reform method using in various fields in China.

To draw a demarcation line between the two laws, one possibility is to make clear that the

⁹ If the GPL also regulates government procurement of works through tendering, under Article 18 requiring that the procuring entity must entrust the *non-profit* institution for centralised procurement to procure, tendering agencies *seeking profits*, which currently can be entrusted to procure works through tendering under the TL Article 12, will not be eligible to act as a procuring agent.

GPL regulates i) government procurement of general goods and services *and* works-related goods and services through any procurement method, and ii) government procurement of works *not* through tendering; the TL applies to government procurement of works through tendering. The other possibility is to clarify that the TL governs government procurement of works *and* works-related goods and services through tendering; while the GPL applies to i) government procurement of works and works-related goods and services *not* through tendering and ii) government procurement of general goods and services through any procurement method.¹⁰

As far as the supplier review system is concerned, it should be noted, to have separate laws does not necessarily mean that two sets of rules on supplier review should be provided respectively in each law. No matter which approach for demarcation is used, it is still possible to provide a unified supplier review system to *all* government procurement disputes by making clear that the GPL rules on supplier review also apply to complaints regarding government procurement activities regulated by the TL such as complaints regarding government procurement of works through tendering.

In theory, as explained in chapter 7(4.1), it can be argued that the supplier review system formally established in the GPL which was promulgated later than the TL should be used, while handling complaints regarding government procurement activities regulated by the TL. Further, there is no need to lay down a set of rules on supplier review specially for complaints regarding government procurement activities regulated by the TL.

To apply the GPL supplier review system to all government procurement complaints

¹⁰ In addition, there are other suggestions on the demarcation between the two primary laws. For example, Qian suggests that the TL applies to *all* government procurement contracts conducted through tendering. (See Qian, Zhongbao, "Suggestions on ending the battle between the Tendering Law and the Government Procurement Law", available at <http://laochan.chinabiddingblog.com>).

concerns the issue of which government department, the financial departments or other government departments concerned, are responsible for handling complaints. This seems sensitive as it concerns the allocation of administrative power among government departments. One option is to maintain the current allocation of administrative supervision over government procurement activities but require other government departments concerned, as with the financial departments, to apply the GPL rules on supplier review. Another option is to entrust the review task solely to the financial departments, which is more appropriate and practicable, as discussed in 3.3.2.

3. Reforming the current forum for review

As revealed in chapter 11(section 3), the current design of forum for review in China is quite unsatisfactory. Similar to the Model Law, the GPL broadly establishes a sequential three-tiered supplier review system, involving procuring entity review, administrative review and further administrative reconsideration or administrative litigation, as the main channel to solve government procurement disputes. However, many problems exist in this tiered review system, as analysed in chapter 11. In addition, arguably suppliers can bring a civil litigation against the procuring entity directly before the court. However, this civil remedy procedure plays little role in remedying suppliers and enforcing procurement rules, because the GPL and the TL offer no clear provision on the availability of such a civil litigation, as explained in chapter 11(3.5). To reform forum for review in China, this civil remedy procedure is not suggested, because administrative procedural rules are more appropriate to handle disputes regarding the conclusion of government procurement contracts, as explained further in 3.3.

Thus, the following suggestions focus on how to improve the aforesaid three tiered supplier review system.

As noted, the current tiered review system is quite rigid, time consuming and ineffective. This is because, first, a compulsory procuring entity review is required, which makes it impossible for the supplier to directly seek external review. Then, the supplier has to seek an administrative review first before seeking judicial review. Also, as far as administrative review is concerned, currently, it lacks a unified administrative review body handling *all* government procurement disputes. Finally, judicial review is designed as the final review; however, the administrative division of the court is merely empowered to handle the supplier's complaint against the administrative review body but has no power to handle the dispute between the supplier and the procuring entity as explained in chapter 11(3.3). This sequential tiered supplier review system makes the review process quite lengthy; during which the disputed contract may be awarded and even performed, as happened in the cases of *Modern Wo'er* and *Yidi* introduced in chapter 11(section 2). Consequently, the suppliers may not obtain effective remedies and irregularities may not be corrected.

To make the supplier review system effective in China, it is necessary to reform the current forum for review. There are two options. One is to provide for only one forum for review - for example, judicial review only in China. As discussed in chapter 4(3.4), a State is allowed under the GPA¹¹ and APEC NBPs¹² to merely provide for judicial review or an independent and adequate administrative review as the only forum for review. Another option is to keep the tiered review system but improve it by i) providing more optional provisions to

¹¹ See Article XX.6 [Article XVIII.1].

¹² See Annex 3, 4.2.

suppliers to make it possible to simplify the levels of review, ii) unifying the administrative review body and iii) empowering the administrative division of the court to directly handle suppliers' complaints against the procuring entity. Compared with the former option, this option is better, as explained below.

As analysed in chapter 4, procuring entity review, administrative review and judicial review have different advantages and disadvantages. To offer only judicial review in China, suppliers and the procuring entity cannot enjoy the possible benefits of other review stages. More importantly, if only judicial review is available, this means that any complaint, whether it concerns serious violations or merely minor irregularities, will have to burden judicial review. This will be very costly and time-consuming, as explained in chapter 9(3.3.1).

To improve the current tiered review system, a possible solution is to provide more options on the avenue for review with suppliers. In this respect, the current three tiered review system can be simplified to a one or two tiered review system by i) changing procuring entity review from compulsory to optional and ii) allowing suppliers to raise their complaints against the procuring entity directly to the competent court, rather than requiring administrative review as the prerequisite of seeking judicial review. With such optional arrangements, the review process may include only one review stage - judicial review; or two stages of review – administrative review and judicial review, for example -; or three levels of review – procuring entity review, administrative review and judicial review (see Diagram 12.1), which depends on the choice of the supplier concerned, on the basis of its own analysis of advantages and disadvantages of different choices. This suggestion concerns reforming all three stages of the current forum for review, as elaborated below.

Diagram 12.1 Suggestions on reforming forum for review

	Procuring entity review	Administrative review	Judicial review
Current GPL provisions	<i>compulsory</i> first stage of review	the second instance review; a prerequisite of seeking judicial review	the final review
Suggestions for improvement	<i>optional</i> first instance review	i) the second instance review, if the supplier submits its complaint to the procuring entity first; or ii) the first instance review, if the supplier seeks external review directly.	i) the final review of the three-tiered review, if the supplier brings its complaint first before the procuring entity and then appeals to administrative review; ii) the final review of the two-tiered review, if the supplier first files its complaint to either the procuring entity or the financial department; or iii) the only forum for review if the supplier brings the case directly before the court.

3.1 Reforming procuring entity review – changing it from compulsory to optional

As discussed in chapter 11(3.2), the compulsory procuring entity review required in the GPL and the *MOF Review Measures* is criticised as useless, since the procuring entity or its agency often ignores the supplier's challenges or merely gives a simple reply without any substance. If compulsory procuring entity review is changed to optional, the supplier can determine whether to first complain to the procuring entity or seek external review directly, based on the consideration of potential advantages and disadvantages of procuring entity review. Further, this is not inconsistent with the GPA or APEC NBPs, which do not require a *compulsory* procuring entity review as noted in chapter 4(3.1.1).

3.2 Two options for reforming administrative review – not providing it as the prerequisite of seeking judicial review and unifying the administrative review body

As showed in chapter 8(section 2), administrative review is the core stage of the current review system. It is in the first instance administrative review that the dispute between the procuring entity and the supplier is handled by an external review body. However, the current administrative review is unsatisfactory mainly because there is no a unified first instance administrative review body, the independence of the administrative review bodies sometimes cannot be guaranteed and the procedural rules on administrative review are not clear and strict enough. To improve administrative review and thus benefit the whole review system, two different proposals explained below are suggested together, though adopting even one would improve things.

3.2.1 Not providing administrative review as a prerequisite of judicial review

The first suggestion for making the whole review system more effective is *not* to provide for

administrative review as a prerequisite of judicial review but to allow suppliers to choose to bring their case directly before the court. If a supplier decides not to choose procuring entity review first but to seek external review directly, under the system being proposed here, it can complain to the court directly. In the case that the supplier has complained to the procuring entity first, it can seek further review directly from the court; instead of applying for administrative review first and then appealing to the court. Considering that judicial review is the final review and the independence of the court may be better than the administrative review body, the supplier can, under this proposal, choose to go to the court directly, rather than seeking administrative review first. This can dramatically shorten the whole process of dispute resolution.

If the supplier, considering the possible benefits of administrative review discussed in chapter 4(3.2.2), decides to first seek administrative review, it will decrease the burden of judicial review. Further, if the dispute can be successfully solved by the administrative review body within the shorter time limit usually specially set for administrative review, this will benefit the complainant and the operation of the procurement process. Of course, if the supplier disagrees with the administrative review body's decision and appeals to the court, longer time than directly seeking judicial review will be needed.

3.2.2 Unifying the administrative review body

The second suggestion for improving administrative review and thus benefiting the whole review system is to unify the administrative review body. As discussed in chapter 8(2.2.1), currently in China, the financial departments and many other government departments are involved in handling the suppliers' complaints. When complaints concern, for example,

government procurement of works-related goods and services through tendering, it is uncertain whether the financial department or any other government department concerned is the competent review authority. Further, as mentioned in section 2, because the financial departments and other departments concerned apply different rules to handle complaints, they may follow different procedural rules and provide different remedies to the suppliers.

To solve these problems, the simplest method is to clearly provide i) the jurisdiction of the financial departments and of other government departments concerned over government procurement complaints; and ii) that all government departments involved in handling complaints apply the same rules on administrative review contained in the GPL. The financial departments and other government departments concerned may be willing to accept this approach, since it will not dramatically change the allocation of administrative power between the financial departments and other government departments concerned in the field of government procurement. However, this approach maintaining the current decentralised system can cause administrative costs waste. More importantly, the independence of the administrative review body cannot be secured, as discussed in chapter 11(3.2.1).

A better approach is to entrust only one organ with such administrative review task. For the administrative review body, under the GPA,¹³ it should be independent of the procuring entity and had certain procedural rules ensuring due process, *if designed as the final review body*, as analysed in chapter 4(3.2.1.3). Under APEC NBPs, the administrative review body can be an independent review body or a government agency not directly involved in the procurement.¹⁴ The drafters of the UNCITRAL Model Law suggests that the administrative

¹³ See Article XX.6 [Article XVIII.4, 5 and 6].

¹⁴ See Annex 3, 4.2.

review body can be “a central procurement board” or an agency “that exercises financial control and oversight over the operations of the Government and of the public administration” or a specialised “procurement review board.”¹⁵ In China, academics have made various proposals on the unified administrative review body suggesting for example, establishing the Government Procurement Supervision and Management Committees,¹⁶ the Government Procurement Committee,¹⁷ or an independent body – the Government Procurement Tribunals¹⁸ – to handle complaints. It might, however, be a more appropriate option that empowers the financial departments to be responsible for handling complaints regarding *all* government procurement activities. Why it is thought more appropriate and how it can work well are explained below.

3.2.2.1 Reasons suggesting the financial departments as the administrative review body

Firstly, the GPL clearly provides that the financial departments at all level are responsible for handling suppliers’ complaints.¹⁹ It does not expressly exclude complaints regarding government procurement of works and works-related goods and services through tendering from the jurisdiction of the financial departments. Also, suppliers defined in the GPL Article 21 include not only suppliers providing goods and services but also suppliers providing works. Thus, it can be argued that the financial departments should also be the competent authorities handling complaints regarding government procurement of works through tendering. Therefore, as far as administrative review body is concerned, what is needed is to further

¹⁵ See the Guide to Enactment, remarks on Article 54, para.3.

¹⁶ See Zeng, Liangliang, “Professor Yu An of Tsinghua University: Chinese government procurement is going astray”, *Economic Information Daily* (28 September 2005). Yu suggests that the above Committees are under the direct management of the governments at all levels..

¹⁷ See further Shi, Jichun and Deng, Feng., “Suggested Draft of Government Procurement Law”, available at www.civillaw.com.cn/article/default.asp?id=27352.

¹⁸ See Xiao, Beigeng, *The International Rule of the Public Procurement* (Beijing: Law Press, 2005), p286.

¹⁹ See Articles 13 and 55.

make clear that the financial departments are the unified administrative review bodies responsible for handling suppliers' complaints regarding *all* government procurement activities.

Secondly, it does not involve a significant adjustment of the organisational structure to entrust the review task to the financial departments. Currently, the financial departments are the competent authority responsible for government procurement, whose duties include drawing up and enforcing government procurement policies. To entrust the review task to the financial departments can benefit the unified management of government procurement. Furthermore, after the entry-into-force of the GPL in 2003, the financial departments have started to handle complaints regarding government procurement of general goods and services as the competent administrative review body. The offices and officers needed for review have been provided in some financial departments. Thus, certain administrative costs and resources needed for the establishment of a new administrative body can be saved.

In contrast, an additional organisation will be needed if a specialised review board handling only government procurement disputes is established in China. This is also the case if specialised Government Procurement Offices exercising overall supervision and control over government procurement are set up and entrusted with the administrative review task. This means that administrative costs have to be incurred for setting up the new body and maintaining its operation. It might be very difficult to establish a new organ dealing with matters on government procurement or suppliers' complaints only, as Chinese government is making efforts to simplify the administrative structure and decrease administrative costs.

It should be admitted, the aforesaid options, especially the establishment of a specialised

review board, can provide higher level independence than the option empowering the financial departments to handle complaints. However, the independence of the financial departments and its ability to fairly handle the complaints can be improved if certain reform measures discussed further in 3.2.2.2 can be adopted.

Thirdly, to suggest the financial departments as the unified administrative review body might not cause strong objection from other government departments concerned such as the development and reform departments; since the latter's substantive power in the management of government procurement of works through tendering, for example, approval of the use of selective tendering and approval of tendering agencies, will not be affected. To handle suppliers' complaints is not an easy task. Although government departments concerned are willing to lay down rules on supplier review to show their administrative jurisdiction in this area, in fact, they are often unwilling to handle suppliers' complaints. Two *Modern Wo'er* cases introduced in chapter 11 has shown that the NDRC is actually unwilling to handle the supplier's complaint, although the NDRC arguably has responsibility to handle complaints concerning tendering activities in major national construction projects under the ministerial regulation issued by the NDRC itself introduced in chapter 8(2.2.1). Also, in *Yidi* mentioned in chapter 11, the Ministry of Agriculture, to which the defendant was subordinate, declined to handle *Yidi*'s complaint. These facts indicate that the NDRC and other government departments concerned are actually not interested in handling complaints very much. Rather, they prefer such a tough review task is undertaken by others.

Finally, to entrust the administrative review task to the financial departments does not contravene the relevant provision of the GPA and APEC NBPs. As noted earlier, the GPA

requires that the administrative review body, when working as the *final* review body, must be independent of the procuring entity and have certain judicial type procedural rules. In China, the financial departments are generally independent of the procuring entities but have only some of the GPA procedural rules. However, as they do not work as the *final* review body, the aforesaid GPA requirement does not apply to the financial departments. Also, it is acceptable to empower the financial departments to handle complaints under APEC NBPs noted earlier.

3.2.2.2 Measures ensuring that the financial departments function well as the administrative review body

To make the financial departments as the administrative review body functions well, the following reforms are suggested.

Firstly, all financial departments above the county level should establish a specialised review office and provide trained review officers to be specially responsible for handling complaints. In other words, there should be two separate sections in the office dealing with government procurement matters in the financial departments: one section is responsible for handling suppliers' complaints only; the other deals with other matters related to government procurement. This proposal comes from the suggestion contained in the Guide to Enactment (GTE) of the Model Law, stating if the administrative review body is one undertaking approval of certain decisions of the procuring entity, "care should be taken to ensure that the section of the body that is to exercise the review function is independent of the section that is to exercise the approval function."²⁰ In addition, the financial departments should strength training in particular legal training to the review officers to improve their ability to correctly handle complaints under law. These measures can benefit the impartial settlement of

²⁰ See remarks on Article 54, para.3.

complaints.

Secondly, to ensure that the financial departments can handle the complaints impartially, suppliers can be allowed to decide to bring the complaint either before the financial department at the same level with the procuring entity or the financial department at the higher level.

Currently, under the *MOF Review Measures* Article 3, a supplier seeking administrative review must complain to the financial department *at the same level* with the procuring entity. Such a provision is convenient for suppliers, especially for local suppliers, as they can make their complaints locally and thus save time and costs. It is also convenient for the financial department concerned and can save administrative costs, as the financial department can collect evidence and conduct investigation locally. However, whether the financial department can fairly handle the complaint may be doubted by especially non-local suppliers, since the review body and the procuring entity are both under the management of the same local government. In addition, in the case that the complaint concerns the decision approved by the financial department, the suppliers may doubt whether the review office of the same financial department can handle the complaint impartially.

It would be helpful for increasing suppliers' confidence in the impartiality of the financial department as the administrative review body and keeping the independence of the review body if the supplier is allowed to raise the complaint to the higher financial department. The higher financial department, for example a provincial financial department, is in a higher position in bureaucratic rank than the procuring entity, for example the education bureau of a city; and it may be far from the latter and the local government. These can help it not affected

by the local protectionism and handle complaints fairly. Nevertheless, to file a complaint to the higher financial department usually located in other place may be inconvenient for both the complainant and the review body; and also more time and more costs may be needed.

It should be noted that China has initiated the GPA accession negotiation and will possibly join the GPA in the future. For complaints regarding government procurement projects covered by the GPA, it seems appropriate to provide that these complaints are handled by provincial financial departments or the MOF, when they are raised by foreign suppliers, considering that these complaints might be complex and influential.

Thirdly, all procurement centres conducting centralised procurement must be completely separated from the financial departments. As pointed out in chapter 11(3.2.1), although the GPL Article 60 clearly provides that the financial departments must not establish an institution for centralised procurement or participate in procuring items for the government, certain provincial procurement centres are still subordinate to the provincial financial departments. When these procuring agencies are involved in suppliers' complaints, the financial department is actually not independent of the procuring entity and may not handle the complaint impartially. If the financial departments can, under Article 60, remove the procurement centres from their management and do not participate in the procurement, they will be independent of the procuring entity and its agency, which will benefit the fair resolution of the dispute.

Fourthly, it is necessary to add the provision on withdrawal of review officers to ensure that the complaint can be fairly handled. The *NDRC Review Measures* Article 13 clearly requires personnel of the administrative review bodies concerned to withdraw on their own initiative if i) he is the close relative or the leading cadre of the defendant or of the

complainant; ii) he was the senior officer of the defendant in the last three years; or iii) he has other relationship with the defendant or the complainant, which may affect he handle the case impartially. There are no such requirements in the *MOF Review Measures*. To ensure the fair resolution of complaints, the above requirement and a further provision, which allows the supplier to demand the withdrawal while considering that the review officer has an interest in the complaint, should be placed on the review officers of the financial departments.

Finally, if those judicial-type procedural rules required in the GPA for the last instance administrative review body can be set for the financial departments, it will be helpful for the impartial resolution of the dispute. As noted, the GPA Article XX.6 [Article XVIII.6] requires the last instance administrative review body to have certain procedural rules. The *MOF Review Measures* has included some GPA procedural rules. For example, it requires that the procuring entity must make a written explanation after receiving the duplicate of the complaint and submit the relevant evidence,²¹ and that the financial department must make written decisions within 30 workdays and provide the legal basis for the decision.²² Also, it allows the complaining supplier to entrust an agent to handle the complaint related matters,²³ indicating that the supplier has the right to be presented and accompanied. However, unlike the GPA, the *MOF Review Measures* do not require that the complaint is handled through hearing,²⁴ the proceedings take place in public and witness can be presented. If these GPA requirements are added for financial departments, it will benefit the fair resolution of complaints; since hearing and the presentation of the witness will be helpful for the review officers to learn the truth, and oversee from the public can bring pressure to the financial

²¹ See Article 13.

²² See Articles 20 and 21.

²³ See Article 9.

²⁴ See Article 14.

department and its review officers to impartially handle the complaint.

3.3 Reforming judicial review - empowering the administrative division of the court to directly handle suppliers' complaints against the procuring entity

As suggested above, the supplier unsatisfied with the financial department's decision can seek further judicial review. However, in China, administrative litigation deals only with specific administrative acts conducted by government departments and organisations having administrative functions and its personnel, under the *Administrative Litigation Law* (ALL) Article 2 and Article 1 of the *Explanatory Notes of the Supreme People's Court on Some Issues of Implementing the Administrative Litigation Law*.²⁵ Government procurement activities are not regarded as specific administrative acts and thus not directly handled by the court in administrative litigation. As noted in chapter 10(2.3.1), currently, the administrative division of the court deals only with the supplier's complaint against the administrative review body and examines merely whether the administrative review body handles the supplier's complaint against the procuring entity in due time or properly. It does not handle the supplier's complaint against the procuring entity and has no power to examine whether the procuring entity followed the relevant procurement rules and order it to suspend the award process, correct irregularities and set aside its improper decisions. Because of these, the supplier cannot obtain effective remedies in administrative litigation, as revealed in chapter 11(3.3).

To make judicial review effective for resolving procurement disputes, it is necessary to allow the administrative division of the court to directly adjudicate government procurement disputes between suppliers and the procuring entities. How to empower the administrative

²⁵ It was effective on 10 March 2000. (Legal interpretation [2000] No.8)

division of the court to handle the aforesaid disputes and the benefits of such reform are explained below.

3.3.1 Options on empowering the administrative division of the court to handle the disputes between suppliers and the procuring entities

To allow the administrative division of the court to directly handle suppliers' complaints against the procuring entity, there are two options. One is to treat the procuring entity's government procurement activity as specific administrative act, the legal relationship between the procuring entity and suppliers in the pre-contract stage as an administrative legal relationship, and the dispute between the supplier concerned and the procuring entity or its agency as an administrative dispute.²⁶ However, it is not always appropriate to treat procuring entities' government procurement activities as specific administrative acts, because certain procuring entities do not exercise administrative functions, as explained below.

Under the GPL, procuring entities covered by this law include not only government departments but also institutions and public organisations using fiscal fund. The problem is that in China, the nature of institutions and public organisations are quite complex. Some of them exercise an administrative function; some of them such as public universities do not exercise any administrative function. More importantly, after China joins the GPA, it is predictable that the coverage of the future government procurement law will be extended, including to cover for example certain state enterprises.²⁷ In China, some of state enterprises enjoy certain administrative function; some of them do not have such function. Since the ALL is designed to merely regulate specific administrative acts of the government departments and

²⁶ See Xiao, fn.18 above, pp276-287.

²⁷ See Wang, Ping, "Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and Other Countries with a large State Sector into the Global Trading System" (2007) 10 *J. Int'l Econ. L.* p887.

other bodies and organisations *exercising administrative function* and their personnel, it seems inappropriate to treat procurement activities conducted by state enterprises, institutions or organisations *not* exercising administrative function as specific administrative acts. Thus, it seems unacceptable to empower the administrative division of the court to adjudicate the supplier's complaint against a state enterprise, an institutions or organisation *not* exercising administrative function.

A better approach might be to define government procurement contracts as administrative contracts and empower the administrative division of the court to handle administrative contracts; so that it can examine the legality of the conclusion of contracts and thus handle the disputes concerning both *conclusion* and performance of the contract between the supplier and the procuring entity. To make such an approach work, the following reforms are needed.

Firstly, it is necessary to categorise government procurement contracts as administrative contracts, no matter how the coverage of the future government procurement law is adjusted for the accession to the GPA (e.g. by including state enterprises). Accordingly, the nature of the procuring entity – whether it is a government department or any others such as a state enterprise not exercising administrative function – will not affect the jurisdiction of the administrative division of the court. The current GPL actually defines government procurement contracts as civil contracts,²⁸ mainly because the exercise of administrative power is not involved in concluding contracts. However, many academics argue that government procurement contracts are *administrative* contracts, since they have certain essential characters of administrative contracts, such as using public funds, seeking public

²⁸ See Article 43.

interest and following special procedural rules in concluding contracts.²⁹

Secondly, it is necessary to amend the ALL, as suggested by certain academics, to extend the ALL's scope of acceptance of cases to include not only disputes concerning specific administrative acts but also disputes regarding administrative contracts.³⁰ It is possible that such a suggestion will be adopted in the reform of administrative law and administrative litigation law. This is because, with the reform of governments' administrative function, a great deal of administrative contracts including not only government procurement contracts but also contracts for transferring right to the use of land, agreements on contracted management for example, are extensively used in practice; thus, there is an urgent need to regulate these contracts in administrative regulation. Currently, the regulation of these administrative contracts has been included in the fourteenth draft of the *Administrative Procedures Law*³¹ which has been listed in the national legislative agenda.³²

3.3.2 Benefits of settling suppliers' complaints through administrative litigation

Compared with rules of the *Civil Procedures Law* (CPL), rules of the ALL are more suitable for handling procurement disputes, although they are not specially designed for such disputes.

Firstly, the relevant ALL time limits are much shorter than those provided in the CPL, which is quite helpful for rapid resolution of procurement disputes. For example, as mentioned in chapter 9(3.1.3), in civil litigation, the basic time limit for the first instance court

²⁹ See further Luo, Haocai & Zhan, Zhongle, (eds.) *Administrative Law*, 2nd ed. (Beijing: Peking University Press, 2006) p272; Wang, Yaqin, *Government Procurement and Administrative Review* (Beijing: The People's Court Press, 2004) pp251-257; Xiao, fn.18 above, p286.

³⁰ See Luo & Zhan, *ibid*, p325; Pi, Chunxie, (eds.) *Comparative Research on Administrative Procedures Law* (Beijing, Press of Public Security University of China, 2000), p438.

³¹ See chapter 7. See further Ying, Songnian, "Comments on the Administrative Procedures Law (draft)", available at http://www.so100.cn/html/lunwen/falvlunwen/xingzheng/2006-3/18/2006063180140383676437101_4.htm

³² See "The list of the legislative programmes of the Standing Committee of the Tenth National People's Congress (76 in total)", *China Youth Newspaper*, 1 March 2004.

to make its judgment is 6 months;³³ in administrative litigation, however, it is merely 3 months.³⁴

Secondly, it is impossible in the civil litigation to suspend the award of the procurement contract before the case is handled, as there is no provision on suspension in the CPL. However, the ALL Article 44 clearly provides that in the process of legal proceedings, the plaintiff can apply for suspending specific administrative acts and the court shall suspend the execution of the act if it thinks the execution can cause irreparable loss and suspension will not harm public interest. After amendment, this provision can be applied to suspend the conclusion of procurement contracts as well. This will be very useful for remedying the supplier and correcting irregularities.

In addition, the ALL Article 54(2) states that the court in administrative litigation shall wholly or partly annul the specific administrative act and may order the defendant to undertake the act anew in certain circumstances explained in chapter 10(2.3.1). Also, under Article 67, the plaintiff has the right to claim compensation when its legal right and interest is harmed by the defendant's specific administrative act. If disputes regarding administrative contracts including the conclusion of government procurement contracts are allowed to be handled through administrative litigation, the aforesaid provisions can be used while handling disputes regarding procurement contracts award. This means remedies of annulment and damages can be available to the complaining supplier in administrative litigation.

Thirdly, in civil litigation, the burden of proof is placed on the plaintiff under the CPL Article 64. However, it is difficult or sometimes impossible for the complaining supplier to

³³ See the CPL Article 135.

³⁴ See the ALL Article 57.

get key evidence (such as the record of bids evaluation) usually possessed by the procuring entity, and thus discourage it from seeking judicial review. However, in administrative litigation, the defendant must undertake the burden of proof under the ALL Article 32. This means in administrative litigation, the procuring entity must prove for example why the contract should not be awarded to the complainant. This can encourage suppliers to seek judicial review and consequently benefit the enforcement of the procurement rules.

Finally, the system of administrative litigation is currently under reform. To make administrative litigation more effective, some academics suggest establishing specialised administrative courts, or allowing the plaintiff not to bring the case before the administrative division of the court at the same level in bureaucratic rank with the defendant but before the administrative division of the higher court.³⁵ The latter suggestion, to certain extent, have been adopted in a judicial interpretation effective on 1 February 2008 making clear that a plaintiff can bring an administrative case directly to the intermediate court.³⁶ This is helpful for improving the independence of the courts and can benefit the impartial resolution of disputes. For civil litigation, because of its nature – handling disputes between subjects of equal footing, it is impossible that the aforesaid measures are taken, although other measures may be adopted to ensure that civil cases can be fairly handled.

4. Revising provisions on standing and the time limit for raising complaints

4.1. Giving standing not only to actual suppliers but also potential suppliers

As analysed in chapter 5(2.1.1), it can be interpreted that the relevant provision of the GPA

³⁵ See Ma, Huaide, (eds.) *Judicial Reform and the Improvement of Administrative Litigation System*, (Beijing: University of Politics and Law Science of China Press, 2004) pp3-52.

³⁶ See Article 3 of the *Provisions of the Supreme People's Court on Some Issues of Jurisdiction of Administrative Cases*. (Legal interpretation [2008] No.1).

and APEC NBPs³⁷ give the right to review to both actual suppliers and potential suppliers. However, as noted in chapter 9(2.1.1.2), under the GPL and the *MOF Review Measures*, in China, only actual suppliers have the standing to make a complaint; potential suppliers are excluded from the scope of complainants. This can result in that the irregularity cannot be rectified in certain cases and that certain aggrieved suppliers cannot receive protection, as analysed in chapter 11(4.1).

Thus, to ensure compatibility with the standard of the GPA and APEC NBPs and to ensure an effective system of remedies for both domestic and international purposes, it is necessary to clearly stipulate in the future revised government procurement law that both actual suppliers and potential suppliers have the right to raise a complaint if they believe their lawful rights and interests are infringed in the procurement contract award process.

4.2. Changing the time limit for raising complaints

As discussed in chapter 5(3.1.3), to ensure that suppliers have sufficient time to complete preparatory work for making complaints, the GPA Article XX.5 [Article XVIII.3] requires to give suppliers *at least* 10 days, from the time when the basis of the challenge became known or reasonably should have become known, to initiate their challenges. However, as noted in chapter 11(4.2.1), the GPL provides for a 7 workdays time limit, which is slightly shorter than the GPA requirement.

At least, the suppliers should be given 10 days to initiate complaints to satisfy the above GPA minimum requirement. However, a better option for China may be to adopt the time limit suggested in the Model Law Articles 53(2) and 54(1) as the basic time limit and provide further provisions as explained below.

³⁷ See the GPA Article XX.1 (Article XVIII.1 of the revised GPA); APEC NBPs, Annex 3, 4.1.

First, as discussed in chapter 5(3.1.1), the Model Law gives suppliers 20 days to initiate complains. This time limit can be introduced into China. It is suggested that this time limit begins to run when the supplier knew or should have known of the violation. For example, if a supplier attends the bids opening and finds irregularities in opening bids, the time limit for initiating a complaint for this supplier runs from the date of bids opening. To ensure that suppliers can learn the procuring entity's violation, it is important to provide suppliers with relevant information such as the award decision in time. As noted in chapter 9(3.2.1), Article 8(4) of the *Publicity Measures* mentioned in chapter 7(2.3) clearly requires that government procurement information including the award notice must be published, which can ensure that suppliers can learn the award decision in time.

Next, it may further provide that the above 20 days time limit can be extended by the review body in special circumstances, (for example in the case that the supplier cannot raise a complaint within the above time limit due to force majeure); but in any event, complaints must be made within 3 months from the date when the violation occurs.

The above proposal can strike a balance between the protection of public interest and suppliers' interests and ensure legal certainty to certain degree. First, the clear time period of 20 days suggested above can provide sufficient time for suppliers to complete preparation for challenge in most cases. In special cases, suppliers can apply for extension of the above time limit. Meanwhile, this clear time limit can encourage suppliers to initiate proceedings promptly to reduce disruption to the procurement. Second, the maximum period of 3 months for initiating complaints suggested above can avoid legal uncertainty and delay caused by complaints brought a long time after the occurrence of the violation.

5. Providing more detailed and clear rules on the grant of remedies

As revealed in chapter 11(section 5), one problem related to remedies is that, in China, provisions on remedies of suspension, setting aside and damages are quite simple, lacking clear and detailed stipulations on the conditions for using these remedies. Further, due to poor legislation skills, the relevant provisions on the use of a remedy such as annulment contained in the GPL and its implementing regulation are inconsistent. These problems can be solved by providing more detailed and clear provisions on these three remedies, as explained below.

5.1 Suggestions for improving the suspension remedy

As analysed in chapter 6(3.1), the GPA clearly states suspension of the procurement process shall be provided in domestic review procedures.³⁸ Also, the remedy of suspension is required in the EU regime and recommended in the Model Law.

As discussed in chapter 10(section 3), the suspension remedy is provided in the current Chinese supplier review system. However, it is only available when the financial department as the first instance administrative review body handles complaints. Further, whether to suspend the award process is at the discretion of the competent financial department, due to the lack of detailed provisions on the conditions for suspension. Consequently, it is very difficult for the supplier to be awarded a suspension. As revealed in chapter 11(5.1), in practice, it is easy to find cases that the contract had been signed or even performed before the complaint is finally handled, which can makes it difficult or impossible for suppliers to get an effective remedy.

To improve the provisions on suspension, two suggestions are put forward. One is when

³⁸ See Article XX.7(a) [Article XVIII. 7(a)].

suppliers seek external review – administrative review or judicial review -, the law should adopt a semi-automatic approach recommended in the Model Law to suspend the award process for 7 days and then allow the external review body to decide whether to prolong suspension, at the request of the complainant. Another suggestion is to make clear conditions for suspension. These suggestions are fully explained in 5.1.1. Then, the benefits and problems of the reform are discussed in 5.1.2.

5.1.1 A semi-automatic suspension and conditions for use

Unlike the Model Law, suspension is not suggested in procuring entity review in China because of the following considerations. One is that procuring entity review is suggested in 3.1 to be changed from compulsory to optional. If a supplier believes that a suspension is needed, it can lodge its complaint directly to the financial department or the court. The other is that the period of procuring entity review is relatively short – 7 workdays only. A more important consideration is that concluded contracts are allowed to be annulled by the external review body, as further explained in 5.2.

Suspension suggested to be awarded while the supplier seeks external review. An automatic suspension is not suggested here since it can result in undue disruption to the procurement process, as analysed in chapter 6(3.6). For striking a balance between the protection of the aggrieved supplier's interest and the avoidance of excessive disruption to the procurement process, it is suggested to use the semi-automatic approach recommended in the Model Law. This semi-automatic suspension will be applied not only before but also *after* the procurement contract is signed, provided i) the contract has not been performed and ii) the conditions for suspension discussed below, which are based on the provisions of the Model

Law considered in chapter 6(3.2) but with slight changes, can be satisfied by the complainant. To speak concretely, the suggestion on the semi-automatic approach includes the following three points:

Firstly, the supplier should be allowed to apply for a suspension of 7 days while seeking external review. If it can satisfy the following conditions which are easy to be fulfilled in general, the review body should order such a short period of suspension within 2 workdays; unless there is one of circumstances under which suspension is prohibited as considered further below. The conditions for the initial short period of suspension include three points. First, the complaint is not frivolous. Second, the supplier shall demonstrate in writing the procuring entity's violations and state it will suffer irreparable injury in the absence of such a suspension. Finally, circumstances that can lead to the non-application of a suspension explained below do not exist.

Secondly, the complainant may require prolonging the suspension to 30 days. However, whether the prolongation is allowed is decided by the review body, on the consideration of the following three factors. The first is whether the supplier's case is arguable. This means that the review body needs to see whether the complainant has clearly demonstrated the procuring entity's infringements and whether these violations are serious enough, which means if they were proved, it is likely that the complainant would win the case. The second is whether the prolongation is really needed. This means that the review body needs to consider whether the complainant will be at the risk of suffering irreparable damage, such as the loss of an opportunity to compete for the contract, without a longer suspension. More importantly, the review body needs to balance the complainant's interest and the interests of the public and of

other suppliers while deciding the prolongation. If the review body believes that the prolongation can cause serious adverse affection to the public or other suppliers' interests, it may deny ordering a longer suspension. The GPA and the EU regime clearly allow such a "balance of interests" test, as explained in chapter 6(3.4 and 3.3). However, it is difficult to decide whether to agree the prolongation of suspension in each case. Also, how effective suspension is will depend very significantly on how the review body makes the balance in practice – whether it is more sympathetic to the public interest and the winning supplier's interest or the interest of the complainant and the procurement law in a particular case.

Finally, it is necessary to learn from the Model Law (Article 56(4)) to explicitly provide that the provisions on suspension do not apply if "urgent public interest considerations require the procurement to proceed".

5.1.2 Benefits and problems of adopting a semi-automatic suspension

The above design on the application of a suspension can, to a certain degree, balance the protection of the aggrieved supplier and the protection of the interests of the public and of the third parties. The aggrieved supplier can be encouraged to seek an external review, since it is easy for it to seek the suspension of the procurement process for 7 days and it is possible to suspend the procurement proceedings longer to 30 days. This makes it possible that the complainant still have an opportunity to compete for the contract after the dispute is handled. Also, the procuring entity can be encouraged to enforce procurement rules properly to avoid the interruption to the procurement process caused by the initiation of a complaint, and to correct promptly irregularities to avoid the prolongation of a suspension.

For the public and the third parties, the above design can avoid the excessive disruption

to the procurement process, so that their interests cannot be harmed by the failure of completion of a procurement contract as planned. As explained above, the use of suspension is not unlimited. First, the initiation of a complaint does not necessarily lead to automatic suspension of the award process for 7 days. More importantly, whether a suspension, including the initial short period of suspension, is awarded is decided by the review body. Further, for the urgent public interest consideration, a suspension will not apply. Finally, the maximum period of suspension is limited to 30 days.

However, the above design means that the award of a suspension is determined by the review body on a case by case basis, which requires the review officers or the judges properly exercise their discretion. They may exercise their discretion improperly, because of the lack of good knowledge on procurement, or the flexible provisions on suspension demonstrated above, or intentional favoritism to the procuring entity or to the supplier.

5.2 Suggestions for improving the remedy of setting aside

The issue of whether concluded contracts can be annulled still needs to be carefully considered, even if the suspension of the procurement process or of concluded contracts has been suggested above. This is because the complaint may not be handled during the aforesaid maximum period of suspension; and thus it is still possible that the disputed procurement contract is signed pending the resolution of the dispute. Furthermore, the supplier may not know and miss the chance of suspension in certain cases, for example when the contract was signed on the same day when the award decision was announced.³⁹ Although the supplier can apply for the suspension of the concluded contract while initiating proceedings, this remedy

³⁹ This is possible under Articles 46 of the GPL and of the TL, as they merely provide that the procuring entity shall conclude the contract with the winning supplier within 30 days from the date of issuance of the award notification but do not require a delay between notification of award and conclusion of the contract.

may be insufficient for the protection of the supplier's interest; since the dispute may not be settled during the period of suspension, as explained above. Thus, the annulment of concluded contract as an effective remedy for suppliers is still needed.

As discussed in chapter 10(4.1), currently in China, setting aside concluded contracts is allowed when the complaint is handled by the financial department, provided the contract has not been performed. It is suggested here to allow the annulment of conclude contracts while the supplier seeks external review, because of the following considerations.

Firstly, as discussed in chapter 6(4.1), allowing the annulment of concluded contracts can benefit the protection of the aggrieved supplier's interest and the enforcement of the procurement rules. Adverse effects of annulling concluded contracts to the public and the winning supplier can be decreased by giving the review body discretion to decide not to award this remedy and indicating conditions for such a decision, as explained below.

Secondly, the annulment of concluded contracts is allowed under the GPA and APEC NBPs, which have no provisions precluding domestic review bodies from interfering with concluded contracts, as analysed in chapter 6(4.4.and 4.5).

Finally, allowing the annulment of concluded contracts is a better idea than the introduction of a mandatory standstill period before the conclusion of contracts, in view of providing effective remedies to suppliers. To ensure that suppliers can get the best remedy – having a chance to compete for the contract –, there are two options. One is to provide for a standstill period between the notification of the award decision and the conclusion of the contract, as recently provided in the new EU Remedies Directive discussed in chapter 6(4.3); so that suppliers can learn of the award and challenge it before the contract is concluded.

However, this approach can result in the situation that almost every procurement process, including the procurement process conducted strictly under the procurement rules, has to delay a period of time, which “seems disproportionately disruptive”.⁴⁰ In contrast, another option – allowing the annulment of concluded contracts affects only the disputed procurement contract.

As analysed in chapter 11(5.2), certain current provisions on the annulment of concluded contracts contained in the GPL and the *MOF Review Measures* are unreasonable, overlapping and inconsistent. They are also not detailed enough, not indicating conditions for annulling concluded contracts. To improve provisions on the annulment of concluded contracts, three suggestions discussed below are put forward.

First, it is necessary to indicate, in the revised legislation, factors that the review body should consider while deciding whether to annul concluded contracts. These factors may include the following points. The first is whether the contract has started to be performed. If so, the contract cannot be annulled; unless the winning supplier has a fault, for example, it won the contract as a result of fraud. However, a difficult point is to define the commencement of the performance. It is better to indicate what constitutes the commencement of the performance. For example, it may be indicated if the winning supplier has signed the purchase contract with a seller for performing the disputed contract, this procurement contract will be treated as a contract that has been started to be performed. If the winning supplier is negotiating with the seller, the procurement contract will be deemed as the non-performed contract. The second is whether the procuring entity’s violation is clear and

⁴⁰ See Arrowsmith, S., “Implementation of the New EC Procurement Directives and the *Alcatel* Ruling in England and Wales and Northern Ireland: A Review of the New Legislation and Guidance”, (2006) 3 *P.P.L.R.* p86 at p132.

serious. If, for instance, the procuring entity indicated in advance that the contract would be awarded to the lowest bidder but actually awarded to another supplier, the contract should be annulled. The third is whether the complaining supplier knew of the error. If it did not know the violation before the conclusion of the contract, the concluded contract can be set aside. The last point is whether the public interest can be adversely affected by the annulment of concluded contracts. For reasons of public interest, the review body may decide not to annul a contract.

The second suggestion is to clearly require that the procuring entity must re-run the procurement after the contract is annulled. As analysed in chapter 11(5.2), the GPL Article 73(2) stipulates that the concluded contract that has not yet been performed can be annulled and then *select a new winning supplier from among the remaining qualified suppliers*. This unreasonable provision should be amended. A more reasonable provision is to order the procuring entity to conduct the procurement proceedings afresh in the case that the contract is annulled, as stipulated in the *MOF Review Measures* Article 19(2), to ensure that irregularities can be rectified.

The third suggestion is to delete overlapping provisions of the implementing regulation. As noted in chapter 11(5.2), Articles 18(3) and 19(2) of the *MOF Review Measures* are overlapping and conflicts each other, because they both concern concluded contracts reached on the basis of defective procurement documents but provide different measures to deal with them. To solve this problem, the solution is to delete Article 18 specially providing remedy for defective procurement documents.

5.3 Suggestions for improving the damages remedy

In China, as introduced in chapter 10(5.1), provisions on the damages remedy can be found in the GPL Article 73(3) and the *MOF Review Measures* Article 19(3); however, they do not provide the extent of compensation and detailed conditions for awarding damages. Thus, it is almost impossible for the supplier to predict whether it can be awarded compensation and how much compensation may be awarded, as discussed in chapter 11(5.3). To make clear these issues is quite important, since they can decide to relative degree the role of such a remedy in protecting the supplier's interest and ensuring the enforcement of the procurement rules, as analysed in chapter 6(5.6). How to make clear the extent of compensation and the conditions for damages in China are explained below.

5.3.1 Suggestions on the extent of compensation

The extent of compensation, as considered in chapter 6(5.1), may be limited to the bid protest or the tender preparation costs only, or extended to include compensation of lost profits or punitive damages. The Model Law provides for two options – compensating reasonable costs or loss in connection with the procurement proceedings - for enacting States for choice. In the EU regime, the extent of compensation is not made clear; however, it is normally presumed in theory and the Member States' case law that the aggrieved supplier can claim for the compensation of lost profits.⁴¹ Under the GPA and APEC NBPs, the compensation for damages can be limited to the costs of tender preparation or protest only. For China, the present author suggests limiting compensation to the tender preparation costs *and* bid protest costs, rather than a more generous compensation including lost profits, based on the following considerations:

⁴¹ See further Treumer, S., "Damages for breach of the EC public procurement rules – changes in European Regulation and practice" (2006) 4 *P.P.L.R.* p159 at p161.

First, the extent of compensation suggested above is consistent with the GPA and APEC NBPs, under which the minimum standard is to compensate the tender preparation costs *or* the protest costs only.

Next, to limit the compensation to the tender preparation costs *and* bid protest costs can, to a certain extent, strike a balance between the protection of the aggrieved supplier's interest and protection of the public interest, as explained below.

In the first place, the above limited compensation suggested will not substantively affect the protection of the supplier's interests in most cases, as two other effective remedies - suspension of the award process and setting aside concluded contracts – are available to the supplier, as suggested above. If the supplier wants to obtain a better remedy – having a chance to participate in the procurement competition -, it can initiate a complaint earlier when it is still possible that the award process is suspended or a concluded contract is annulled. If, for any reason, the supplier fails to make a complaint earlier to seek a better remedy, it is still able to seek remedy recovering its tender preparation costs and the costs for raising a challenge. This can at least put the supplier in the position that it has no loss for participating in the procurement competition and making a complaint.

In the second place, as noted earlier, the application of suspension and setting aside concluded contracts suggested above can cause adverse affections to the public interest. Together with these two remedies, if a generous compensation including lost profits is also required in the supplier review system, the public interest can be further adversely affected, as compensation to the aggrieved supplier is drawn from the public funds.

In the case that the violations have been proved, to order the procuring entity to

compensate the aggrieved supplier the tender preparation costs and the bid protest costs seems appropriate. On the one hand, the procuring entity should bear certain compensation if it violated the procurement rules and has caused loss to the supplier. On the other hand, the compensation suggested above will not heavily burden public funds due to its limited extent.

The last consideration is that the above proposal will not seriously affect suppliers' incentive to make complaints. As already noted, the above suggestion can put the supplier in the position that all the expenditure it spent in participating in the procurement competition and in seeking review can be compensated, although it cannot get the lost profits. If only the tender preparation costs *or* the bid protest costs can be compensated, the supplier still suffers certain economic loss. Such a result can discourage the supplier from making a complaint, as discussed in chapter 2(2.2.1).

In certain cases, however, the limited compensation suggested above may affect the supplier's incentive to sue. For example, if there are hardly any bid costs in the case of simple supplies contract, the supplier concerned may be unwilling to sue.

5.3.2 Suggestions on the conditions for awarding damages

As to the conditions for awarding damages, as discussed in chapter 6(5.2-5.5), the following three factors - i) the procuring entity made a violation during the award process, ii) the complainant has suffered damages, and iii) there is a causal link between the above two factors - are actually included in the GPA and APEC NBPs, although they are not explicitly provided in the text; also, they seem to be used in the Model Law and in the EU regime. These three factors can also be deduced from the simple provisions on compensation of the GPL and the *MOF Review Measures*, as noted in chapter 10(5.1). However, it is necessary in China to

further clarify the first two factors, concerning whether the procuring entity's violation should be serious and whether it is necessary to prove that the supplier would have won the contract if no breaches have occurred.

Firstly, while claiming damages, the supplier needs to demonstrate that the procuring entity violated the procurement rules in the procurement process. As discussed in chapter 6, in some regimes, to award damages may be conditional upon that the violation is serious or culpable. This requirement can make the proof more difficult, as the supplier may need to prove the extent of the violation and even the subjective intention of the procuring entity, such as serious negligence or willful infringement. Thus, it is not suggested to require this.

The complainant should have suffered the loss is the second factor mentioned above. This factor means that the supplier has to prove that it would win or at least has a chance to win the contract if the procurement is conducted properly. As analysed in chapter 6(5.1 and 5.6), it is difficult or sometimes impossible for the supplier to prove it would be successful in the normal case, because the procuring entity possesses almost all important documents concerning the procurement process and the selection criteria may be very complex. It has been suggested above that the defaulting procuring entity should compensate the aggrieved supplier the tender preparation costs and the bid protest costs in China. If the supplier is required to prove its possibility to win for the limited compensation suggested earlier, it may choose not to sue.

The present author suggests placing the aforesaid burden of proof on the procuring entity, mainly because of the following considerations. For balancing the protection of public interest and the protection of suppliers' interests, the compensation to the supplier suggested above is

not high. When the supplier claim such a limited compensation, it seems acceptable not to make it very difficult, to avoid affecting the supplier's incentive to sue. In addition, this might not be a heavy burden for the procuring entity that possesses all important documents and information related to the procurement process.

6. Deleting unreasonable sanctions on the complaining supplier

As discussed in chapter 11(section 6), to prevent suppliers from making malicious complaints, provisions on the imposition of sanctions on the complainant initiating a malicious complaint are made in the current Chinese supplier review system. However, as criticised in chapter 11, provisions on malicious or false complaints and sanctions contained in the *MOF Review Measures* are problematical. The most serious problem is that Article 26(1) provides that the supplier's complaints would be treated as false or malicious complaints, if the complainant has made three complaints within one year and all are found groundless. As argued in chapter 11, such a provision is totally unreasonable, as it limits the supplier's right to seek review. Thus, this provision should be deleted.

Chapter 13 Conclusions

The objective of this thesis, as noted in chapter 1, has been to provide a critical analysis of the current Chinese supplier review system and to identify and evaluate options for improvement of the Chinese system, based on the analysis of provisions on supplier review contained in the UNCITRAL Model Law, the GPA, the EU Remedies Directives and APEC NBPs. To this end, we first analysed how the key characteristics of national supplier review system are dealt with in the Model Law and the other three international instruments in the first part of this thesis (chapters 1-6); and we then discussed the current Chinese supplier review system in the second part of the thesis (chapters 7-12).

As analysed in chapter 2, a supplier review system can play a significant role in ensuring the enforcement of procurement rules through its deterrent and redress effects. Suppliers have the strongest incentive to supervise the government procurement process; and they are, as participants, perhaps in the best position to detect breaches quickly. Also, the availability of supplier review, especially, the fact that the use of this mechanism is under the control of suppliers, is particularly valuable for ensuring suppliers' confidence in procurement. The existence of the supplier review system can benefit the protection of suppliers' interests, and the public interest realised by the correct enforcement of procurement rules. The supplier review system, on the other hand, has some disadvantages. Suppliers may be reluctant to use this mechanism because of fear of retaliation, procedural difficulties, absence of sufficient incentives and legal costs; over deterrence may be caused because of fear of suppliers' complaints; inappropriate compromise between the procuring entity and the supplier may be concluded because of the supplier's threat of legal action; disruption to the procurement

process may be caused; and the public cost has to be incurred for private compensation. These problems should be considered while designing a supplier review system. They can be reduced to certain extent, although cannot be completely solved, by a well-designed supplier review system. A key question for this thesis has been how to harness the potential advantages identified above whilst the same time taking account of the potential difficulties and problems, in the particular context of China and building on the foundations already laid down in the Chinese system.

So far as the current position in China is concerned, we have seen that the position is rather complex and the supplier review system not yet fully developed. As introduced in chapter 7, in China, the *Tendering Law* (TL), which has only one article concerning supplier review, was first enacted in 1999 to specially regulate tendering activities. Then the *Government Procurement Law* (GPL) was promulgated in 2002, which provides a basic legal framework for China's government procurement reform. It establishes a new challenge system by providing basic rules on supplier review. Subsequently, many implementing regulations, including the *NDRC Review Measures* (for construction projects) and the *MOF Review Measures*, were adopted to implement the TL and the GPL respectively. The cross-application of the GPL and the TL is the most outstanding feature of the Chinese government procurement legislation. Because of the lack of a demarcation line between the above two laws and their respective implementing regulations, many ambiguities and uncertainties have been caused in the whole Chinese government procurement regime, including in the area of supplier review. The current situation on the application of rules on supplier review is quite complex, as summarised below:

i) for complaints regarding government procurement of works, if it is conducted *not* through tendering, the GPL and the *MOF Review Measures* applies; if *through tendering*,

whether the GPL / the *MOF Review Measures* or the TL and / *NDRC Review Measures* should apply is unclear.

ii) for complaints regarding government procurement of goods and services, if they are general goods and services, the GPL and the *MOF Review Measures* should apply, whether any procurement method is used. If they are works-related goods or services and purchased *through tendering*, it is unclear whether the GPL / the *MOF Review Measures* or the TL / the *NDRC Review Measures* should apply. If they are mechanical and electric products and procured *through international tendering*, it is unclear whether the *MOF Review Measures* or rules on supplier review contained in the *MOC Measures on Tendering* specially regulating international tendering in procurement of mechanical and electric products should apply.

As noted in chapter 8, it appears that government procurement complaints can be handled through two channels in China. One is civil procedures – the supplier initiates a civil litigation against the procuring entity directly before the economic or civil division of the court. However, because of the lack clear provision on such a civil litigation in the GPL and the TL and their respective implementing regulations, it is uncertain in practice whether the court accepts the above civil case. Another is administrative procedures – seeking administrative review and administrative litigation after procuring entity review, which provides the main channel of supplier review in practice. Under the GPL / the *MOF Review Measures*, resorting to procuring entity review is a precondition for seeking administrative review. Thus broadly a three-tiered review system, including compulsory procuring entity review, the first instance administrative review (undertaken by the financial departments) and a further administrative reconsideration or administrative litigation, may be invoked when complaints concern government procurement regulated by the GPL such as government procurement of general goods. However, under the TL / the *NDRC Review Measures*, procuring entity review is optional, thus a two-tiered review system including the first instance administrative review

(undertaken by other relevant government departments) and a further administrative reconsideration or administrative litigation is required for solving complaints concerning government procurement regulated by the TL such as complaints regarding government procurement of works through tendering. When the supplier is dissatisfied with the first instance administrative review body's decision or the latter fails to handle the complaint in due time, whether it applies for administrative reconsideration or initiate an administrative litigation, the administrative reconsideration organ, especially the administrative division of the court will deal with the supplier's appeal against the first instance administrative review body, rather than the original dispute between the supplier and the procuring entity.

In this thesis the present author has sought to identify problems of the current Chinese supplier review system, which can be summarised as follow:

1) Uncertainties regarding the application of rules on supplier review. It is uncertain which law and regulation – the GPL / the *MOF Review Measures* or the TL / the *NDRC Review Measures* – should apply when complains concern certain kinds of government procurement for example government procurement of works-related goods through tendering. This can make it difficult for the supplier to ascertain to which government department it should raise the complaint in the above case, and to predict how its complaint will be handled and which remedies it may receive. Also, the uncertainty of the application of legal rules on supplier review can, on the one hand, provide an excuse for the first instance administrative review body to evade its responsibility of handling suppliers' complaints; and on the other hand, make the department concerned at the risk of being sued due to non-performance of its duty. In addition, under the legal rules on supplier review contained in different law and their respective implementing regulations, the result of a particular case may be totally different, which can seriously harm certainty in proceeding and the authority of the relevant legal rules.

2) Problems related to forum for review. First, there is inconsistency and uncertainty on

whether procuring entity review is compulsory. Unlike the TL, the GPL / the *MOF Review Measures* require a compulsory procuring entity review; because the procuring entity and its agency is often unwilling to actively respond to the complaining supplier and correct violations, this compulsory review can delay the whole process of resolution of the dispute. More seriously, administrative and judicial review bodies in China lack independence, which can affect the fair resolution of procurement disputes. Sometimes, administrative review bodies are not independent of the procuring entity because they may have close relationship with the procuring agency or even participate in the procurement as a purchaser. For judicial review bodies, the lack of independence from the government is caused by a fundamental problem existing in the whole Chinese legal system - the lack of sufficient guarantees of the independence of the courts and of the judges. In addition, in China, administrative division of the court is limited to handle the supplier's complaint against the administrative review body's decision; it has no power to handle the original complaint between the supplier and the procuring entity, which makes the supplier receive no effective remedies in administrative litigation. Finally, ambiguity in seeking civil remedies in the GPL and the TL makes it difficult for the supplier to seek civil remedies by initiating a civil litigation against the procuring entity.

3) Problems related to standing and procedures. In terms of standing, one problem is inconsistency and uncertainty. The TL / *NDRC Review Measures* give the right to review to both actual suppliers and potential suppliers and possibly subcontractors and others; under the GPL / the *MOF Review Measures*, only actual suppliers have the standing to seek review. Further, the narrow scope of complainants under the latter can result in that nobody can make a challenge in certain cases for example in the case of illegal direct award, which may leave those irregularities uncorrected, and potential suppliers are unfairly treated. Also, to exclude potential suppliers from the scope of the complaints is inconsistent with the GPA and APEC

NBPs.

Problems related to procedures concern time limits and insufficient publication of the review bodies' decisions. First, the *NDRC Review Measures* and the *GPL / the MOF Review Measures* provide different time limits for initiating complaints to the first instance administrative review body and for completing review process, which means different time limits will be applied by the financial departments and other administrative departments concerned while handling different kinds of government procurement disputes. This may cause the supplier's confusion on which time limits it should respect when its complaint concerns for example government procurement of works-related goods through tendering. Also, the 7 workdays time limit for lodging a complaint provided in the *GPL* is inconsistent with the *GPA* minimum time limit of 10 days. More seriously, the completion of the review procedures in China can be quite lengthy, because i) the current time limits for completion provided for administrative reconsideration, administrative litigation and civil litigation, which apply to all kinds of cases under their jurisdictions, are quite long for the resolution of disputes regarding government procurement process; ii) the basic time limit for completing proceedings for almost all review stages can be extended; and iii) the review bodies often do not observe the time limit for completion. These problems indicate that the current administrative and judicial review procedure in China is not rapid and effective enough, which is inconsistent with the *GPA* requirements on rapid and effective domestic review procedures. Second, provisions on publication of the financial departments' decisions and of other administrative review bodies' decisions show inconsistency and the administrative review bodies often do not publish their decisions at all or do not publish the decisions as required by law or regulation. In addition, publication of the courts' judgments on government procurement cases is insufficient.

4) Problems related to remedies. It can be argued that the current Chinese supplier

review system cannot provide effective remedies to the aggrieved supplier because of the problems related to remedies of suspension, setting aside and compensation. First, the suspension remedy is only available in the first instance administrative review when the financial departments are responsible for handling complaints under the GPL and the *MOF Review Measures*, and the application of suspension in a particular case is at the discretion of the competent financial department since detailed conditions for suspension are not made clear. Because of these and the lengthy review process, it is common in China before the complaint is handled, the procurement contract had been signed and even performed.

Second, provision on the remedy of setting aside provided in the GPL and the *MOF Review Measures* and the relevant provisions of the *MOF Review Measures* are inconsistent. As noted in chapter 10(5.2), the GPL Article 73(2) is problematic, as it state annulling the concluded contract and then selecting a new winner among the remaining qualified candidates in the case the contract has not been performed, which can maintain the effectiveness of the irregular procurement activities. Also, the *MOF Review Measures* Article 18 and Article 19 are overlapping and inconsistent, which can cause confusion on which provision should be followed when the procurement documents are defective. In addition, concluded contracts can be annulled under the GPL / the *MOF Review Measures*; however under the TL, they are arguably not allowed to be annulled.

Third, as to the damages remedy, it is only possible for the complaining supplier to apply for this remedy when its complaint concerns for example government procurement of general goods and services regulated by the GPL / the *MOF Review Measures* which clearly require the procuring entity and its agency to bear compensation responsibility to the aggrieved supplier. Also, provisions on the damages remedy contained in the GPL and the *MOF Review Measures* are not clear and detailed enough, which do not indicate the extent of compensation and provide clear and detailed conditions for awarding compensation. Thus the financial

departments may merely award the minimum compensation, say protest costs, to the complaining supplier, which may discourage the supplier from making complaints, although it is not inconsistent with the relevant GPA provision and APEC NBPs.

5) Overly-strict sanctions on the complaining supplier. Unlike the Model Law and the other three international instruments, in the current Chinese supplier review system, there are provisions on the imposition of sanctions on the complaining supplier making malicious complaints in the *MOF Review Measures* and the *NDRC Review Measures*. They are inconsistent. Further, the relevant provisions of the *MOF Review Measures* are overly-strict and unreasonable, which can restrict or discourage the supplier from seeking review.

Because of these problems, it is quite difficult for suppliers to get effective remedies. Thus, it is hard to say that the current Chinese supplier review system is effective or is consistent with the provisions on domestic review system of the international instruments which may apply or currently actually apply to China, namely the GPA and APEC NBPs.

Chapter 12 has therefore put forward proposals for improving the current Chinese supplier review system. To make the current supplier review system both more effective and in harmony with the relevant standards stipulated in the international instruments, especially in the GPA, the present author has recommended the following reforms that aim to be effective yet capable of realistic achievement and also workable in the particular context of Chinese circumstances and the existing position in China.

The first is to provide a unified supplier review system to all government procurement disputes to avoid or reduce uncertainties and inconsistencies in the area of supplier review. This can be done by unifying the GPL and the TL, which is an ideal approach but difficult to be achieved in the short run. A more realistic approach in China is to make clear that the GPL rules on supplier review apply to all government procurement disputes in the case that the GPL and the TL are kept to regulate government procurement of goods and services and

government procurement of works through tendering respectively.

The second is to reform the current forum for review by improving the sequential tiered review system established in the GPL to make the forum for review clear and easy accessible for suppliers. The current tiered review system can be improved by simplifying levels of review, unifying the administrative review body, and empowering the administrative division of the court to directly handle suppliers' complaints against the procuring entity. First, the current three tiered review system can be simplified to a one or two tiered review system by providing more options on the avenue for review with suppliers - i.e. changing procuring entity review from compulsory to optional and allowing suppliers to choose to seek judicial remedy directly, rather than requiring administrative review as the prerequisite of seeking judicial review. Second, to unify the administrative review body, an appropriate option is to empower the financial departments as the unified administrative review body to handle complaints regarding *all* government procurement activities. The financial departments can function well if certain reforms suggested, such as establishing a specialised review office and allowing suppliers to bring the complaint before the higher financial department, are adopted. Third, to empower the administrative division of the court to directly handle suppliers' complaints against the procuring entity, an appropriate approach is to define government procurement contracts as administrative contracts and empower the administrative division of the court to handle administrative contracts. To make this approach work, certain reforms, including categorising government procurement contracts as administrative contracts and amending the *Administrative Litigation Law* (ALL) to allow that disputes regarding administrative contracts including *conclusion* of administrative contracts can be handled under the ALL, are needed.

The third is to revise the current provision on standing and the time limit for raising complaints. The present author suggests giving not only actual suppliers but also potential

suppliers, which currently have no standing to seek review in the GPL / the *MOF Review Measures*, the right to review to ensure compatibility with the relevant provision of the GPA and APEC NBPs. As noted in chapter 11, the current GPL time limit for raising complaints is slightly shorter than the GPA minimum period of 10 days. To strike a balance between the protection of public interest and suppliers' interests and ensure legal certainty to certain degree, the present author suggests introducing the 20 days time limit recommended in the Model Law into China and it begins to run when the supplier knew or should have known of the violation; this time limit can be extended by the review body in special circumstances; but in any event, complaints must be made within 3 months from the date when the violation occurs.

The fourth proposal is to provide more detailed and clear rules on the grant of remedies of suspension, annulment and damages. For suspension, the present author suggests adopting the semi-automatic suspension suggested in the Model Law with certain changes. When suppliers seek external review – administrative review or judicial review, the award process can be suspended for 7 days if the complaint is not frivolous and the supplier can demonstrate in writing the procuring entity's violations and state it will suffer irreparable injury in the absence of such a suspension. At the request of the complainant, the external review body can decide to prolong suspension to 30 days, on the consideration of whether the supplier's case is arguable, whether the prolongation is really needed and whether the public or other suppliers' interests can be seriously affected by prolongation. In addition, the present author suggests making clear that suspension does not apply if urgent public interest considerations require the procurement to proceed. This semi-automatic suspension is suggested to be applied not only before but also *after* the procurement contract is signed, provided the contract has not been performed and the above conditions can be satisfied.

As to the remedy of setting aside, currently in China, setting aside concluded contracts is

allowed when the complaint is handled by the financial department, provided the contract has not been performed. The present author suggests the annulment of concluded contracts, which is allowed under the GPA and APEC NBPs, is allowed while the supplier seeks external review. Further, the current provisions on annulment of concluded contracts are suggested to be improved by i) indicating in the revised legislation while deciding whether to annul concluded contracts, the review body should consider whether the contract has started to be performed, whether the violation of the procuring entity is clear and serious, whether the complaining supplier knew of the error and whether the public interest can be adversely affected by the annulment of concluded contracts; ii) clearly requiring that the procuring entity must re-run the procurement after the contract is annulled and iii) deleting overlapping provisions of the implementing regulation.

As to the damages remedy, there are provisions on this remedy in the *GPL* / the *MOF Review Measures*; however they do not make clear the extent of compensation and conditions for damages. The present author suggests limiting compensation to the tender preparation costs *and* bid protest costs, rather than a more generous compensation including lost profits. Currently in China, three conditions for awarding damages - the procuring entity's violation, and the complainant's damages, and the causal link between the above two factors - can be deduced from the simple provisions on compensation of the *GPL* and the *MOF Review Measures*. However, it is necessary to further clarify the first two conditions, concerning whether the procuring entity's violation should be serious and whether it is necessary to prove that the supplier would have won the contract if no breaches have occurred. The present author suggests not requiring the supplier to prove that the violation is serious or culpable and placing the burden of proof on whether the complaint can win the contract on the procuring entity.

The final proposal is to delete unreasonable sanctions on the complaining supplier

provided in the *MOF Review Measures*, which provides that three times groundless complaints constitute malicious complaints.

China has put foundations for a modern procurement system in place; however, it needs to build on these to develop the current system, especially the current supplier review system, to make it truly effective and also comply with letter and spirit of existing/forthcoming international obligations. To help China to move forward towards a truly modern and effective procurement system, the present author has provided some proposals on how to improve the current supplier review system in a realistic manner on what is already there by drawing on the wealth of experience that already exists in review systems globally and learning from lessons there and by considering specific situations of China.

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