

Annual Report on International Commercial Arbitration in China

2016

中国国际经济贸易仲裁委员会

China International Economic and Trade Arbitration Commission

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CHINA INTERNATIONAL ECONOMIC AND
TRADE ARBITRATION COMMISSION

Preface

Currently, the vision of the Belt and Road Initiative is becoming a reality. Governmental and non-governmental economic and trade exchanges and cooperation between China and other countries involved in the Belt and Road construction are entering into a new stage of rapid development with the initiation of a large number of cooperation projects, the preliminary shaping of an infrastructure network and the advancement of industrial cooperation along the Belt and Road. However, trade and investment disputes and conflicts are unavoidable along with the continuous progress of the cooperative projects. Therefore, efficient and impartial resolution of disputes and the protection of the legitimate rights and interests of all parties concerned are of great significance in the construction of the Belt and Road, which also creates a best development opportunity in history for international commercial arbitration in China.

The China International Economic and Trade Arbitration Commission (the CIETAC) released its 2014 Annual Report on International Commercial Arbitration in China at Beijing on 22 September 2015. That was the first annual report ever released in China on the development of international commercial arbitration in China, which is normally called the foreign-related arbitration in China. The release of the 2014 and 2015 Annual Reports on International Commercial Arbitration in China in both Chinese and English has attracted extensive attention of arbitration practitioners and researchers in and outside

China. The CIETAC decides to carry out its preparation and publication of its 2016 Annual Report as an effort to sum up the annual development of the legal system of international commercial arbitration in China, promote the perfection of China's international commercial arbitration system, the development of arbitration and the exchange of information, enhance China's influence in international commercial arbitration arena, and provide suggestions and references for future development of international commercial arbitration in China.

Through empirical analysis and theoretical research, the 2016 Annual Report on International Commercial Arbitration in China covers data analysis and legal system progress in the micro level, the improvement of arbitration practice and system in the medium level and the judicial review and industry development in the macro level so as to show the highlights in the development of international commercial arbitration in China. Specifically, based on the analysis of the data of international commercial arbitration cases in 2016, the 2016 Annual Report follows the developments of the legal system of international commercial arbitration in China, discusses the judicial supervision in the field of international commercial arbitration in China, makes special observation on the application of the International Commercial Terms (the Incoterms) published by the International Chamber of Commerce (the ICC) in such field, and takes the promotion of resolving intellectual property disputes through arbitration as an example to analyze the current situation and prospect of specified sectors of international commercial arbitration in China.

The 2016 Annual Report is divided into four chapters in addition to the Preface and the Summary of the Year. Chapter One *Overview of the Development of International Commercial Arbitration in China* is an overview of the development of international commercial arbitration nationwide, the analysis of data regarding arbitration cases in China, judicial support and supervision of international commercial arbitration cases by the Supreme People's Court (the SPC), and the development of theoretical research on international commercial arbitration in China in 2016. In the 2015 Annual Report, special observation was made on the application of the United Nations Convention on Contracts for the International Sale of Goods (the CISG) in China's international commercial arbitration. The Incoterms is another most influential legal document regarding the international sale of goods. Thus, Chapter Two of the 2016 Annual Report *Special Observation on Application of the Incoterms in International Commercial Arbitration in China* makes a special observation on the application of the Incoterms in China's international commercial arbitration. Through analysis of typical cases, the Report reveals the common problems in the application of the Incoterms by parties involved in international trade, summarizes and studies experience for China's international commercial arbitration practice, and makes recommendations for international trade practitioners and potential parties of arbitration cases. Chapter Three *Judicial Supervision of International Commercial Arbitration in China* focuses on the judicial supervision of international commercial arbitration in China, including confirmation of validity of arbitration agreements, annulment and enforcement of arbitration awards. Chapter Four *Development of China's*

International Commercial Arbitration in Specific Sectors-Promotion of Resolving Intellectual Property Disputes through Arbitration contains in-depth investigation on the status of China's intellectual property arbitration practice through analyzing relevant cases handled by the CIETAC in recent years, analyzes the existing gap between theories and practice, and puts forward proposals on pushing forward the development of intellectual property arbitration.

The 2016 Annual Report on International Commercial Arbitration in China is written by the research team of the Renmin University of China, led by Professor Du Huanfang, Vice President and Deputy Party Secretary of the Law School of Renmin University of China, and Mr. Li Bing, Director of the CIETAC Research Institute. Main team members are Professor Song Lianbin from the International Law School of China University of Political Science and Law, Dr. Shen Hongyu, judge of the 4th Civil Division of the SPC and Mr. Dong Xiao, Partner of Anjie Law Firm. The work of the members is divided as follows: *Preface and Summary of the Year* by Professor Du Huanfang, Chapter One by Professor Song Lianbin's team with participation of Mr. Dong Xiao and Dr. Shen Hongyu with Dr. Shen providing the data for *Part III, Judicial Supervision of Commercial Arbitration in China*. Mr. Liao Yuyi, postdoctoral researcher of the SPC Applied Science of Law Research Institute, and Mr. Huang Baojin, PHD candidate of private international law of China University of Political Science and Law, participated in the composition of *Part IV, Theoretical Research on International Commercial Arbitration In China*. Chapter Two was accomplished by Mr. Dong Xiao's team.

Chapter Three is written by Dr. Shen Hongyu while Chapter four by Mr. Li Xiansen, PHD candidate of International Law of the Law School of the Renmin University of China. Professor Du Huanfang and Director Li Bing compiled and edited this Report after the completion of the draft while Mr. Wang Chengjie, the CIETAC Vice Chairman and Secretary General, Dr. Li Hu, the CIETAC Party Chief and Deputy Secretary General, and Dr. Zhao Jian, the Vice President of the CIETAC Arbitration Court reviewed the draft.

We hereby acknowledge the kind support and generous assistance from the Legal System Coordination Department of the Office of Legislative Affairs of the State Council, the Fourth Civil Division of the SPC, the CIETAC, Anjie Law Firm, Renmin University of China, China University of Political Science and Law, etc. for providing information, drafting and providing advice and assessment for this Report, and extend our gratitude to Ms. Yue Jie and Ms. Yang Fan, who are both the CIETAC arbitrators, for their pertinent advice, to Ms. Zhang Bei, Mr. Liu Gang, Ms. Zhao Jinxin, Ms. Su Sa and Ms. Cai Fei of the CIETAC Research Institute for their great efforts in data collection, proofreading and typographical arrangement of the Report.

Our special thanks and appreciation also go to the following persons for their hard work in translating the Report into English: Ms. Gu Huaning for translating the Report into English, Ms. Jin Xi for proofreading of the translation of Preface and Chapter One, Ms. Lu Yahan for proofreading of Chapter Two, Ms. Liu Yang for proofreading of Chapter Three, Ms. Li Shuzhen for proofreading of Chapter Four

and Summary of the Year, and last but not the least, Ms. Jie Wang for the final proofreading of the whole English version of the Report.

The Research Team of 2016 Annual Report on International Commercial Arbitration in China

20 August 2017

Chapter One Overview of the Development of International Commercial Arbitration in China

The caseload of arbitration commissions in China continued its surging trend in 2016 with the number of foreign-related arbitration cases increasing steadily. Though no legislation was made in 2016 that relates to arbitration, the SPC issued important judicial interpretations and normative documents in 2016, highlighting its policy of supporting arbitration. Meanwhile, a number of arbitration commissions amended their arbitration rules. Concerning the research on international commercial arbitration, the methodology of empirical research was so widely used that outsiders could have a better understanding of the confidential arbitration while active discussion was made in China regarding the latest hot issues in the international arbitration community such as investment arbitration, third-party funding, interim measures, professional ethics of arbitrators and codes of conduct for agents.

I. Data Analysis of Commercial Arbitration Cases in China

Since the implementation of the 1995 PRC Arbitration Law (the Arbitration Law), Chinese arbitration commissions have maintained the increase in caseloads and dispute amounts for over 20 years, with the average annual increase rate being over 30%. In total, over 1.2 million cases involving civil and commercial disputes

with the total amount of dispute of RMB 2,260 billion have been accepted. The rate of errors found through judicial supervision remains below 1%.¹ The number of cases accepted and the dispute amount reached a historic high in 2016.²

1. Overview of Caseload

The number of cases accepted by the 251 Chinese arbitration commissions in 2016 was 208,545, an increase of 71,621 cases at the increase rate of 52% as compared to the previous year. The total amount of dispute was RMB 469.5 billion, an increase of RMB 58.3 billion at the increase rate of 14% as compared to the previous year. The average caseload is 831, an increase of 270 cases and 48% over the previous year. The average amount of dispute was RMB1.9 billion, an increase of RMB 0.2 billion at the increase rate of 12% as compared to the previous year.

¹ *The Statistics on Cases Accepted by Chinese Arbitration Commissions in 2016*, provided by the Legal System Coordination Department of the Office of Legislative Affairs of the State Council, <http://fzb.wuxi.gov.cn/doc/2017/06/28/1373728.shtml> (last visited on 19 August 2017).

² Source: *Relevant Situation in Chinese Arbitration in 2016*, the Legal System Coordination Department of the Office of Legislative Affairs of the State Council, March 2017.

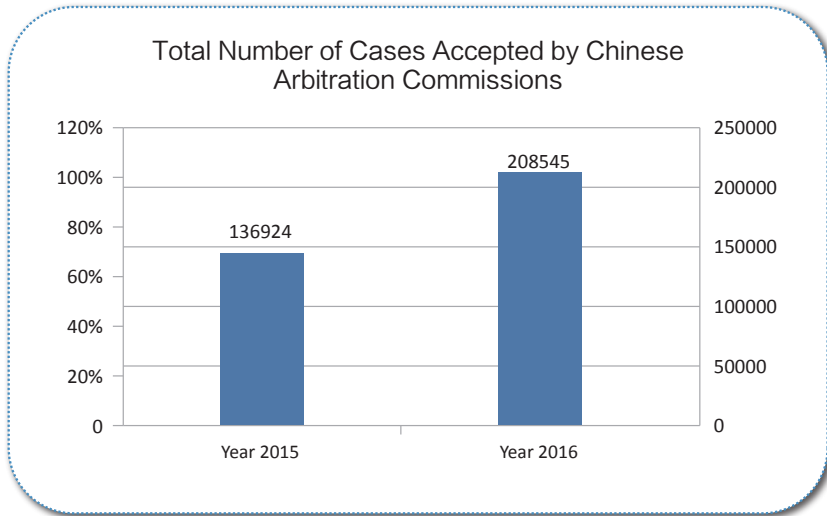


Figure 1.1

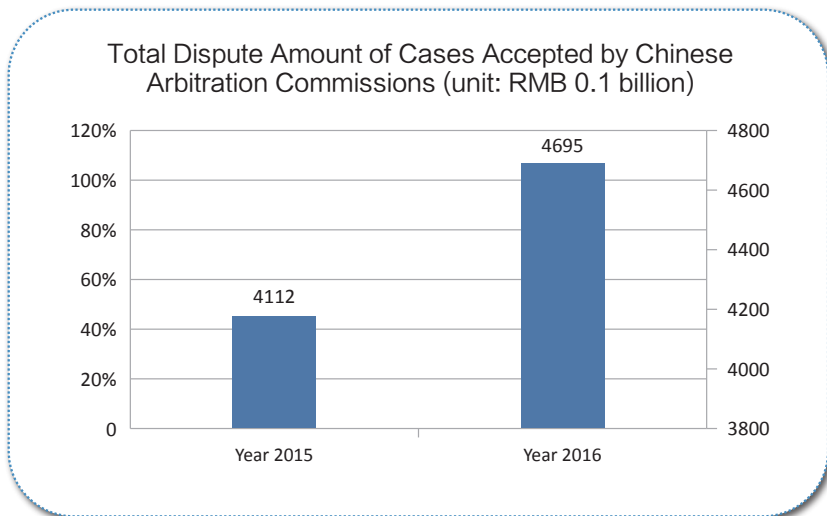


Figure 1.2



Figure 1.3

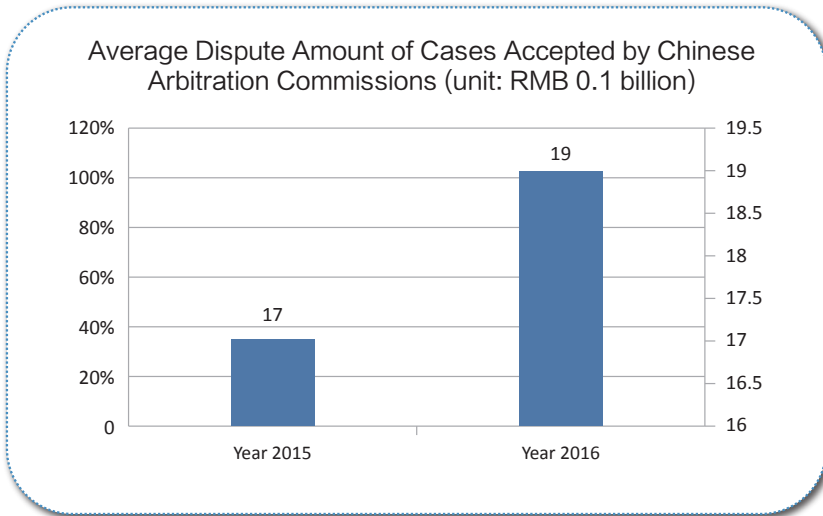


Figure 1.4

Among the 251 Chinese arbitration commissions in 2016, the three arbitration commissions established within the CCOIC/CCPIT, i.e. the CIETAC, the Chinese Maritime Arbitration Commission (the CMAC) and the Arbitration Center Across the Straits (the ACAS) accepted 2,250 cases in 2016, accounting for 1% of the national total caseload. The amount of dispute was RMB 59.9 billion, accounting for 13% of the national total dispute amount. The four arbitration commissions in municipalities directly under the central government accepted 10,286 cases, accounting for 5% of the national total caseload. The amount of dispute was RMB 75.9 billion, accounting for 16% of the national total dispute amount. The 27 arbitration commissions in cities where the people's governments of provinces and autonomous regions are located accepted 89,475 cases, accounting for 43% of the national total caseload. The amount of dispute was RMB 133.6 billion, accounting for 28% of the national total dispute amount. The 218 arbitration commissions in other prefecture-level cities accepted 106,534 cases, accounting for 51% of the national total caseload. The amount of dispute was RMB 200.3 billion, accounting for 43% of the national total dispute amount.

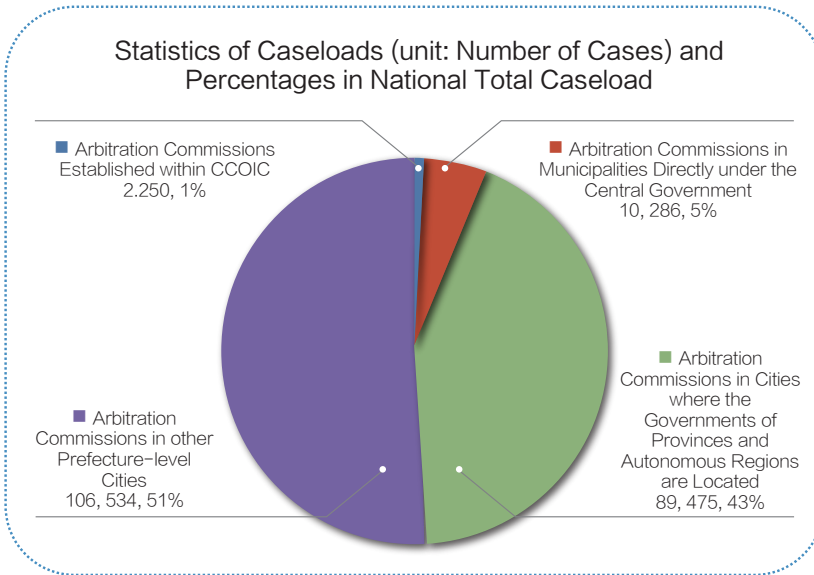


Figure 1.5

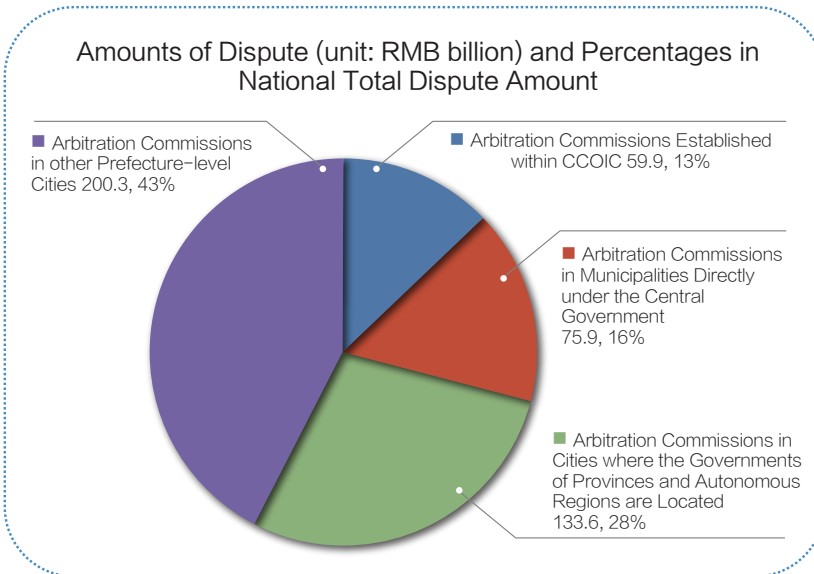


Figure 1.6

1) Caseloads of Arbitration Commissions

The number of arbitration commissions accepting over 500 cases were 76, accounting for 30% of the arbitration commissions nationwide. The number of arbitration commissions accepting between 200 and 500 cases were 53, accounting for 21% of the arbitration commissions nationwide. The number of arbitration commissions accepting between 50 and 200 cases were 71, accounting for 28% of the arbitration commissions nationwide. The number of arbitration commissions accepting less than 50 cases were 51, accounting for 21% of the arbitration commissions nationwide. Among the 76 arbitration commissions accepting over 500 cases, one was the CIETAC established within the CCOIC, 4 were arbitration commissions in municipalities directly under the central government, 22 were arbitration commissions in cities where the people's governments of provinces and autonomous regions are located and 49 were arbitration commissions in other prefecture-level cities.

2) Statistics of Caseloads of Arbitration Commissions in Comparison with the National Average Caseload

There were 46 arbitration commissions accepting more cases than the national average caseload of 831, accounting for 18% of the arbitration commissions nationwide. These commissions accepted a total of 162,766 cases, accounting for 78% of the national total caseload. There were 205 arbitration commissions accepting fewer cases than the national average caseload, accounting for 82% of the arbitration commissions nationwide. Altogether, these commissions accepted 45,779 cases, accounting for 22% of the national total caseload.

3) Comparison of Caseloads of 2016 and 2015

In 2016, the number of arbitration commissions that had an increased caseload was 159, accounting for 63% of the arbitration commissions nationwide, which was a 3% decrease compared to the 162 arbitration commissions accounting for 66% of the arbitration commissions nationwide in 2015. The number of arbitration commissions with increased dispute amount was 138, accounting for 55% of the arbitration commissions nationwide, which was a 17% decrease compared to the 176 arbitration commissions accounting for 72% of the arbitration commissions nationwide in 2015. The number of arbitration commissions with increased caseload and dispute amount was 101, accounting for 40% of the arbitration commissions nationwide, which was a 13% decrease compared to the 129 arbitration commissions accounting for 53% of the arbitration commissions nationwide in 2015.

4) Statistics of Cases Settled through Mediation or Conciliation

In 2016, 121,527 cases were settled through mediation or conciliation in, accounting for 58% of the national total caseload, which was an increase of 17% by 64,868 cases as compared with 56,659 cases settled through mediation or conciliation, accounting for 41% of the national total caseload in 2015.

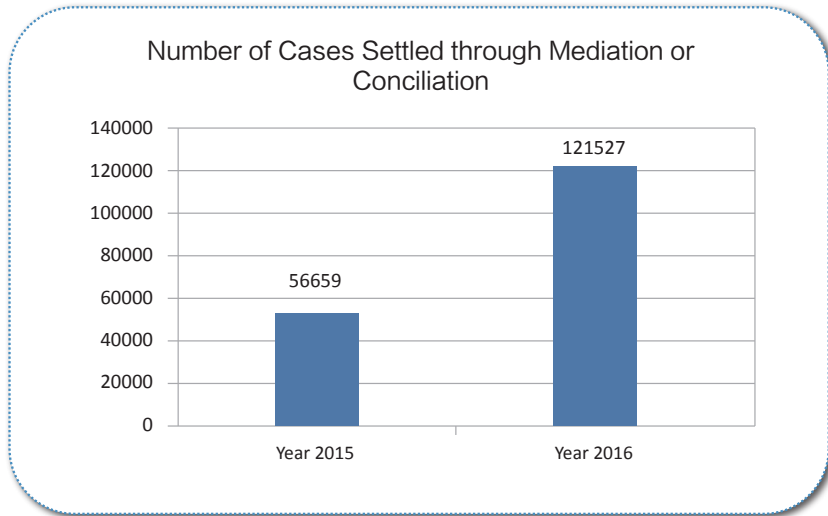


Figure 1.7

2. Statistics of Foreign-related, Hong Kong-related, Macao-related and Taiwan-related Cases

Most cases were domestic in 2016. There were 62 arbitration commissions accepting altogether 3,141 foreign-related, Hong Kong-related, Macao-related and Taiwan-related (HMT-related) cases, accounting for 1.5% of the national total caseload. The ratio was almost the same as in 2015. Among these cases, 1,187 cases were Hong Kong-related, 173 Macao-related, 235 Taiwan-related and 1,546 foreign-related. The foreign-related cases mentioned above are international commercial arbitration cases accepted by Chinese arbitration commissions.

According to statistics, there were 22 arbitration commissions that accepted over 10 foreign-related and HMT-related cases, 1 arbitration commission that

accepted 9 cases, 3 arbitration commissions that accepted 5 cases, 2 arbitration commissions that accepted 4 cases, 4 arbitration commissions that accepted 3 cases, 5 arbitration commissions that accepted 2 cases, and 25 arbitration commissions that accepted 1 case. Arbitration commissions that accepted over 100 cases were CIETAC, Guangzhou Arbitration Commission and Shanghai Arbitration Commission.

It is obvious from the above statistics that the proportion of foreign-related cases in the total national caseload was not high, accounting for only 1.5%. The number of foreign-related cases was very uneven among Chinese arbitration commissions. This also indicates that there is still space for further development of international commercial arbitration in China.

3. Comparison of China's International Commercial Arbitration Practice

Considering that China's international commercial arbitration is institutional arbitration in the sense of both legislation and practice, this Chapter endeavors to analyze the features, the latest trend and development direction of China's international commercial arbitration practice mainly through comparison based on the 2016 annual reports and case statistics published by major international arbitration institutions on their websites or through other official channels.

1) Caseload

The CIETAC celebrated its 60th anniversary in 2016. In the past 60 years, the CIETAC had continuously improved its arbitration service and maintained a

steady growth in its caseload. In 2016, the CIETAC accepted 2,181 cases, an increase of 10.82% compared to the previous year. There were 483 foreign-related cases, an increase of 10.53% compared to the previous year. There were 59 cases conducted in English or in both Chinese and English. There were 1,517 summary-procedure cases, accounting for 69.56% of the total caseload.

The International Court of Arbitration of International Chamber of Commerce (the ICC Arbitration Court) accepted 966 cases in 2016, 165 cases more than the figure in 2015, reaching a record high in the 94 years since its establishment.

The London Court of International Arbitration (the LCIA) accepted 303 cases in 2016, a slight decrease compared to the previous year. Among them, there were 253 cases where the LCIA Arbitration Rules were applied, and in the rest 50 cases, the LCIA either acted as the appointing authority or provided other administrative service in cases where the UNCITRAL Arbitration Rules applied, or took the role of funds trustee in such cases and other ad hoc cases.

The Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) accepted 199 cases in 2016. Among them, 96 were Swedish domestic cases and 103 were international ones. The SCC Rules were applied in 123 cases, the SCC Rules for Expedited Arbitration was applied in 55 cases, while emergency arbitrators were appointed in 13 cases.

The Singapore International Arbitration Centre (the SIAC) accepted 343 cases in 2016, 80% of which were international ones. The SIAC received 70 applications for fast-track procedure with 28 approved.

The Hong Kong International Arbitration Centre (the HKIAC) accepted 262 cases in 2016. The HKIAC administered 94 cases according to its Rules or the UNCITRAL Arbitration Rules. Meanwhile, the majority of the cases accepted by HKIAC in 2016 were international ones. 78.4% of the cases involved at least one party from outside Hong Kong. 87.2% of the institutional cases were international ones. 49.1% of the cases did not involve Hong Kong. 6.6% of the cases did not involve Asia.

The statistics of the caseloads of the above arbitration institutions are shown in Figure 1.8.

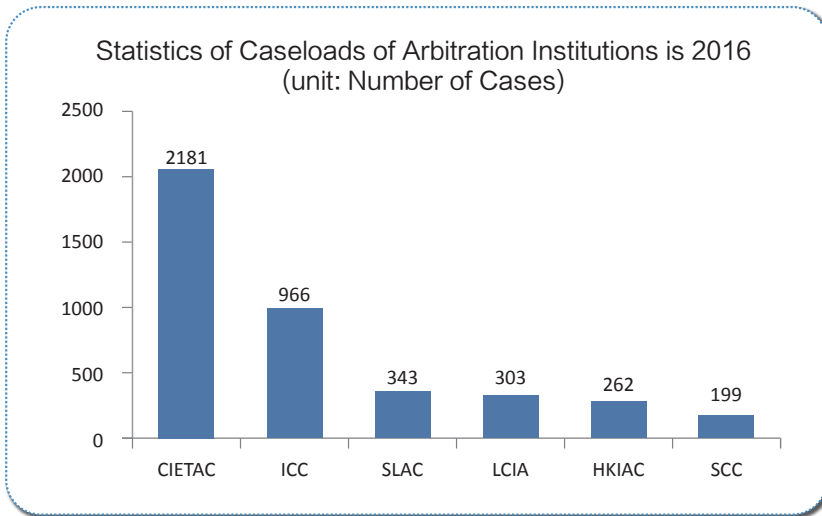


Figure 1.8

2) Parties

The internationalization of the parties may reflect how much an arbitration institution is recognized in international arbitration. According to the statistics published by the major international arbitration institutions, the parties of the cases accepted in 2016 were from the following countries or regions:

The parties of the CIETAC cases were from 57 countries or regions. The top 10 countries or regions, excluding Mainland China, with the most parties involved were Hong Kong, the U.S., South Korea, Singapore, Germany, U.K., Russia, Japan, Taiwan and British Virgin Islands (BVI).

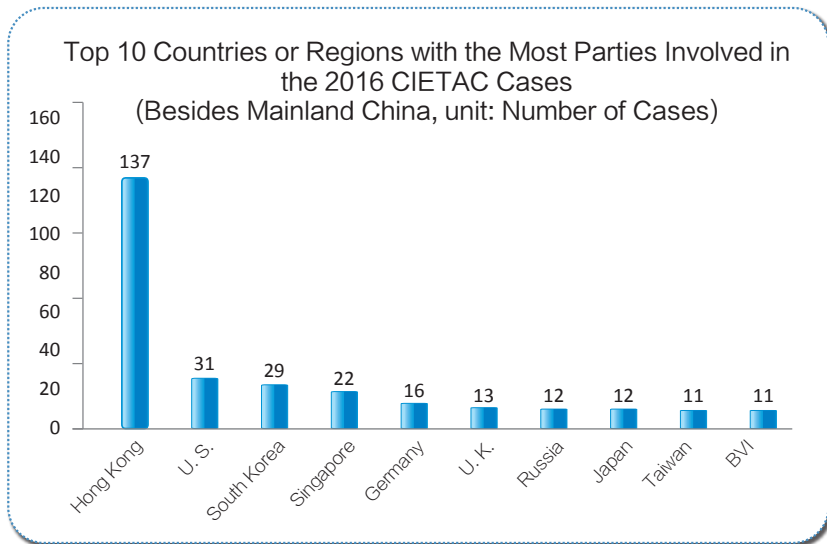


Figure 1.9

The 3,099 parties of the 966 cases accepted by the ICC Arbitration Court in 2016 were from 137 countries or regions. Nearly half of the cases involved three or more parties while 20% of the cases involved five or more parties. One case even

involved as many as 46 parties.

The parties of the cases accepted by the HKIAC in 2016 were from 39 countries or regions. The top 10 countries or regions with the most parties involved were Hong Kong, mainland China, BVI, Singapore, the U.S., South Korea, Marshall Islands, Taiwan, Macao and Cayman Islands.

The parties of the cases accepted by the SIAC in 2016 were from 56 countries or regions. The top 10 countries or regions with the most parties involved were India, Mainland China, the U.S., Indonesia, South Korea, Australia, Malaysia, Hong Kong, U.K. and the Netherlands.

The parties of the cases accepted by the SCC in 2016 were from 44 countries or regions. The top 6 countries or regions with the most parties involved were Sweden, Russia, Ukraine, the U.S., Germany and Azerbaijan.

3) Types of Disputes

There were 18 types of cases accepted by the CIETAC in 2016, with a continuous increase of new types of cases. The numbers of cases involving disputes arising from sale of goods and electro-mechanical equipment kept increasing, reaching 461 and 268 respectively. The numbers of cases involving disputes arising from service contracts, construction and real estate remained high, reaching 237 and 184 respectively. There were 171 cases involving disputes arising from share investment and transfer, 151 cases involving disputes arising from financial leasing, and 113 cases involving disputes arising from finance, loans and other capital matters.

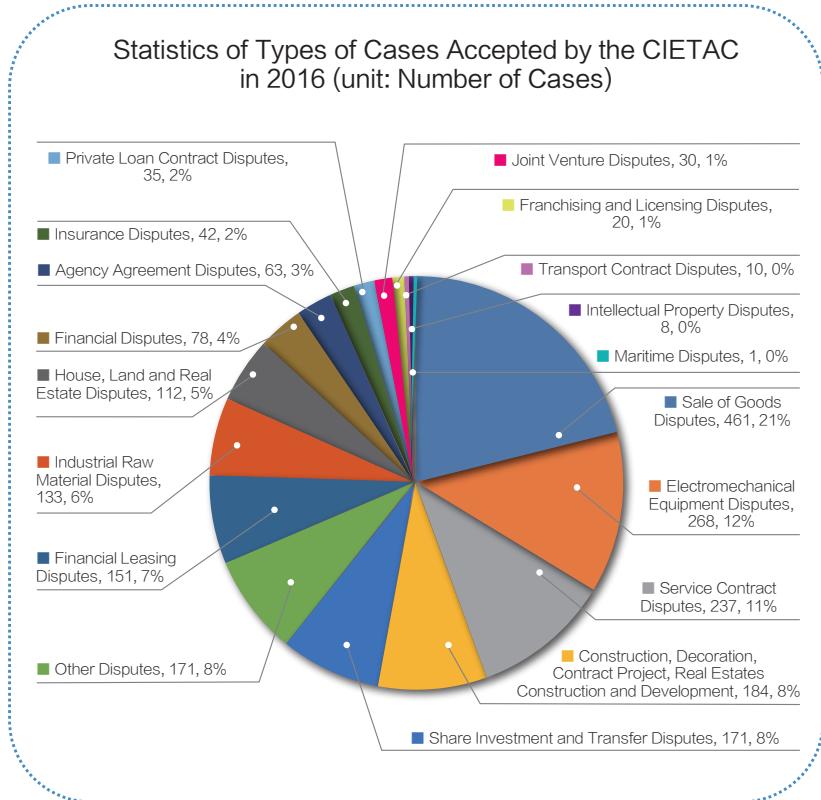


Figure 1.10

According to the statistics from the LCIA, the cases accepted by the LCIA in 2016 were mainly concerning mineral and energy disputes accounting for 22.53% of the total caseload, bank and financial disputes accounting for 20.55%, construction project disputes accounting for 16.2%, shipping and transportation of goods disputes accounting for 15.42%, consulting and other professional service disputes accounting for 5.14%.

According to the statistics from the SCC, the main types of disputes involved in the cases accepted by the SCC in 2016 were as follows: transport disputes (50 cases), service disputes involved (38 cases), merge and acquisition disputes (25 cases), construction project disputes (15 cases), and partnership disputes (15 cases).

The main types of disputes involved in the cases accepted by the SIAC were trade and business disputes, including agency, distribution, franchising and licensing, etc., accounting for 24% of the total caseload, transport/maritime disputes accounting for 19%, trade disputes accounting for 16%, company disputes accounting for 16% and construction/project disputes accounting for 16%.

The main types of disputes involved in the cases accepted by the HKIAC in 2016 were as follows: company and financial disputes accounting for 29.3% of the total caseload, maritime disputes accounting for 21.6%, construction project disputes accounting for 19.2%, international trade disputes accounting for 10.8%, intellectual property disputes accounting for 5.4%, energy disputes accounting for 2.4%, insurance disputes accounting for 2.4% and other disputes accounting for 8.9%.

4) Place of Arbitration

China, as one legal region, remained the place of arbitration for the majority of the cases accepted by the CIETAC in 2016. Meanwhile, the parties of 2 cases chose Hong Kong as the place of arbitration. Parties, when drafting arbitral clauses, normally agreed to choose major cities in Mainland China including Shanghai, Shenzhen, Guangzhou, Chongqing, etc. as the place to resolve their disputes.

Such agreement was generally regarded as the parties' agreement on the place of hearing.

106 cities in 60 countries were chosen as the place of arbitration for cases accepted by the ICC Arbitration Court. Belize City of Central America and Doha, the capital of Qatar, were two new places of arbitration, which is directly related to the increase in the number of parties therefrom.

For cases accepted by the LCIA, London was the chosen or designated place of arbitration in as many as 235 cases while Geneva ranked the second with 3 cases and India the third with 2 cases.

Most parties chose cities in Sweden as the place of arbitration in cases accepted by the SCC in 2016. Stockholm was chosen in 77% of the cases while Goteborg and Malmo, located at the southern end of Sweden, ranked the second.

Hong Kong remained the most often chosen place of arbitration in cases accepted by HKIAC in 2016. The parties of 1 case chose Singapore as the place of arbitration.

5) Arbitrators

Foreign arbitrators or arbitrators from outside Mainland China participated in the hearing of 28 foreign-related cases accepted by the CIETAC in 2016, involving 18 arbitrators from 6 countries and regions, including 10 from Hong Kong, 2 from Taiwan, 2 from Singapore, 2 from Germany, 1 from Sweden and 1 from New Zealand.

According to the data of the ICC Arbitration Court, 1,411 arbitrators from 76 countries were appointed or confirmed by the ICC Arbitration Court in 2016. Among them, there were 209 female arbitrators from 47 countries, an increase of 54% compared with the previous year, accounting for 14.8% of the total number.³

In 2016, 496 arbitrators from 276 countries participated in the hearing of the LCIA cases. Among them, 82 arbitrators were appointed by the LCIA for the first time and 102 arbitrators were females, accounting for 20.6% of the total number.

The SAIC appointed 167 arbitrators in 2016. They were from Australia, Canada, China, France, Germany, Greece, Hong Kong, India, Ireland, Italy, Malaysia, New Zealand, the Philippines, Singapore, South Africa, South Korea, Swiss, Taiwan, U.K., U.S. and Vietnam. The statistics shows that the SIAC and the parties preferred arbitrators from Singapore, (34%), U.K.(27.3%) and Australia (10.6%).

The HKIAC appointed 75 arbitrators and confirmed 62, totaling 137. The top 10 countries where the arbitrators were from include U.K., Hong Kong, Australia, Singapore, Canada, Mainland China, Austria, Malaysia, U.S. and New Zealand. Female arbitrators were appointed by parties, co-arbitrators and the HKIAC for 18 times (11.5%).

6) Dispute Amount

In international commercial arbitration, the dispute amount, which can be quantified, reflects to a certain extent not only the income of the arbitration

³ <https://iccwbo.org/media-wall/news-speeches/icc-court-sees-marked-progress-gender-diversity/>

institution but also the parties' trust thereof.

In 2016, the amount in dispute in the 2,181 cases accepted by the CIETAC was RMB 58.66 billion (about USD 9.1 billion), an increase of 37.9% compared to the previous year. The average dispute amount per case was RMB 26.9 million per case, reaching a record high.

In the cases accepted by the LCIA in 2016, 67% of the claimants specified the dispute amount in their application for arbitration. The statistic thereof is shown in Figure 1.11.

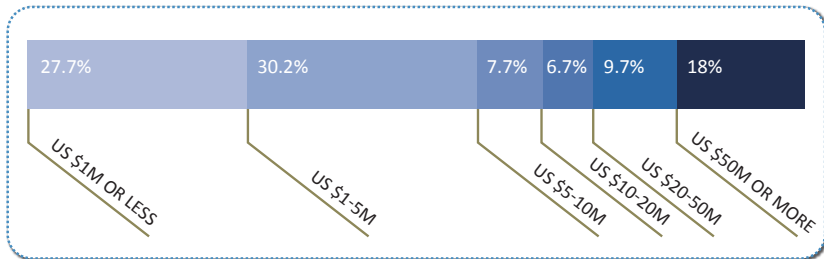


Figure 1.11

The total dispute amount of the cases accepted by the SCC was EURO 1.6 billion (about USD1.93 billion). The statistic thereof is shown in Figure 1.12.

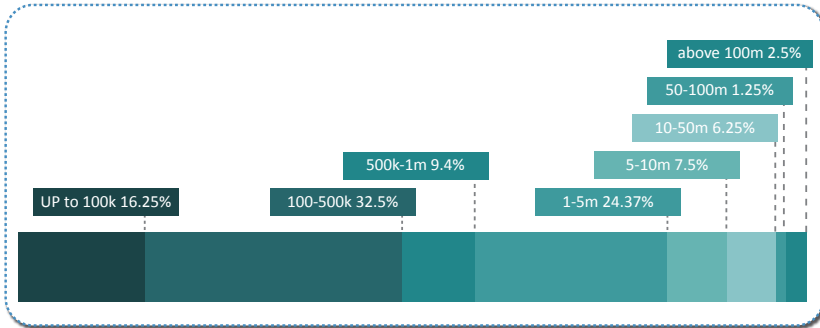


Figure 1.12

The total dispute amount of cases accepted by the SIAC in 2016 was SGD 17.13 billion (about USD 11.85 billion), an increase of 175% compared to the previous year. The highest dispute amount involved in a case was SGD 2.03 billion (about USD 1.496 billion), while the average dispute amount per case was SGD 550,000 (about USD 380,000).

The total dispute amount of the cases accepted by the HKIAC in 2016 was about HKD 19.4 billion (about USD 2.5 billion).

7) Conclusion

The following conclusion may be drawn from the above statistics and analysis of the annual reports and case data released by the relevant major international commercial arbitration institutions.

① The caseloads of major international commercial arbitration institutions were all on the rise, which indicated that arbitration had won greater recognition. The

ICC Court of Arbitration, the LCIA and other traditional arbitration institutions still took important positions in international arbitration. At the same time, the Asia-Pacific arbitration market was booming with great potential. The total caseload of China international arbitration bodies remains in the top.

② In terms of internationalization, the ICC Court of Arbitration kept its prominent place in the international arbitration market, relying on the influence and neutrality of the ICC. The complexity and diversity of the parties involved in the ICC cases, the range of nationalities thereof (137 countries and regions) and the distribution of places of arbitration (106 cities in 60 countries) were significantly higher and wider than other international arbitration institutions established in a specific country or region. The degree of internationalization of all the arbitration institutions other than the ICC Arbitration Court, including the long-established LCIA, the SCC, etc. was influenced by the historical and geographical factors of the host country, resulting in a high proportion of domestic parties and foreign parties from about 50 countries and regions averagely. Meanwhile, the places of arbitration were mainly in the host countries or neighboring ones. Therefore, as the Belt and Road Initiatives are carried out in an all-round way and the exchange and cooperation between China's international commercial arbitration community and the arbitration circles of the participating countries thereof is further expanded, the geographical advantages of China's international commercial arbitration will become increasingly prominent.

③ The cases accepted by China's international commercial arbitration institutions covered more and more types of disputes. Though each institution has its own way of classifying its cases, it may be found that Chinese international commercial

arbitration cases involved not only disputes in traditional sale of goods, electro-mechanical equipments, joint venture and cooperative contracts etc., but also rather new ones in service contracts, finance, equity investment and share transfer, intellectual property, insurance contracts, etc., covering a wide range and distributing over a large spectrum, by which Chinese arbitration institutions have kept abreast with or even in some way surpassed their international counterparts. In addition, the CIETAC summed up its domain name online dispute resolution experience, and actively explored the Internet + Era online arbitration mechanism, laying the foundation for developing online arbitration.

④ In view of the diversity of arbitral tribunals, China's international commercial institutions were slightly lagged behind compared to other international arbitration institutions, due to the restrictions by the arbitrator panel system, languages and others. However, the CIETAC offers parties more choices in the appointment of international arbitrators along with the increase in the number of its foreign arbitrators and the relaxation of restrictions on the arbitrator panel system. There are 1,437 arbitrators in the new CIETAC Panel of Arbitrators effective as from 1 May 2017. Among them, 405 are from 65 countries and regions including Hong Kong, Macau and Taiwan, accounting for 28.2% of the total number of arbitrators, an increase of 24 countries compared with the preceding panel. The number of counties along the Belt and Road increased from 15 to 28. Parties can enjoy more choices while the CIETAC will have more influence in the international arbitration circle.

⑤ With regard to the dispute amount, there was an apparent increase in the total dispute amount of all the international arbitration institutions in 2016. Among

them, the SIAC set a new record high while Chinese arbitration institutions still held a high share in the total amount.

In summary, Chinese international commercial arbitration institutions, represented by the CIETAC, have been among the well-known international arbitration institutions. Chinese international commercial arbitration institutions have been widely praised within and beyond China for their independent, impartial and efficient arbitration services, and have made positive contributions to the development of Chinese arbitration. Meanwhile, it can be predicted that with China's strong support for arbitration and accelerated opening-up, Chinese international commercial arbitration institutions will continue to 'go out' while international commercial arbitration institutions will be gradually 'invited in' so as to enrich the practice of China's international commercial arbitration to a greater extent. Therefore, China's international arbitration institutions need to continue strengthening theoretical research and personnel training, constantly improve their rules and practice, follow the development path with the integration of internationalization and localization, avail of their own advantages, improve their service capabilities and standards, and give full play to the important role of China's international commercial arbitration in the international commercial dispute resolution to further promote the development of China's international commercial arbitration.

II. Legislative Practice of International Commercial Arbitration in China

Compared with the SPC's *Interpretation concerning the Application of the*

Civil Procedure Law of the People's Republic of China regulating all the major aspects of judicial supervision over arbitration in 2015, the judicial interpretations and opinions issued by the SPC in 2016 were more specialized, clarifying the positions and role of arbitration in the diversified dispute resolution mechanism and emphasizing the role of arbitration in the implementation of the Belt and Road Initiatives and the construction of pilot free trade zones (FTZs). They will surely have a profound impact on China's international commercial arbitration.

1. On Property Preservation of Arbitration

The Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Property Preservation Cases by the People's Courts (Fa Shi [2016] No.22) issued on 7 November 2016 and effective as of 1 December 2016 contains stipulations on certain difficult judicial problems in property preservation in arbitration practice. The Provisions stipulate as follows:

1) Where a party applies for property preservation to a people's court during the process of arbitration, the written application, the notice of acceptance of an arbitration case, and other relevant materials shall be submitted through the arbitral institution to the people's court. If the people's court renders a ruling to take a preservation measure or dismiss the application, it shall serve the written ruling on the party and notify the arbitral institution.

2) Where an interested party applies for property preservation before an action is instituted and institutes the action or applies for arbitration according to the law within 30 days after a preservation measure is taken by the people's court, the preservation measure taken before the action is instituted shall be automatically

transferred into a preservation measure taken during the action or arbitration; and after the enforcement procedure commences, the preservation measure shall be automatically transferred into the seizure, impoundment, or freezing measure taken in enforcement, and the people's court need not render a written ruling again.

3) After a people's court takes a property preservation measure, under any of the following circumstances, the preservation applicant shall apply for removal of preservation in a timely manner. The people's court shall, within five days after receiving an application for removal of preservation, render a ruling to remove preservation; and in case of emergency, must, within 48 hours, render a ruling to remove preservation.

The above stipulations further improve the system of property preservation before and during the arbitration and provide a strong guarantee for the enforcement of effective awards and avoidance of damages to the prevailing creditors' rights.

2. On Arbitration and Diversified Dispute Resolution Mechanism

After issuing *the Decision on Designating Model Courts for Diversified Dispute Resolution Mechanism Reform* in 2015, the SPC released *the Opinions Concerning People's Courts' Further Deepening the Reform of the Diversified Dispute Resolution Mechanism (Fa Fa [2016] No.14)*, stating the main objectives of deepening the reform of the diversified dispute resolution mechanism as rationally allocating social resources of dispute resolution, and perfecting the connection and coordination among conciliation, mediation, arbitration, notarization, administrative adjudication, administrative reconsideration and litigation. People's

courts need to strengthen the connection with arbitration institutions, actively support the arbitration system reform, improve communication with commercial arbitration institutions, handle preservation applications of arbitration institutions timely, proceed cases involving revocation or non-enforcement of arbitral awards in accordance with law, and normalize judicial supervision procedures over foreign-related and foreign commercial arbitral awards.

The SPC also pointed out in the Opinions that the diversity of Chinese and foreign parties' legal cultures shall be fully respected and their choice of arbitration or other non-litigation way of dispute resolution shall be supported so that the internationalization of diversified dispute resolution mechanism could be promoted. The advantages of various dispute resolution methods shall be brought into full play to meet the diversified demands of Chinese and foreign parties in dispute resolution and to provide judicial services and guarantee for the implementation of the Belt and Road Initiatives. The Opinions is aimed at enhancing the international credibility of Chinese arbitration. It reflects Chinese courts' firm stand in supporting the arbitration system reform and the development of arbitration.

3. On Arbitration and Construction of Pilot FTZs

In order to support the arbitration system reform, the SPC made useful attempts on the validity of arbitration agreements and the arbitration types. On 30 December 2016, the SPC issued *the Opinions on Providing Judicial Safeguard for the Construction of Pilot Free Trade Zones (Fa Fa [2016] No.34)*. Article 9 thereof has attracted wide attention.

1) Where two FTZ-registered wholly foreign owned enterprises (WFOEs) agree to submit commercial disputes to arbitration seated in foreign jurisdictions, people's courts shall dismiss challenges to the validity of such agreement on the sole ground that there is no foreign element involved in the disputes.

2) Where one or two FTZ-registered foreign investment enterprises (FIEs) agree to submit commercial disputes to arbitration seated in foreign jurisdictions, people's courts shall dismiss challenges to the validity of such arbitration agreement or the validity and enforceability of the award on the sole ground that there is no foreign element involved in the disputes if the party applying for the non-recognition or non-enforcement of the award is the claimant initiating arbitration in foreign jurisdictions or the respondent raising no objection to the validity of the arbitration agreement in the process of arbitration.

3) FTZ-registered enterprises' agreements to arbitrate at a specific particular place in Mainland, by specific arbitrator(s), and under a specific set of arbitration rules may be deemed valid. People's courts, if deeming such agreements invalid, shall report to higher-level courts for review. If higher-level courts approve the invalidity, they shall report to the SPC for its reply before making any ruling.

The above stipulations are in line with general international practice, showing positive support to the development of international arbitration in China and injecting new legal power into the deepening implementation of the Belt and Road Initiatives. The Arbitration Law only regulates institutional arbitration without mentioning ad hoc arbitration. Thus, China lacks the practice of ad hoc arbitration. There are different voices in the theoretical circle regarding whether ad hoc

arbitration can be rooted in the soil of China. The SPC, following *the Siemens International Trading (Shanghai) Co., Ltd. vs. Shanghai Golden Landmark Co., Ltd.* case involving the application for the recognition of a Singapore arbitral award [2013 Hu Yi Zhong Min Ren (Wai Zhong) Zi No. 2] and taking an open and inclusive mindset, showed an exploratory attitude towards the progressive development of ad hoc arbitration in pilot FTZs in the Opinions. In particular, ad hoc arbitration has been allowed in Mainland China as the third circumstance mentioned above, with the parties limited to FTZ-registered enterprises.⁴ Party autonomy of FTZ-registered enterprises are fully respected. People's courts may confirm the validity of FTZ-registered enterprises' agreements on arbitration other than institutional arbitration if the requirements on specific places, specific arbitration rules and specific arbitrators are met. Thus, China is not confined to a single form of institutional arbitration while not completely copying the foreign ad hoc arbitration system. The reporting system is adopted for the ruling of invalidity of such arbitration agreements, under which the SPC has the final say. The experience of the FTZ arbitration will be timely summed up for the future amendment of the PRC Arbitration Law.

III. Judicial Review of International Commercial Arbitration in China

In 2016, Chinese people's courts ruled to set aside arbitral awards in 232 cases, accounting for 0.11% of the total number of cases, with a decrease of

⁴ Starting from 22 August 2013 when the State Council approved the establishment of the Shanghai FTZ, altogether 11 FTZs have been set up in Shanghai, Guangdong, Tianjin, Fujian, Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan and Shaanxi. Applications for FTZ are being made by other provinces and cities.

0.04% compared with the rate of 0.15% (209 cases) in 2015, and ruled not to enforcement arbitral awards in 63 cases, accounting for 0.03% of the total number of cases, a decrease of 0.03% compared with the rate of 0.06% (84 cases) in 2015. Among the 251 Chinese arbitration commissions, 157 commissions had no awards being set aside or refused of enforcement, accounting for 63% of the total number of commissions while 16 commissions had over 5 cases wherein the courts ruled to set aside or not enforce the awards, accounting for 6% of the total number.⁵

In 2016, people's courts concluded 50 cases wherein applications for recognizing and enforcing foreign arbitral awards were made, and 8 cases wherein applications for recognizing and enforcing HMT-related arbitral awards were made. 3,278 cases were concluded by the courts wherein applications for confirmation of the validity of arbitration agreements were made, including 34 cases applying for confirmation of the validity of foreign-related arbitration agreements and 22 cases for confirmation of the validity of HMT-related arbitration agreements, and 16,995 for revocation of the arbitral awards, among which 46 cases applying for revocation of foreign-related arbitral awards and 30 cases for revocation of HMT-related awards.⁶

IV. Theoretical Research on International Commercial Arbitration in China

In 2016, appealing topics appeared in the research field on international commercial arbitration both within and outside China. Introduction and comments

⁵ Source: *Relevant Situation in Chinese Arbitration in 2016*, the Legal System Coordination Department of the Office of Legislative Affairs of the State Council, March 2017.

⁶ Source: judicial statistics of the SPC Research Department.

thereof are as follows.

1. Major Topics of Arbitration Research in China

1) Perfection of International Commercial Arbitration System in the Context of the Belt and Road Initiatives

The Belt and Road dispute resolution mechanism has been a hot topic of wide concern since the promotion of the Belt and Road Initiatives in 2013. It is generally accepted by the academic circle that the promotion of the Belt and Road Initiatives is not only an issue of economic connection, but also an important legal topic. The Belt and Road goes through more than 60 countries and regions with different levels of economic and political development and varied legal systems, which makes the resolution of international disputes extremely difficult. In this context, it has been an important issue to seek an effective the Belt and Road dispute resolution way. Wang Jiayi proposed that in order to meet the practical demand of the Belt and Road Initiatives, China's international commercial arbitration system urgently needs to be improved and be in line with international rules. Specifically, it is necessary to promote the de-administration of Chinese arbitration commissions, to clarify China's international commercial arbitration institutions as non-profit corporate organizations, to reduce supervision and interference by government agencies, to ensure the independence of Chinese arbitration institutions, to recognize and introduce the ad hoc arbitration system, to promote ad hoc arbitration in pilot FTZs selectively and gradually and to push forward the reform with experience therefrom, and to actively promote online arbitration, optimizing online arbitration rules and fully protecting parties'

autonomy.⁷ Zhang Xianda also agrees that international commercial arbitration will play a vital role in the resolution of international commercial disputes among the Belt and Road countries along with the all-round implementation of the Initiatives. Thus, the reform on the arbitration agreement system should be taken as a breakthrough. First, broad interpretation should be made on the written form of arbitration agreements, with the only requirement for the proof of existence of the ‘arbitration consensus’. Secondly, the validity of implied arbitration agreements should be recognized conditionally. Finally, China should put ad hoc arbitration into trial use in pilot FTZs to gain experience for the nationwide adoption and promotion thereof.⁸

Zhu Weidong holds that under the existing system, China should encourage parties to settle disputes through arbitration and create a good legal environment for the implementation of the Belt and Road Initiatives gradually through perfection of the foreign-related civil and commercial dispute resolution system in China, promotion of bilateral treaties with countries along the Belt and Road and actively proposing for the establishment of multilateral mechanisms.⁹

Liu Mingping noted that since the promotion of the Belt and Road Initiatives, the economic and trade exchanges between China and other countries along the Belt and Road have been further developed in both frequency and depth, especially in the investment field. Thus, it is necessary to build the Belt and Road investment

7 See Wang Jiyi, *The Construction of International Commercial Arbitration System under ‘the Belt and Road’ Initiatives*, 5 People’s Forum(2016), p241.

8 See Zhang Xianda, *The Escort of ‘the Belt and Road’ by the International Commercial Arbitration Agreement System*, 11 People’s Forum(2016), p.149.

9 See Zhu Weidong, *The Perfection of Civil and Commercial Dispute Resolution Between China and Other Countries along ‘the Belt and Road’*, 12 Qiu Suo(2016), p.4.

dispute resolution mechanism. After collecting relevant data and consulting a large number of relevant research literatures, comparing and analyzing the typical international dispute resolution mechanisms constructed by the OECD, the WTO, the ICSID and the NAFTA, he made suggestions on the Belt and Road dispute resolution mechanism from such aspects as the construction method, the value preference, the settlement of jurisdiction conflicts, the procedure design and specific mechanism. He also analyzed major issues noticeable in investment dispute resolution process such as the connection of legal systems in the Belt and Road construction, the prerequisite for the exhaustion of local remedies in dispute resolution, the introduction of retaliation mechanism and the perfection of China's overseas investment insurance system.¹⁰

2) International Commercial Arbitration System from the Perspective of Economics

International commercial arbitration, 'a kind of contractual system under which the parties to international commercial transactions settle their disputes voluntarily, that is, the parties agree to submit any disputes between them that have occurred or will possibly occur to arbitrators who act as private judges or tribunals as private courts for the settlement',¹¹ has been developed into an important way of resolving international commercial disputes. In this sense, it is also a system regulating and adjusting international commercial and economic behaviors. Though a lot of research have been made on the international

¹⁰ See Liu Mingping, *Discussion on the Construction of 'the Belt and Road' Investment Dispute Settlement Mechanism*, Master Thesis, Yun'nan University, 2016, p.3.

¹¹ Zhao Xiuwen, *Textbook for Theories and Cases of International Commercial Arbitration Laws*, Law Press, 2010, p.4.

commercial arbitration system and its various specific mechanisms in the theoretical circle, the research is more from the perspective of law and less from the economic point of view. Yan Lingju, in her book ‘Economic Analysis of International Commercial Arbitration System’,¹² adopted the economic analysis method to conduct a comprehensive and systematic investigation on the economic logic of the international commercial arbitration system from the hypothesis of a rational man. In particular, the book covers arbitration agreements, arbitration proceedings, arbitral awards and international recognition and enforcement of awards, etc., and is worthy of attention.

3) Arbitrability of International Antitrust Disputes

The current development trend of international commercial arbitration system has less and less restriction on the arbitrability of disputed matters in national or regional legislations.¹³ It has always been a matter of great concern and controversy in the theoretical and practical circles of various countries whether disputes arising from antitrust can be submitted to arbitration. China’s academic community has been paying attention to the arbitrability of antitrust disputes and made some achievements since the beginning of the 21st century. But generally speaking, the current research on the arbitrability of antitrust disputes in China is still in its infancy. In his book ‘Research on the Arbitrability of Antitrust Disputes in International Commercial Arbitration’,¹⁴ Zhang Aiqing

¹² See Yan Lingju, *Economic Analysis of International Commercial Arbitration System*, Shanghai Sanlian Publishing House, 2016.

¹³ See Zhu Kepeng, *Law Application in International Commercial Arbitration*, Law Press, 1999, p.40; Ou Mingsheng, *Research on Arbitrability of Civil and Commercial Disputes*, Zhejiang University Publishing House, 2013, pp.113-114, etc.

¹⁴ See Zhang Aiqing, *Research on the Arbitrability of Antitrust Disputes in International Commercial*

conducted a comprehensive, systematic and in-depth study on the arbitrability of antitrust disputes, which is commendable. The book covers the basic theory of arbitrability, the latest development of arbitrability, the jurisprudence and practice of arbitrability of antitrust disputes, the legislation and practice of antitrust dispute arbitration in various countries and China's relevant legislation and practice and the improvement thereof.

4) Confidentiality in International Commercial Arbitration

Confidentiality is an important feature of international commercial arbitration. When making a choice between litigation and arbitration for the resolution of international commercial disputes, parties will always take confidentiality as an essential consideration factor. Therefore, the exploration on the confidentiality of international commercial arbitration is of great benefit to the development of the Arbitration Law and relevant practice. Xin Baichun, through detailed analysis, pointed out that all the nations have recognized confidentiality as the feature of and obligation in international commercial arbitration, and gradually reached the consensus that confidentiality in arbitration is not absolute but has some exceptions and is under restriction of certain factors and conditions. For China, the Arbitration Law should be amended in the future to make it a clear obligation of the parties, tribunals and other participants of arbitration proceedings to keep the arbitration confidential, and to provide specifically for the scope of confidentiality obligation, the restriction and exceptions thereof, the relief for breach of such obligation and other basic issues. Only in this way can China conform to the development trend of international commercial arbitration, keep

Arbitration, Law Press, 2016.

in line with the international system, and protect parties' legitimate rights through proper handling of confidentiality in international commercial arbitration.¹⁵ Zhang Yuqing, through careful analysis of the specific connotation of the confidentiality obligation in international commercial arbitration, believed that the private hearing of arbitration cases and the confidentiality obligation were two different concepts which should not be mixed up. The international legal provisions and practices regarding private hearing of arbitration cases are basically the same, but those regarding the confidentiality obligation are quite different, represented by U.K. and Australia respectively. U.K. recognizes the confidentiality obligation with the exception of disclosure requested by law. Australia reckons that there is no confidentiality obligation in arbitration unless parties agree so in the arbitration agreements. In view of the different judicial practice and stipulations in arbitration rules in various countries, Chinese enterprises, when getting more and more involved in international commercial arbitration, should better have clear provisions on the confidentiality obligation in arbitration, the disclosable matters and the applicable law of arbitration agreements in the dispute resolution clauses of the contracts so that tribunals or courts may have a rule to follow once disputes occur. However, such agreement is still rare in practice, which needs to be changed. In addition, in order to build itself into an international arbitration centre, China should also adopt a confidentiality system in line with international standards in the Arbitration Law and arbitration rules.¹⁶

5) Issues on Introducing Foreign Commercial Arbitration Institutions into

¹⁵ See Xin Baichun, *Research on Confidentiality in International Commercial Arbitration*, 2 Modern Science of Law(2016), p.124.

¹⁶ See Zhang Yuqing, *Exploration and Thoughts on the Confidentiality Obligation in International Commercial Arbitration*, 4 Modern Science of Law(2016), p.96.

China

In April 2015, the State Council issued *the Notice on Issuing the Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone*, clearly pointing out that ‘FTZs shall support international well-known commercial dispute resolution institutions to have their offices therein so that China can keep in line with international commercial dispute resolution rules, optimize arbitration rules in pilot FTZs and enhance the degree of internationalization of commercial dispute arbitration. The establishment of a nationwide FTZ arbitration legal service alliance shall be explored and the creation of an Asia-Pacific arbitration centre for the world shall be accelerated’. It can be predicted that the introduction of foreign commercial arbitration institutions into China will inject new elements into the future internationalized development of China’s commercial arbitration. As of June 2016, internationally renowned commercial dispute resolution institutions such as the HKIAC, the SIAC and the ICC had set up representative offices in the Shanghai Pilot FTZ. Liu Xiaohong and others pointed out that there were obstacles and various uncertainties for foreign arbitration institutions to offer arbitration services in China either before or after setting up representative offices in China since China’s current arbitration laws and regulations were still lagged behind. Specific issues include the validity of arbitration agreements choosing foreign arbitration institutions to arbitrate in China, the judicial supervision of arbitral awards, the recognition and enforcement of arbitral awards and the market access of foreign arbitration institutions. China needs to accelerate the construction of relevant supporting systems such as the clarification of access conditions for foreign commercial arbitration institutions,

the exploration of multiple modes for these institutions' access in FTZs, the adjustment of application of certain provisions in the PRC Arbitration Law in FTZs, the definition of 'the standards for the place of arbitration' and the issuance of relevant judicial interpretations, etc. with pilot FTZs as the testing platform.¹⁷

6) Optimization of Institutional Functions of Arbitration Commissions

Yang Ling pointed out that the continuous expansion of the legal function of Chinese arbitration commissions has become a bottleneck that hinders the progress of Chinese arbitration legal system. Such expansion is mainly reflected in the determination of the nationality of arbitral awards by the nature of arbitration institutions, the determination of the validity of arbitral awards by the conduct of the arbitration commissions, the determination of the validity of arbitration agreements by *lex fori*, etc. At the same time, the system expansion and practical operation constantly challenge and alienate legislation along with the fragmentation trend of institutional norms. The main reasons for such expansion are the arbitration system centred on institutional arbitration, arbitration institutions analogous to courts and negligence of special features of international commercial arbitration. Such expansion affects the arbitration function of Chinese arbitration commissions, limits the internationalization of Chinese arbitration, and leads to litigious and administrative arbitration. The amendment of the PRC Arbitration Law should focus on weakening the legal function of Chinese arbitration commissions and improving the legal function of 'arbitral tribunals' and 'the place of arbitration'. Specifically, the classification of arbitration

¹⁷ See Liu Xiaohong, Wang Wei, *Discussion on Legal Obstacles and Breakthroughs in China's Opening-up to Foreign Commercial Arbitration Institutions*, 3 *The Journal of Suzhou University* (Law Edition 2016), pp.15-17.

commissions shall be deleted, arbitration commissions' power to intervene in arbitration proceedings shall be weakened and the impact of *lex fori* on arbitration agreements and arbitral awards shall be limited.¹⁸

7) Extraterritorial Execution of International Commercial Arbitration Interim Measures

More and more domestic laws, international commercial arbitration rules and international commercial arbitration documents of the international community contain provisions that parties may obtain interim measures from arbitral tribunals or competent courts. However, clear and specific provisions on the extraterritorial execution of such measures and the grounds, conditions, methods and other issues involved are still few. Thus, the extraterritorial circulation and execution of arbitration interim measures can hardly be guaranteed. At present, the extraterritorial execution of interim measures has become one of the bottlenecks restricting the development of international commercial arbitration. While scholars have been highly concerned about the extraterritorial execution of tribunals' interim measures, there are only a few publications on the extraterritorial execution of interim measures either by tribunals or by courts. To this end, Zou Xiaoqiao, in his doctoral thesis 'Research on Extraterritorial Execution of Interim Measures in International Commercial Arbitration', conducted a thorough study on extraterritorial execution of interim measures in international commercial arbitration based on the latest development of international commercial arbitration conventions and documents and domestic arbitration legislations and judicial practices, drafts of relevant legislation by some international organizations,

¹⁸ See Yang Ling, *Criticism on Arbitration Institutions' Legal Function*, 2 Science of Law(2016), p.175.

execution of interim measures in specific areas and arbitration rules of major foreign and Chinese international commercial arbitration institutions. In particular, the thesis covers issues such as the definition of extraterritorial execution of interim measures in international commercial arbitration, the grounds, conditions and methods for such execution, and suggestions on the rules for such execution.¹⁹

2. Research Trends of International Arbitration outside China

The high-profile 23rd International Commercial Arbitration Conference of the International Council of Commercial Arbitration (the ICCA) was held in the Republic of Mauritius from 8 to 11 May 2016 under the theme of ‘International Arbitration and Its Contribution to and Compliance with the Rule of Law’. As the first top-level international arbitration conference ever held in Africa, the Conference invited Ban Ki-moon, the United Nations Secretary-General, and Dr. Mohamed El Baradei, the International Atomic Energy Director-General, to attend and gathered participants of politicians from African countries. Thousands of arbitration experts from various countries participated and made in-depth discussion on each topic of the conference. During the three-day conference, the participants not only exchanged ideas on commercial arbitration practices, but also discussed reflection and reform expectation of basis rules in international arbitration, especially on the latest hot issues in investment arbitration and major issues in international arbitration. On one hand, arbitration experts from all over the world put forward many targeted opinions and suggestions from different cultural habits, political background and legal concepts. On the other hand, the international arbitration experts of about 1000 attending the conference

¹⁹ See Zou Xiaoqiao, *Research on Extraterritorial Execution of Interim Measures in International Commercial Arbitration*, Doctoral Thesis of Wuhan University, 2016.

have considerable power of discourse and decision in their own countries and regions. It is conceivable that in the near future the achievements made in this ICCA Conference will be merged or absorbed in the development and rules of international arbitration, which will inevitably form a new development trend.²⁰

The relatively new topics of research on international commercial arbitration outside China are as follows.

1) Influence of Psychology on International Commercial Arbitration

Though psychology seems irrelevant to international commercial arbitration, psychological issues are involved not only in tribunals' legal reasoning, parties and agents' exhibition of evidence and arrangement of arguments but also in parties' evaluation of the arbitration process and final awards. Accordingly, the study of psychological issues in international commercial arbitration will help to promote international commercial arbitration. The regular patterns of the occurrence, development and change of arbitration subjects' psychology was discussed comprehensively for the first time in 'The roles of Psychology in International Arbitration' edited by Tony Cole.²¹

2) Law Making by the Tribunal

'In the process of resolving substantive issues of disputes, no tribunal can avoid the important problem what criteria they would use to judge disputed parties'

²⁰ See *Speech by Researcher Liu Jingdong at the 23rd ICCA Conference*, <http://www.iolaw.org.cn/showNews.aspx?id=51378>, last visited on 8 September 2017.

²¹ See Tony Cole, eds., *The Roles of Psychology in International Arbitration*, Kluwer Law International, 2017.

right or wrong and to determine parties' rights and obligations'.²² Tribunals may conduct amiable arbitration or arbitration according to law under almost all arbitration legislations, international commercial arbitration conventions and documents, and arbitration institution rules.²³ In the circumstances where parties have not expressly authorized tribunals to arbitrate amiably, tribunals shall render awards on substantive issues involved in the disputes according to law. Then, how will tribunals which 'are formed by arbitrators appointed by parties or authorities authorized by parties, or according to legal provisions or stipulations in arbitration rules, are responsible for hearing disputed matters submitted to arbitration, and shall render substantive awards on disputed matters finally'²⁴ apply laws? Are the arbitrators legal craftsmen using law mechanically or can they create applicable laws and regulations through legal interpretation? Can tribunals have certain discretion? If yes, what are the grounds and limitations for tribunals' law making? There are no existing answers to the above questions in current national or regional arbitration legislations, international commercial arbitration conventions and documents, and arbitration institutions' rules. Dolores Bentolila, in 'Arbitrators as Lawmakers: The Creation of General Rules through Consistent Decision Making in International Commercial and Investment Arbitration', conducted a comprehensive and in-depth study of tribunals' law making, covering issues such as circumstances, procedures and attributes of achievements thereof.²⁵

²² Pei Pu, *Discussion on Law Application for Substantive Issues in International Commercial Arbitration*, 6 The Journal of Chongqing University (Social Science Edition 2008), p.102.

²³ See Song Lianbin, eds., *Arbitration Law*, Wuhan University Publishing House, 2010, p.6; Chen Zhidong, *International Commercial Arbitration Law*, Law Press, 1998, pp.13-14; Han Jian, *Theories and Practices of Modern International Commercial Arbitration Law* (2nd edition), Law Press, 2000, pp.26-29, etc.

²⁴ See Song Lianbin, eds., *Arbitration Law*, Wuhan University Publishing House, 2010, p.136.

²⁵ See Dolores Bentolila, *Arbitrators as Lawmakers: The Creation of General Rules through Consistent Decision Making in International Commercial and Investment Arbitration*, Kluwer Law International, 2017.

3) Design of Provisions by the Tribunal regarding Determination of Substantive

Laws in International Commercial Arbitration in the Absence of Express Agreement by the Parties

Substantive laws in international commercial arbitration, i.e. ‘substantive laws relied on by tribunals to render awards on disputes involved in arbitration cases’,²⁶ are the main legal grounds for tribunals’ awarding on substantive issues of disputes.²⁷ It is generally believed that ‘the law application for dispute resolution shall be the basic connotation since the modern arbitration system is on a legalized track’.²⁸ In international commercial arbitration, tribunals shall apply laws applicable to substantive issues as agreed by parties, but also are under certain obligations when parties make no express agreement on substantive laws under national and regional arbitration legislations, international commercial arbitration conventions and documents, and arbitration institution rules. Under such circumstances, the method for tribunals’ determination of substantive laws is principled while the discretion of tribunals is too broad. Benjamin Hayward, in ‘Conflict of Laws and Arbitral Discretion: The Closest Connection Test’, attempted to design specific provisions for tribunals’ determination of substantive laws in the absence of parties’ express agreement on applicable laws for

26 See Xu Weigong, *Discussion on Law Application for Substantive Issues in International Commercial Arbitration*, 1 *Law and Commerce Research* (2001), p.94.

27 See Zhu Kepeng, *Law Application in International Commercial Arbitration*, Law Press, 1999, p.122; Han Jian, *Theories and Practices of Modern International Commercial Arbitration Law* (2nd edition), Law Press, 2000, p.273, etc.

28 Pei Pu, *Discussion on Law Application for Substantive Issues in International Commercial Arbitration*, 6 *The Journal of Chongqing University* (Social Science Edition 2008), p.102.

substantive issues in international commercial arbitration. He made suggestions on how to draft or amend relevant stipulations based on comparative analysis of arbitration legislations in 134 countries and regions, international commercial arbitration conventions and documents and arbitration institution rules.²⁹

The conflict law approach still plays an important role in international commercial arbitration. Markus A. Petsche, in ‘Choice of Law in International Commercial Arbitration’, pointed out that tribunals’ choice-of-law rules were different from courts’ rules and such difference was related to the following three choice-of-law issues. The first issue is the admissibility of the choice-of law result in absence of parties’ choice, the second is the interpretation and supplement of laws chosen by parties, and the third is the application of mandatory stipulations. Compared with common conflict-of-law rules, tribunals usually enjoy more freedom under specific choice-of-law rules in international commercial arbitration. In addition, tribunals, when attempting to interpret or make up the gap of domestic laws, may resort to non-state legal sources.³⁰

4) Relationship between International Commercial Arbitration and Foreign Direct Investment

In theory, international commercial arbitration should facilitate foreign direct investment (FDI) since companies can effectively avoid inconvenience of foreign courts and execute contracts more efficiently under the private commercial legal system set up in international commercial arbitration. Andrew Myburgh

²⁹ See Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test*, Oxford University Press, 2017.

³⁰ See Petsche M.A. *Choice of Law in International Commercial Arbitration*. In: Garimella S., Jolly S. (eds) *Private International Law*. Springer, Singapore.

and Jordi Paniagua, in ‘Does International Commercial Arbitration Promote Foreign Direct Investment?’, constructed a mathematical model, attempting to explain the practical effect of resolving international disputes through arbitration. The analysis result of the model confirmed the hypothesis that international commercial arbitration could facilitate FDI. It also pointed out the effect was more on the change in the investment amount while the impact on investment project quantities was not significant.³¹

5) Legal Interpretation in International Commercial Arbitration

Joanna Jemielniak, in ‘Legal Interpretation in International Commercial Arbitration’, explored legal interpretation in international commercial arbitration. He pointed out that arbitration, as a unique legal and semantic phenomenon, is more like a discourse-based dynamic nonlinear legal reasoning model compared with the traditional three-stage linear legal reasoning. On the basis of theoretical analysis, he analyzed legal interpretation practice in international commercial arbitration in detail with institutional and ad hoc arbitration as the objects. As a conclusion, he pointed out that international commercial arbitration, as a representative of transnational legal order, still need to face the relationship with the existing institutionalized legal discourse though being independent from the influence of state systems.³²

6) Burden of Proof in International Commercial Arbitration

Francisco Blav and Gonzalo Vial, in ‘The Burden of Proof in International

³¹ See Andrew Myburgh and Jordi Paniagua, “Does International Commercial Arbitration Promote Foreign Direct Investment?”, 59 *The Journal of Law and Economics* (2016), pp. 597-627.

³² See Joanna Jemielniak, *Legal interpretation in international commercial arbitration*, Routledge, 2016.

Commercial Arbitration: Are We Allowed to Adjust the Scales’, explored the burden of proof in international commercial arbitration. They discussed the ability of parties and tribunals to change the rules of burden of proof in international commercial arbitration and pointed out that parties should be authorized to adjust certain rules under some restrictions such as the principle of fairness and equal treatment, mandatory rules, consideration of public policy and good faith. Furthermore, they noted that tribunals, though enjoying extensive power in changing the rules of burden of proof, often preferred to respect parties’ agreements.³³

³³ See Blavi, Francisco, and Gonzalo Vial, “The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales”, 39 *Hastings Int’l & Comp. L. Rev.* (2016), p. 41.

Chapter Two Special Observation on International Commercial Arbitration in China- Application of the Incoterms in International Commercial Arbitration in China

The most influential legal document in international sale of goods besides the United Nations Convention on Contracts for the International Sale of Goods (the CISG) is the International Rules for the Interpretation of Trade Terms (the Incoterms) issued by the International Chamber of Commerce (the ICC). The Incoterms amended in 2010 covers 11 three-letter trade terms related to common sales practices and illustrates obligations of sellers and buyers under each term. The Incoterms intended primarily to clearly communicate the tasks, costs and risks associated with the transportation and delivery of goods.¹ The ICC, since publishing the Incoterms in 1936, has updated it along with the development of international trade, drafting and issuing eight versions in 1936, 1953, 1967, 1976, 1980, 1990, 2000 and 2010. The ICC has begun consultations on the 2020 version. Due to the worldwide acceptance of the Incoterms, many buyers and sellers in domestic trade have adopted the Incoterms as well. Therefore, the application of the terms to both international and domestic transactions was officially confirmed by the subtitle ‘ICC rules for the use of domestic and international trade terms’ of the 2010 version.

¹ Introduction, Incoterms 2010, No.715 publication of the ICC.

This Chapter makes special research and observations on 97 international and domestic typical cases concluded by the CIETAC in which the parties chose to apply the Incoterms with the names of the parties and arbitrators and the case numbers omitted. In the 97 cases, the time period for the parties to submit their applications for arbitration was between July 2010 and June 2016. The tribunals issued final awards in all the cases. This Chapter shares with arbitration practitioners the basic information and features of application of the Incoterms in China's international commercial arbitration practice, by comprehensively analyzing and studying factors in these cases such as the claimants and respondents' nationalities, the parties' identities in sales contracts, the time of application for arbitration, the time of awards, the number of arbitrators, the arbitration languages, the places of arbitration, the claim and counterclaim amounts, the applied trade terms, types and kinds of the trade, the applicable laws, types and focus of the disputes, the outcomes, etc. Meanwhile, it reveals the common problems in the application of the Incoterms by international trade participants, summarizes and refines the enlightenment of this study on China's international commercial arbitration practice, and puts forward suggestions for international trade participants and potential parties of arbitration cases through the analysis of these typical cases.

I. General Review of Incoterms-related Awards

1. Parties' Nationalities, Identities and Absence from Hearing

In the six years (2010-2016), the claimants of the selected CIETAC cases were from 16 countries and regions including the U.A.E., the Republic of Ireland,

Russia, the Republic of Kazakhstan, the U.S., Japan, South Korea, Sweden, Seychelles, Tanzania, Spain, Singapore, U.K., Mainland China, Taiwan and Hong Kong.

The respondents of these cases were from 21 countries and regions including the U.A.E., Oman, Australia, Brazil, Denmark, Germany, Russia, South Korea, the Netherlands, U.S., Japan, Switzerland, Turkey, Ukraine, Spain, Singapore, Italy, Indonesia, U.K., Mainland China and Hong Kong.

The distribution of countries and regions where the claimants were from are shown in Figure 2.1 (arranged in a decreasing order).

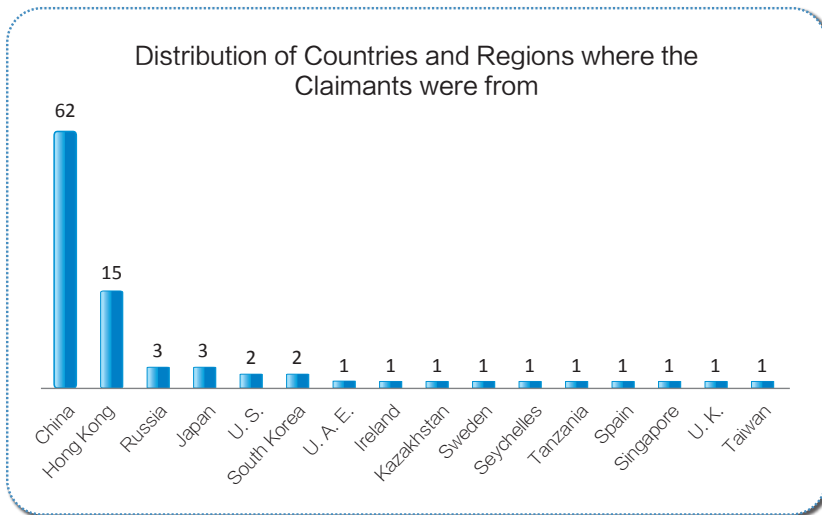


Figure 2.1

The distribution of countries and regions where the respondents were from are shown in Figure 2.2 (arranged in a decreasing order).

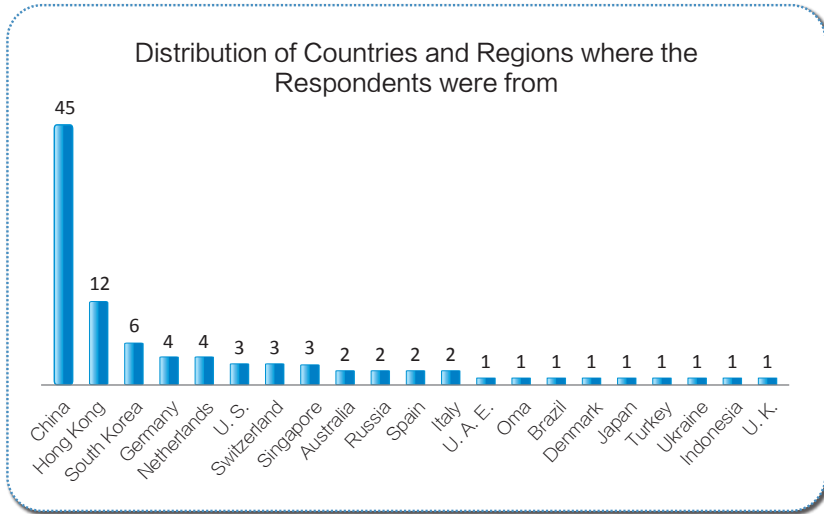


Figure 2.2

Among these cases, 16 cases involved both parties from Mainland China, 26 involved disputes between parties from Mainland China and Hong Kong or Taiwan parties, 1 involved both parties from Hong Kong and 5 involved disputes between Hong Kong parties and foreign parties.

As for the place of arbitration, most parties had made no express choice thereof and tribunals determined U China as the place of arbitration according to CIETAC rules.

The above data seems to indicate that China's international trade arbitration cases

still have strong regional characteristics, i.e., the majority of parties are from Asia and traditional trade powers. As to contractual disputes involving both parties from outside Mainland China, we cannot see that Mainland China has become the preferred place of arbitration. In choosing arbitration institutions, Chinese parties are more inclined to choose their familiar ones.

Concerning the identity of the claimants under the sales contracts, the claimants of 48 cases were buyers or their insurance companies while those of 49 cases were sellers or their insurance companies. The balanced numbers happen to show that the legal risks for both the buyers and the sellers, especially the risks of being respondents, in China's international trade are generally equal.

Furthermore, the cases in which the respondents failed to participate in the arbitration proceedings account for 20% of the total number of cases. 60% of these cases involved respondents from outside Mainland China while 40% involved respondents from Mainland China. Of these cases by default, in only 1 case the claims were dismissed because the claimant failed to prove his performance of contractual obligations while in all the others the claims were supported by the tribunals.

2. Choice of Trade Terms

Among the cases involving the Incoterms, terms in Group C² were the most used,

² In the 2000 version, the terms were arranged in four groups, that is, Group E, Group F, Group C and Group D, in the increasing order of the sellers' liabilities, costs and risks. The 2010 Incoterms classified the terms in 'terms applicable to any mode or modes of transport' and 'terms applicable to sea and inland waterway transport' according to the applicable transport modes. However, parties, when choosing terms, are more accustomed to choosing the applicable ones under the classification standard of the 2000 version.

accounting for 56% of the cases, wherein the cases involving CIF applicable to sea or inland waterway transport account for 28% of the total number, those involving CFR account for 22% while the cases involving CIP or CPT applicable to any mode or modes of transport account for 3% respectively.

Terms of Group F rank the second most used, accounting for 25% of the cases, all of which used FOB with no application of FCA or FAS.

The cases involving terms of Group D account for 10% of the cases. Those involving DDP or DAP account for 8% and 3% respectively.

The cases involving Group E terms account for 8% of the cases. In over half of such cases, warehouses in the bonded area were designated as the place of delivery.

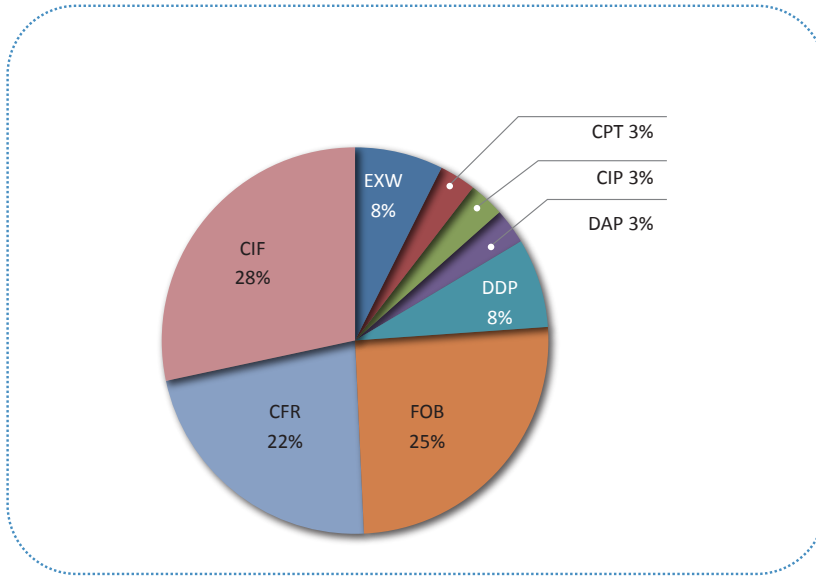


Figure 2.3

In addition, these selected cases involve a wide range of goods including traditional bulk cargos such as ore, fuel oil, rubber, corn and cow; high value-added goods such as motorcycle, gear assembly, ultrasonic bone knife and robot; and combination of services with goods such as construction project equipment and services, production line equipment and technical training. According to statistics, the types of goods have certain impact on the selection of terms. For example, DDP was selected in 2 contracts involving services while the Group E terms was chosen in all the cases involving plastic raw materials including polycarbonate, polypropylene and polyethylene. One possible reason is Group E terms are mostly used in bonded area trade. However, no connection between the

types of goods and the selection of terms is found for Group C and F terms.

Meanwhile, concerning the selection of terms and transport methods, most of the parties could properly understand the applicable way of transport for the terms. However, some non-matching cases such as ‘CIF Shanghai Airport’, ‘FOB Shanghai Train Station’, etc. occurred. The tribunals generally took such agreements for reference when determining the place of delivery. For example, the tribunal held that ‘FOB Shanghai Train Station’ meant that ‘...the agreement on the FOB price between the claimant and the respondent in the contract indicates the parties’ consensus that the FOB rules shall be taken as reference for the transport of the equipment involved in this case by land...considering the situation of this case the seller shall be deemed as having delivered the equipment after loading the goods on the train where the risks were transferred to the claimant’. In reality, however, the buyer, if noticing the features of the FOB term in the contract negotiation, may change the FOB term, which is only applicable to sea transport, to the FCA term, which is applicable to train transport, so as to avoid the risks of damage or loss during the time from the preparation of unloading goods and transferring to the carrier upon the arrival of the train station to the loading of goods on the train.

3. Expression of Trade Terms

The ICC recommended the trade terms to be used in the way of ‘the term + the specific place of delivery + the version of the Incoterms’, such as ‘FCA 38 Courts Albert 1er, Paris, France Incoterms® 2010.’³ Unfortunately, almost all of the 97

³ Introduction, Incoterms 2010, No.715 publication of the ICC.

chosen cases failed to meet such standard.

In 10% of the sales contracts involved in these cases, the parties made no agreement on the place of delivery. In the remaining 90% cases the parties only mentioned the specific names of cities, harbors, bonded areas or companies as the place of delivery.

Only 6 cases specified the specific version of the Incoterms in the contracts involved, mainly the 2000 and 2010 versions. The tribunals had to make extra discussion on the version of the Incoterms in the awards in the absence of such agreement since the Incoterms are only recommended for use and could not directly replace previous versions.

Although there is no special controversy over the allocation of risk due to the unclear agreement on the place of delivery in the chosen cases, it is important to note that there are discrepancies among various versions of the Incoterms. For example, the latest 2010 version contains fewer terms than the 2000 version while the detailed contents of the remaining ones have been modified. For example, in the FOB and CIF terms, the point for the risk transfer has been changed from the long-term traditional standard of ‘the goods pass the ship rail’ to ‘the goods are loaded on board the vessel’. If it occurs that ‘the goods are dropped and damaged when being loaded on board’, though the probability of such occurrence is very small, the parties may argue over the applicable version of the Incoterms and the determination of risk transfer.

It should also be noted that the concept of ‘trade terms’ is not invented by the

ICC. The International Law Association enacted Warsaw-Oxford Rules, i.e. the unified rule for CIF sales contracts, as early as 1928 and amended it in 1932. The 1932 Warsaw-Oxford Rules has been used till now. The joint committee of the Chamber of Commerce of the United States of America, the National Council of American Importers and the National Foreign Trade Council enacted the Revised American Foreign Trade Definitions 1941, formally explained six trade terms including Ex, FOB, FAS, C&F, CIF and Ex Dock. The FOB term was further divided into 6 types. Among them, only the fifth one, i.e. FOB Vessel, contains similar meaning with the FOB term under the Incoterms. Though the Revised American Foreign Trade Definitions 1941 and its follow-up editions have been less used due to the wide acceptance of the Incoterms, they are still in use among American parties. The parties of the chosen cases had no controversy over whether the trade terms used by them were under the Incoterms or other rules, but it is necessary to indicate the version of the Incoterms so as to avoid possible controversies.

4. Relationship between Trade Terms and Applicable Laws

Over half of the contracts of the selected cases contain agreements on the application of the Incoterms with no agreement on the applicable laws. An exceptional contract stipulated clearly in ‘the applicable law’ section that the Incoterms are the applicable law of the contract.

This shows that some international trade practitioners still pay little attention to the choice of law, or do not have a proper understanding of the nature of the Incoterms or the relationship between the Incoterms and the substantive law.

The Incoterms regulates parties' responsibilities and obligations in the delivery, receipt, packaging, transport and customs clearance of goods, but is not a complete set of contract law. There are a lot of problems in practice that cannot be solved by applying the Incoterms, such as the transfer of ownership, the determination of the quality, the conditions and time of payment, the connection of payment and delivery, the liability and consequence for breach of contract, the effect and rescission of contracts, etc.

In addition, the Incoterms does not contain detailed rules for all the actual situations regarding its stipulations. For example, the Incoterms states in Section A10 '*assistance with information and related costs*' that 'the seller must...in a timely manner, provide to or render assistance in obtaining for the buyer, at the buyer's request, risk and expense, any documents and information, including security-related information, that the buyer needs for the import of the goods and/or for their transport to the final destination...' As each contractual transaction may involve different requirements of various nations, the Incoterms can only use the general description of 'any documents and information' while the exact documents and information required in specific transactions need to be determined according to the actual situation. The parties involved need to agree thereon in contracts or reach agreement during performance. Disputes may arise when no such agreement can be reached.

5. Variations of Incoterms in Practice

Since the Incoterms is applied by party autonomy, parties are entitled to change the contents of the Incoterms by agreement. For example, parties may, when using

the CIF term applicable to delivery on board of the port of shipment, agree on delivery in factories, or, when using the FOB term, agree on the arrival at the port of destination as the point for transferring risks from the seller to the buyer.

In the event that parties make special agreement, tribunals will respect such agreement and determine parties' legal liabilities accordingly and generally will not support the defense of invalidity of such agreement.

II. Typical Cases Involving Application of the Incoterms⁴ in International Commercial Arbitration in China

1. Licenses, Authorizations, Security Clearance and other Formalities

The Incoterms stipulates the relevant obligations in Section A2 or Section B2 of the usage notes of each trade term. The specific stipulation is 'the buyer/seller must obtain at his own risk and expense any import/export licence or other official authorization and carry out, where applicable, all customs formalities necessary for the import/export of the goods' while the other party shall provide information for customs examination and formalities upon request and assist with the official authorization.

Such stipulation of the Incoterms is made with regard to the division of obligations for obtaining licences, authorization and formalities, leaving unsolved the problem of which party shall be liable if the import/export formalities cannot be obtained successfully. This point will be further illustrated by the following

⁴ The contents of each term are in accordance with the 2010 Incoterms unless otherwise specified.

case.

Case 1

The Claimant (the buyer, an American company) and the Respondent (the seller, a Chinese company) signed 121 contracts between 2006 and 2010, agreeing that the Claimant would purchase different types of motorcycles from the Respondent under the transaction mode of FOB Chongqing (Incoterms 2000). The contracts also stated that ‘the engines shall be EPA approved’.⁵ The Respondents, before signing the contracts, had provided the Claimant with the EPA certificates listing an American third-party company as the applicant and holder thereof and the EPA public record information for the certificates.

During the performance of the contracts, the Respondents supplied motorcycles with engines not in accordance with the EPA certificates. The Claimant (the buyer) could not obtain EPA certificates to import these motorcycles, thus the motorcycles were detained by the U.S. customs and could not get through.

The tribunal made the following determination regarding ‘the obligation of obtaining the U.S. EPA approval for the engines involved in this case’.

First, as a matter of fact, the tribunal clarified the content of the requirement for obtaining the U.S. EPA, i.e., the EPA certificate were needed and the EPA labelling requirements should be met for the engines of the motorcycles. Otherwise, the EPA would not approve or grant the Claimant’s import and sale of the motorcycles involved in the case in the U.S.

⁵ EPA is the abbreviation for Environmental Protection Agency of the U.S.

As per the contractual provisions and the parties' practice, the Respondent had in effect assumed the obligation of obtaining the EPA certificate and meeting the EPA labelling requirements. In spite of this, the Claimant should bear the risks and costs in obtaining important licenses including the EPA certificates according to the FOB term under the Incoterms 2000 stated in the contracts. The Claimant, being under direct administration of the EPA and the buyer under the FOB term, should have taken necessary and reasonable measures to obtain the EPA approval for the motorcycles delivered by the Respondent and meet the EPA regulatory requirements.

The Respondent, before signing the contracts, had provided the Claimant with the EPA certificates with an American third-party company as the applicant and holder thereof and the EPA public record information, showing that the engines of the motorcycles supplied by the Respondent were under the 'Cu Series' approved in the certificates, had met the EPA requirements and could be approved by the EPA. The Claimant should have checked the EPA certificates and the sample motorcycles sent over by the Respondent.

The tribunal, in the award, found the specifications of the motorcycles produced by the Respondent not in accordance with the parameters of the EPA certificates, thus the Claimant should bear certain liabilities for the loss due to its failure in conducting timely inspection of the motorcycles while the Respondent should bear most of the liabilities. However, the Incoterms contains stipulations for unclear agreement on the variation of the term. On one hand, the party with the obligation of obtaining licenses, authorization, formalities and other procedures

shall ensure smooth customs clearance with due diligence. On the other hand, the seller is still liable for the failure in obtaining import licences if the failure is due to the seller's faults such as poor quality of the goods.

2. Sellers' Obligation of Delivery

The obligation of 'delivery' is stipulated in Section A4 of the Incoterms as '[T]he seller must deliver the goods... at the named place on the date or within the period agreed for delivery and in the manner ...'. Correspondingly, Section B4 states the buyer's obligation as '[T]he buyer must take delivery of the goods when they have been delivered in accordance with A4.'⁶ Disputes over delivery are quite common and the issue is the time of the sellers' fulfilment of the delivery obligation and the specific ways of delivery, for example, whether delivery is made by delivering only the documents or by actually delivering the goods.

Case 2

The Claimant (the buyer, a Chinese company) and the Respondent (the seller, a Chinese company) agreed on the purchase of goods stored in Shanghai Bonded Warehouse under the term 'EXW Shanghai Bonded Warehouse'. The Claimant made full payment through a negotiating bank with the letter of credit. However, the warehouse refused the Claimant's request for delivery of goods with the bill of lading provided by the Respondent. Thus, the Claimant could not pick up the goods. The two parties went together to the warehouse to take delivery, but were

⁶ It is stated under the EXW term that '[T]he buyer must take delivery of the goods when they have been delivered in accordance with A4 and A7/B7'. Section A7 thereof stipulates that '[T]he seller must give the buyer sufficient notice as to when and where the goods will be placed at his disposal'.

informed by the warehouse that the goods had been seized by the police and could not be delivered.

The Claimant alleged that the Respondent failed to deliver the goods.

The Respondent argued that it had submitted the commercial invoice, the packing list and the bill of lading to the Claimant. In particular, it was clearly stated in the bill of lading that the Respondent was the consignor, the Claimant was the consignee, the place of delivery was Shanghai Bonded Warehouse and cargo details. The Respondent had delivered the goods to the Claimant in accordance with the instructions.

The tribunal held that the contract of this case requested for actual delivery of goods since it was an EXW contract with Shanghai Bonded Warehouse as the agreed place of delivery. This contract was different from CIF, CFR or FOB contracts under which the seller would have completed the symbolic delivery as long as he loaded goods on board at designated ports of shipment within specified time and submitted legal and effective bill of lading representing the ownership of goods. However, according to the interpretation of EXW in Section A4 of the Incoterms 2000, the Respondent should have placed the goods at the disposal of the buyer at the named place of delivery, not loaded on any collecting vehicle, on the date or within the period.

According to the provisions on the seller and the buyer's delivery obligation under the EXW Incoterms 2000, the Respondent had obviously failed to fulfil the delivery obligation under the EXW (warehouse) contract of this case. The

Respondent's argument that it had delivered documents requested under Article 6 of the contract could not prove that the Respondent had actually delivered the goods.

In another case of 'EXW Huangpu Bonded Warehouse, China' contract, the parties agreed that 'the seller shall submit to the buyer all the documents under the letter of credit, especially the delivery order, and request the warehouse deliver the goods to the buyer by issuing the cargo title certificate'. The tribunal deemed that the parties' agreement on delivery in the form of 'submitting documents' had actually changed the content of the term. The seller shall be deemed as having fulfilled the delivery obligation after submitting the cargo title documents to the buyer. Furthermore, the tribunal noticed that the seller's staff and the warehouse staff had been charged and sentenced under criminal liabilities with contract fraud due to their collusion in forgery documents. Thus, the tribunal held that the goods stated in the documents submitted by the seller to the buyer did not exist at the time of delivering the cargo title certificate, therefore, it was impossible for the cargo title to be transferred along with the delivery of the documents. As a result, the seller had not fulfilled the delivery obligation.

In summary, parties need to distinguish between actual delivery under Group E and D terms and symbolic delivery under Group C and F terms.⁷ Meanwhile, parties are advised to avoid deviation from the terms through contractual provisions different from the Incoterms because they can normally choose

⁷ It usually refers to the situation when the buyer and seller have no direct contact, the seller loads the goods at the designated time and place and submits relevant documents including the title certificate to the buyer, performs the delivery obligation by obtaining the transport documents issued by the carrier or other commercial documents, and needs not to guarantee the arrival of the goods.

another more appropriate term. As for symbolic delivery, what documents shall be submitted to satisfy the ‘delivery’ requirements? Some tribunals deemed that ‘the seller’s submission of negotiating documents required to the negotiating bank indicates the seller has fulfilled the obligation of delivering goods’. Some held that ‘the buyer, though having not received the original bill of lading, obtained the delivery order by issuing the letter of guarantee, which has the same effect as using the original bill of lading for collection of goods’. Others found that ‘the parties had changed the term content through contractual provisions, allowing the buyer to transfer the goods stated in the delivery instructions to other warehouses or re-sell the goods to others. Thus, the buyer had obtained the cargo title under the delivery instructions’. In short, the tribunals’ judging standard for the seller’s fulfillment of ‘the symbolic delivery’ obligation may be summarized as the extent to which the submitted documents can help the buyer to achieve the basic power of possessing, using, benefiting from and disposing of the goods.

3. Risk Transfer Points

‘The buyer must bear all risks of loss of or damage to the goods from the time they have been delivered’ is the general provision in contract laws of various countries. The Incoterms also specifies the points of risk transfer under different trade terms. For example, the risks of goods transfer ‘from the time they have passed the ship’s rail’ under the FOB term in pre-2010 versions, or ‘from the time they have been delivered to the carrier’ under the FCA term. However, we find that a considerable number of parties have deviated from the true meaning of ‘risks’ stipulated in the Incoterms, though in some cases the respondents deliberately

‘distorted’ the term content according to their defense strategies.

The ‘risks’ under the Incoterms refer to the risks of goods during transport, including damage, loss and other risks. If the goods have been damaged before the shipment while such damage may occur during transport, it is necessary to investigate into the real cause of the damage upon the arrival of the goods at the destination to find out the time of the damage. Under such circumstance, the seller cannot defend himself solely on the ground that ‘the risks have been transferred to the buyer at the time of delivery’ under the Incoterms.

Case 3

The Claimant (the seller, a Chinese company) sold chestnuts grown in China to the Respondent (the buyer, a Dutch company) under CIF Rotterdam. The Respondent, after receiving the goods, found serious quality problems in some of the goods, including worms in large quantities and a small amount of rotten and moldy chestnuts. In light of the foregoing, the Respondent had alleged the Claimant’s fundamental breach of contract and refused to pay the remaining contract price. The Claimant applied for arbitration to claim the outstanding payment.

During arbitration, the Respondent asserted that the quality problem of the chestnuts had existed before the shipment and submitted an Inspection Report. The Report stated that ‘...inspection conclusion: There are a large number of worms in the fresh chestnuts in No.XXX container because 1) the goods had not been frozen appropriately before shipment; 2) the goods had been rotten before

shipment; and 3) the worms in the goods had existed before shipment’.

The Claimant believed that the risks had been transferred to the buyer after the goods being loaded on board under the CIF term. The Claimant submitted the Phytosanitary Certificate and the Fumigation/Disinfection Certificate issued by one Entry-Exit Inspection and Quarantine Bureau, showing that ‘the batch of chestnuts has been inspected and tested in accordance with the prescribed procedures. There is no pest under the importing country or region’s quarantine requirements and basically no other pest. The importing country or regions’ current phytosanitary requirements are met’ and ‘the batch of chestnuts has been fumigated and disinfected on XX/XX/XXXX date’ respectively, to prove that the risks of goods damage by worms had occurred after the delivery.

The tribunal considered the fact that the Inspection Report submitted by the Respondent had been issued by an independent third party, the Claimant had been aware of the inspection since the Respondent notified and communicated with the Claimant after finding the quality problem, the Claimant had been absent from the on-site inspection and submitted no evidence against the inspection conclusion of the Inspection Report, and the goods with quality problems had got no quality certificate while those without quality problems had got one. Therefore, the tribunal deemed that, in the absence of contradicting evidence, the Inspection Report submitted by the Respondent had probative effect. The Claimant could not rely solely on the Phytosanitary Certificate and the Fumigation/Disinfection Certificate to prove the goods qualified through examination while the Respondent had proved the quality problems of the goods as shown in the

inspection conclusion of the Inspection Report. Therefore, the tribunal held that the Claimant should bear the liability for failing to meet its burden of proof since it had submitted no evidence to the contrary when denying the Inspection Report submitted by the Respondent.

It is noteworthy in this case that the Inspection Report submitted by the Respondent shows the quality problem had existed before the delivery. When did the quality problem occur? Did it occur before or after the goods were loaded on board (for example, due to high temperature or pest infection during transport)? Is there any error in the inspection conclusion of the inspection institution authorized by the Dutch buyer? The seller only submitted certificates issued by Chinese inspection and quarantine authorities, and no further evidence was provided against the Inspection Report submitted by the Dutch buyer, such as evidence from the scientific and technological point of view. At this point, the seller could not be protected by the ‘transfer of risks at the time of delivery’. In the case when the buyer has submitted strong evidence, i.e. the Inspection Report issued after the arrival of goods, the seller could not satisfy its burden of proof with pre-loading inspection and quarantine certificates only. The application of the risk transfer rules under the Incoterms could only achieve the effect with sufficient convincing evidence.

Case 4

The Claimant (the buyer, a South Korean company) and the Respondent (the seller, a Chinese company) agreed on the sale of rolls under the CIF term. The buyer, after finding rust in the rolls and non-conformity with the quality standard

under the contract upon the arrival at the port of destination, initiated arbitration and claimed for compensation. Unlike the above case, the buyer failed to submit evidence 'showing that the rust had occurred before delivery'.

The tribunal of the case held that as the three contracts involved in this case were all CIF contracts and the Claimant failed to submit any evidence to prove the rust had existed before the loading of goods on board, the possibility of the occurrence of rust before or during loading could be precluded. The seller, i.e. the Respondent, should only bear all risks before the loading while the buyer, i.e. the Claimant, should bear all risks after the loading according to the stipulation on the risk transfer point under the CIF term in the Incoterms. Therefore, the Respondent should not be liable for the rust since the Claimant had submitted no evidence to prove the existence of rust before the loading of goods.

Comparing the above two cases, we may find that in the Chinese arbitration practice, the tribunal's general approach to determining 'whether the non-conformity of quality occurs before or after the transfer of risks of goods' is to presume the goods quality according to the risk transfer points for each trade term under the Incoterms and shift the burden of proof to the seller if the buyer submits evidence to the contrary.

4. Performance of Notification Obligation

Under the Incoterms, both the buyer and the seller have the obligation of sending notice to each other. For the seller, the delivery obligation covers not only sending goods to designated places but also notifying buyers or their agents. If a buyer

alleges a seller's failure in delivery, the seller cannot prove its delivery only with the evidence on sending the goods to the designated place. The seller should also prove that it has performed the notification obligation.

Case 5

The Claimant (the buyer, a Hong Kong company) purchased nickel ore from the Respondent (the seller, an Indonesian company) under the FOB major port of Indonesia term.

The Claimant claimed for return of the deposit it had paid since the Respondent failed to deliver the goods.

The Respondent argued that the Claimant should have been aware of the delivery of the nickel ore to the port since the goods had been sent to the port and the Claimant had a representative at the port.

On this issue, the tribunal deemed that according to Section A7 *Notice to the buyer* of the *FOB Incoterms*, '[T]he seller must give the buyer sufficient notice that the goods have been delivered in accordance with A4 or the vessel have not collected the goods within the agreed period with risks and fees borne by the buyer'; and according to A4, '[T]he seller must deliver the goods ... at the named place of loading (if any) in the port of shipment on board the vessel nominated by the buyer, or in the manner of obtaining the goods already delivered onboard...'. It is easy to conclude from the above provisions that the seller, when delivering goods to the buyer at the place of loading in the port of shipment, must give

sufficient notice to the buyer. Furthermore, the seller normally need to send vessel nomination notices to the buyer for the buyer's convenience of receiving goods since ports of shipment, specified quantities of goods and delivery time are involved in the FOB term. However, the Respondent of this case failed to prove its performance of the delivery obligation under the contract due to the lack of any notice of this kind.

What is the exact meaning of the seller's 'notification obligation'? What should be the content of such notices? An answer is given by the tribunal in the following case.

Case 6

The Claimant (the seller, a South Korean company) sold hot rolled steel coils to the Respondent (the buyer, a Chinese company) under the FOB term. The Respondent did not send a vessel to take delivery of the hot rolled steel coils and the market price fell. The Claimant had to resell the goods and suffered loss due to price difference. Then, the Claimant applied for arbitration to claim compensation of the loss.

The Claimant alleged that the main reason for non-delivery of the goods was the Respondent's failure in nominating a vessel for shipment while the Respondent argued that the reason for such failure was the Claimant's failure in notifying the Respondent that the goods had been ready for shipment.

On the issue of 'whether the Claimant should have notified the Respondent the

goods was ready for shipment’, the tribunal held that there had been no contractual provision on the seller’s obligation of notifying the buyer that the goods had been ready for shipment. The FOB term should apply under the contract. Taking A7 stipulation on the seller’s obligation under the FOB Incoterms that ‘[T]he seller must, at the buyer’s risk and expense, give the buyer sufficient notice either that the goods have been delivered in accordance with A4 or that the vessel has failed to collect the goods within the time agreed’ and B7 stipulation on the buyer’s obligation that ‘The buyer must give the seller sufficient notice of the vessel name, loading point and, where necessary, the selected delivery time within the agreed period as reference, the tribunal held that the Respondent, as the buyer, should have notified the seller of the vessel name, the loading point and the delivery time sufficiently while the Claimant, as the seller, should have sent sufficient notice to the buyer on the delivery of goods in accordance with A4. It is stipulated in Section A4 that ‘[T]he seller must deliver the goods ...by placing them on board the vessel nominated by the buyer at the loading point, if any, indicated by the buyer at the named port of shipment...’, under which the seller is not obliged to notify the seller that the goods have been ready for shipment but is obliged to notify the buyer that the goods have been delivered or not been loaded within the agreed period only. The Claimant did not breach the contract for not having delivered the goods and notified the Respondent since the Respondent had not sent a vessel to the port of shipment. If the buyer had sent a vessel but the goods were not ready for shipment, the Claimant would have been liable for breach of contract. Thus, the Respondent, as the buyer, could not refuse to send a vessel on the excuse that the seller had not notified it that the goods had been ready, and had

breached the contract for not sending a vessel.

From the above two cases, it can be seen that different tribunals may have slightly different understanding of the extent of ‘sufficient notice’ by the seller concerning the specific content of the seller’s obligation under the FOB term due to their different understanding of international trade practices. We believe that the tribunal’s understanding in Case 6 seems to be more in line with the original meaning of the Incoterms 2010, i.e. the seller’s notification obligation does not refer to the status that goods are ready for delivery but that goods have been delivered or have not been loaded on the nominated vessel within the agreed period. Unless otherwise agreed in the contract, the seller has no obligation under the Incoterms to notify the buyer that the goods have been ready while the buyer is not entitled to refuse sending a vessel for the delivery of goods if there is no such notice from the seller. To avoid disputes on this specific issue, parties shall make clearer contractual provisions on the obligations of sending vessels and delivering goods and the sequence of relevant steps.

5. Assistance in Information Provision

Under A10/B10 of each term in the Incoterms, both parties are obliged to timely send information related to the safe transport of goods to the other side in certain degrees. However, there is no clear and specific stipulation on the content and scope of such information in the Incoterms.

Case 7

The Claimant (the buyer, a British company) purchased steel from the Respondent (the seller, a Chinese company) under the CFR term. It is stated in the contract that the seller agreed that the buyer would arrange inspection of the quantity and quality of goods by an internationally recognized inspection institution to ensure that the buyer could submit the certificate for loading and inspection in accordance with the end user's requirements.

However, before the goods were loaded and departed from the port of shipment, the seller had neither sent any information in accordance with actual needs and business practice such as the nomination of loading vessel and the date thereof to the buyer nor allow sufficient time for the buyer to arrange the inspection. Therefore, the buyer had no opportunity to nominate the inspection institution for necessary inspection and certificates thereof.

The buyer, relying on A10 of the CFR Incoterms 2000, alleged that the seller was obliged to notify the buyer timely and allow sufficient time for the buyer to entrust an independent inspection institution to inspect the goods at the port of shipment.

The seller argued that the assistance requirement under either the contract or the CFR Incoterms 2000 involved only the passive assistance obligation 'upon the buyer's request', so the seller was not obliged to provide relevant assistance on its own initiative in the absence of such request.

The tribunal held that the seller's assistance obligation under the CFR Incoterms 2000 was very important while the obligation was only about some necessary contents in trade instead of specific assistance stipulated in the contract. In this

case, the inspection only involved the buyer's requirements under the contract, but not the necessary contents in normal trade while the seller's obligation was 'assisting and cooperating with the buyer when it arranges inspection of the goods on its own initiative', so the general provisions in the Incoterms were not applicable.

The tribunal found that the final cause of the non-performance of the contract and loss thereof was the parties' disagreement on whether the modified letter of credit was consistent with the shipment period which had no causal relationship with whether the goods had been inspected before shipment. Thus, the tribunal made no further discussion on whether the seller had performed its contractual obligation. However, we may find from this case that there is no clear definition on the assistance obligation in the Incoterms and it is impossible to determine a party's assistance obligation regarding certain matter and the way of assistance based on the Incoterms only. Therefore, it is recommended that parties reach clearer and more specific agreement on specific matters. Tribunals have full discretion in the absence of clear and detailed agreement thereon.

III. Comments on and Suggestions on Application of the Incoterms in China's International Commercial Arbitration

1. Brief Comments on Application of the Incoterms in China's International Commercial Arbitration

It can be seen that when determining parties' rights and obligations under the

Incoterms, tribunals have an accurate understanding of the meaning of the Incoterms stipulations with consideration of relevant trade practices.

Meanwhile, when discussing disputes related to the Incoterms, tribunals prefer comprehensive discussion of the Incoterms, the applicable laws, the specific contractual provisions, the parties' actual performance of contract and the parties' trade practices over simple discussion on the Incoterms per se, thus combining the Incoterms with trade practices. It is obvious that such comprehensive and complete discussion has almost become the formula in arbitral awards, which undoubtedly reflects the development achievements and level of China's international commercial arbitration over the years.

It is found through research that tribunals can investigate facts objectively, respect party autonomy fully, apply laws and international practices fairly no matter where the parties are from. At the same time, the CIETAC arbitrators have achieved high professional level in languages and managing arbitration proceedings. Chinese arbitrators are proficient at drafting English awards and vice versa.

2. Suggestions to Practitioners of International Trade and Parties in International Commercial Arbitration

The following suggestions are made for international trade practitioners and potential parties in international commercial arbitration based on the analysis of 97 cases involving the Incoterms between 2010 and 2016.

1) Appropriate Selection and Use of Trade Terms

Before selecting trade terms, parties should fully analyze their trade modes to find the term suitable for the transaction purpose and minimize their own risks and obligations through the study of the Incoterms documents. For example, under current shipping conditions, goods are generally delivered to carriers in container yards in contracts with cargo shipment. The seller, if choosing the FOB term, may be still liable for the risks of cargo damage or loss even in a certain period time after it loses control over the goods, so the choice of FCA term is more appropriate. Another example is that the Incoterms 2010 recommends the FCA, CPT and CIP terms for chain sales rather than the CIF term normally used since the former can avoid the seller's risks after delivering goods to the carrier and before loading goods aboard. In light of the frequency of use of the terms, when selecting the most used FOB and CIF terms, parties should be more cautious since such terms apply to sea and inland waterway transport only.

Furthermore, there is always a party that needs to sign a transport contract with the carrier in order to perform the trade contract. Such transport contract, though having no content directly related to the buyer or seller's rights and obligations, constitutes an integral part of the transaction. Therefore, it is recommended that parties, when entering into transport contracts, consider the impact of trade terms on the contract stipulations.⁸

In international trade contracts, parties' agreements prevail over the Incoterms. It is found in the study that some parties made no specific agreement on the delivery

⁸ For more details, see ICC Guide on Transport and the Incoterms[®] 2010 Rules, ICC No. 775 E Publication.

of goods, taking of delivery and vessel notification, etc. The Incoterms, though contain stipulations on these matters, are far from being the specific operational guidelines in business practice. For example, there is no detailed provision on the time for FOB buyers to inform sellers of the vessel collecting goods in advance, the time for sellers to raise objections regarding the tonnage and navigability of vessels or the time for sellers to inform buyers that goods are ready. A large number of disputes may have been avoided if detailed agreements were made thereon.

Similarly, the Incoterms, though provides for the transfer of goods risks, contain no detailed stipulation for the right of objection concerning qualities or quantities. It is impossible to solve all the problems with the Incoterms only. Therefore, it is recommended that parties reach more detailed agreement on matters such as the time for the seller to raise objections regarding qualities and quantities after receiving goods, the necessity and way of appointing third-party inspection institutions, the possibility of unilateral appointment by sellers, the inspection methods, the time for inspection after receiving goods, the place of inspection either in a port or inland, etc.

2) Specific Agreement on the Applicable Law of International Trade Contracts and Ascertainment of Foreign Law

It is shown through analysis that the tribunals of the 97 selected cases tended to apply Chinese laws under the closest connection doctrine when the parties failed to agree on either the applicable law or the application of the CISG. However, Chinese parties and parties with Chinese backgrounds (such as foreign companies

actually controlled by Chinese capital) cannot expect tribunals to determine China as the most closely connected country in any case based on the sole ground that the chosen arbitration institution is in China and one of the parties has Chinese backgrounds. Therefore, it is recommended that parties agree expressly on the applicable law in contracts to avoid uncertainty.

3) More Possibilities of Adverse Consequence for Absence from Arbitration Proceedings

As mentioned above, most parties absent from the arbitration proceedings are foreign ones. In practice, there may be a misunderstanding among parties that there is no need to participate in arbitration proceedings actively, but to wait till the winning parties apply for enforcement of awards to object. Some parties think such method of subsistence can resolve risks of losing in arbitration at a low cost. However, they should be aware that China is a contracting party to the 1958 New York Convention and awards rendered in China can be recognized and enforced in other 156 contracting states of the Convention.⁹ If the losing party has property outside its home country which is a contracting state, the winning party may apply for enforcement there. Then the losing party cannot rely on its local advantage to obstruct the enforcement.

For parties whose places of residence are in China, there will be more risks if absent from arbitration proceedings. The winning parties, after obtaining winning awards, may apply for enforcement directly before the court with jurisdiction.

⁹ As of 14 August 2017, a total of 157 States parties had acceded to the 1958 New York Convention. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

Therefore, it is recommended that parties should actively participate in arbitration proceedings so as to avoid unnecessary risks and loss for being absent from arbitration proceedings.

The incoterms, due to its long history and continuous updates, will take an important place in international trade for a long time. Under current international trade circumstances, more new trading modes, transport ways and payment methods will occur along with the implementation and expansion of the Belt and Road Initiatives. There may be more cases involving the Incoterms in China's international commercial arbitration practices. Arbitrators in China's international commercial arbitration have been very professional in understanding and applying the Incoterms, and can deal with all kinds of relevant disputes and apply international conventions, international practice and domestic laws properly. It is believed that the above summary can better advise participants in international trade to design their trading modes reasonably, apply the Incoterms correctly, minimize legal risks and safeguard their legitimate rights and interests to the largest extent.

Chapter Three Judicial Supervision of International Commercial Arbitration in China

Through the collection of judgments published on China Judgment Online, the Replies of the SPC 4th Civil Division contained in *the Trial Guidance for Foreign-related Commercial and Maritime Cases* and other data from the Internet, comprehensive analysis and review of legal issues involved in the judicial review cases are made in this chapter over China's international commercial arbitration, or HMT-related and foreign-related arbitration.

I. Determination of Validity of Foreign-related and HMT-related Arbitration Agreement

1. Determination of Validity of "Arbitration or Litigation" Clause with Foreign Law as the Applicable Law

In *Hong Kong Spingwater Co., Ltd. v. Hongbai Electrical Appliances (Shenzhen) Co., Ltd.* concerning confirmation of validity of an arbitration clause,¹ the parties had agreed to submit disputes to the state court of Las Angeles, California or the federal court of the U.S., and if necessary and appropriate, to a sole arbitrator to arbitrate in Las Angeles, California, U.S. under the applicable laws of California and the AAA Rules. Concerning this "litigation or arbitration" clause, the court

¹ (2015) Shen Zhong Fa She Wai Zhong Zi No. 91 Civil Ruling by Shenzhen Intermediate People's Court (on 3 March 2016).

ascertained that as the parties had expressly chosen the laws of California, U.S. as the applicable law of the arbitration agreement and the state law of California comprises statutory laws as well as case precedents, the U.S. Federal Arbitration Law, the California Civil Procedure Law and the precedents of the U.S. Federal Court and the California State Court should apply to determine the validity of the clause. In view of the parties' different understanding of the laws of California, the court, for the first time, entrusted Benchmark Chambers International, a foreign law discerning base in Shenzhen, to identify the U.S. laws. The court found in the end that the U.S. statutes, though containing no direct stipulation on the determination of validity of "litigation or arbitration" clauses, expressly supported the validity, irrevocability and enforceability of arbitration agreements unless mandatory grounds for contract revocation existed. The U.S. Supreme Court established the principle favoring arbitration in its precedent applying the Federal Arbitration Law. Though the validity of the "litigation or arbitration" clause was denied in a Utah District Court precedent, it was not applicable to the arbitral clause signed by the parties in the present case due to the substantial differences in the agreements. Thus, the arbitration agreement of the case was valid.

2. Determination of Validity of Ad Hoc Arbitration Clause under the Law of the Seat of Arbitration

In *COFCO Wines & Spirits Co., Ltd. v. Gloriavino Co. Ltd.* concerning confirmation of the validity of an arbitral clause,² the applicant alleged the arbitral

² (2014) San Zhong Min (Shang) Te Zi No. 9333 Civil Ruling by Beijing Third Intermediate People's

clause in the Sales Contract between the parties void since the parties had agreed to submit their disputes to arbitration in Switzerland without mentioning the arbitral institution, which resulted in unclear agreement on the place of arbitration. The court held that though the Sales Contract failed to specify the applicable law, but the parties had agreed to arbitrate in Switzerland, the Swiss law at the place of arbitration should be applied in determining the validity of the arbitration clause.

It is stated in Chapter 12 of the Swiss Federal Code of Private International Law that parties, when reaching no agreement on how to form tribunals, may refer to Article 179 and apply for the appointment of arbitrators by the court at the place of arbitration, which means ad hoc arbitration is allowed under the Swiss law. Thus, the arbitral clause involved in this case did not violate the mandatory provisions of the Swiss Federal Code of Private International Law and should be deemed as valid.

3. Interpretation of Choice of Arbitration Institution in Arbitration Clause

1) Interpretation on the Name Change of Arbitration Institution

In *Shanghai Hongye International Trade Co., Ltd. v. Hard Home Steel Aluminum Container Factory* concerning confirmation of the validity of an arbitral clause,³ the applicant alleged that the arbitral clause could not show the parties true intent in choosing the arbitration institution when signing the contract in 2013 because

Court (on 28 December 2016).

3 (2016) Jing 04 Min Te No. 10 Civil Ruling by Beijing Fourth Intermediate People's Court (on 8 November 2016).

the Chinese translation of the English name of the arbitration institution in the contract, i.e. Foreign Trade Arbitration Commission Within the China Council For the Promotion of International Trade, had been changed to China International Economic and Trade Arbitration Commission in 1988 while the corresponding Provisional Arbitration Rules had ceased to be effective. The court held that it was stipulated in Article 1 of the 2015 CIETAC Arbitration Rules that "(1).The China International Economic and Trade Arbitration Commission (CIETAC), originally named the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade and later renamed the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, concurrently uses as its name the 'Arbitration Institute of the China Chamber of International Commerce'. (2) Where an arbitration agreement provides for arbitration by the China Council for the Promotion of International Trade/China Chamber of International Commerce, or by the Arbitration Commission or the Arbitration Institute of the China Council for the Promotion of International Trade/China Chamber of International Commerce, or refers to CIETAC's previous names, it shall be deemed that the parties have agreed to arbitration by CIETAC." According to the above provision, the arbitration clause in the contract between the parties was valid with a clear intent by the parties to arbitrate and a specified arbitration institution because when the parties designated CIETAC in its former name in the contract, it should be deemed that the parties intended to submit their disputes to CIETAC.

2) Interpretation on Two Arbitration Institutions in One City

In *Avin, L.L.C. v. Shenzhen Zhaori Caiyang Electronics Co., Ltd.* concerning confirmation of validity of an arbitral clause,⁴ the designated arbitration commission in the arbitration agreement was ‘Shenzhen International Arbitration Commission’. There are two arbitration commissions in Shenzhen, i.e. Shenzhen Arbitration Commission and Shenzhen Court of International Arbitration. Based on Article 3 of the *SPC Interpretation concerning Some Issues on Application of the PRC Arbitration Law* that "Where the name of an arbitration institution as stipulated in the agreement for arbitration is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected", the court ascertained that the arbitration agreement was valid since the designated arbitration commission in the arbitration agreement could be determined as the Shenzhen Court of International Arbitration considering the outstanding difference between the names of the two commissions, i.e. the word "international", and the existence thereof in the designated arbitration institution name.

4. Arbitration Agreement Reached by Conduct of Parties in Arbitration Proceedings.

In *Peng Qiuzhen v. PICC Property and Casualty Co., Ltd.* concerning confirmation of validity of an arbitration clause,⁵ the applicant alleged the arbitration agreement void since the defendant had not explained the contract

4 (2016) Yue 03 Min Chu No.1177 Civil Ruling by Guangdong Province Shenzhen City Intermediate People’s Court (on 27 September 2016).

5 (2014) Zhe Hang Zhong Que Zi No.5 Civil Ruling by Zhejiang Province Hangzhou City Intermediate People’s Court (on 13 June 2016).

clauses in detail and signed all the insurance related contracts on behalf of the applicant without his permission, agreeing to submit disputes to Hangzhou Arbitration Commission with no authorization. The Zhejiang Higher People's Court reported the case to the SPC since it involved the determination of the validity of an arbitration agreement over non-signatories. The SPC replied and approved the confirmation of validity.⁶ The SPC ascertained that though the insurance policy had not been signed by the applicant himself but had been issued by the defendant unilaterally, the applicant, after receiving the insurance policy and being aware of the arbitration clause therein, submitted disputes to the Hangzhou Arbitration Commission according to the arbitration clause, which showed his willingness to be bound by the arbitral clause. Thus, the arbitration agreement had been reached between the two parties through the special conduct during the arbitration proceeding. Such agreement was legal and valid as per Article 16 of the PRC Arbitration Law. The applicant's withdrawal of the application for arbitration after the oral hearing did not result in the invalidity of the arbitration agreement.

5. Arbitrability of Monopoly Disputes

In *Yulong Computer Communication Technology Co., Ltd. v. Ericsson Co., Ltd.* concerning objection to jurisdiction over monopoly disputes,⁷ the defendant raised jurisdiction objection and requested the Chinese court to dismiss the case since

⁶ The SPC's Reply regarding *Peng Qiuzhen v. PICC Property and Casualty Co., Ltd.* concerning Confirmation of Validity of Arbitral Clause [(2016) Zui Gao Fa Min Ta No.40].

⁷ (2015) Shen Zhong Fa Zhi Min Chu Zi No.1089 Civil Ruling by Guangdong Province Shenzhen City Intermediate People's Court (on 1 April 2016).

the parties had agreed to arbitration in Singapore. The court ascertained that it had jurisdiction over the case according to Article 50 of the PRC Anti-Monopoly Law and Articles 1, 2 and 3 of *the SPC Provisions on Several Issues concerning the Law Application in the Trial of Civil Disputes Caused by Monopoly Acts* which stipulated that the people's courts should accept cases over civil disputes caused by monopoly acts if the plaintiff directly brought a civil action. In *Nanjing Songxu Co., Ltd. v. Samsung China Co., Ltd.* concerning jurisdiction objection over monopoly disputes,⁸ the applicant sued against the defendant for its monopoly actions such as selling products at unreasonably high prices, forcing conditional sales and splitting sales market with vertical monopoly agreements. The defendant raised objection to the court's jurisdiction on the ground that the parties had reached arbitration agreement on the disputes. The Nanjing Intermediate People's Court for the first instance held that though anti-monopoly disputes were arbitrable under the Arbitration Law, the arbitration agreement was invalid since the parties had reached no agreement on the arbitration commission with two distribution agreements concerning the monopoly actions involved in this case referring both CIETAC and the Beijing Arbitration Commission for arbitration. Upon appealing by the defendant, the Jiangsu Higher People's Court held that China currently had explicit legal stipulation on arbitrating monopoly disputes which had been classified as non-arbitral in various nations for long due to its strong nature of public policy. *The SPC Provisions on Several Issues concerning the Law Application in the Trial of Civil Disputes Caused by Monopoly Acts* only stipulated on resolution through civil litigation and on courts with jurisdiction

8 (2015) Su Zhi Min Xia Zhong Zi No. 00072 Civil Ruling by Jiangsu Higher People's Court (on 29 August 2016).

especially. This case involved public interest, influencing not only the relationship between the defendant and its distributors but also all the customers using Samsung products. The privity of contract was broken. Thus, the disputes could not be solved through arbitration according to the arbitration agreement.

The features shown by cases in the 2016 concerning determination of the validity of foreign-related and HMT-related arbitration agreements are as follows. First, the people's courts follow the way of determining the applicable law of foreign-related arbitration agreements before determining both the form and substance validity of the arbitration agreements under the applicable law, which is highly consistent with the judicial review situation in 2015. Secondly, the people's courts concluded a number of cases with foreign laws as the applicable law of the arbitration agreements and ensured proper application of such laws through foreign law proof by the parties' evidence, court's own ascertainment and foreign law identifying institutions. It can also be seen that Chinese courts have made initial achievements in constructing foreign law identifying platforms. Thirdly, the courts, when interpreting arbitration agreements, tried their best to confirm the validity of the agreements, realizing parties' arbitration intent to the most. Fourthly, the courts emphasized parties' good faith and the principle of estoppel. Specific behavior in arbitration proceedings may be presumed as parties' arbitration agreement in the absence of a written one. Fifthly, there were different views on the arbitrability of new-type disputes involving public interest such as monopoly disputes. The courts made certain policy consideration on retaining the importance of domestic courts' hearing disputes involving public interest and

facilitating the ADR resolution of commercial disputes. Legislative and judicial propositions for setting explicit and detailed judicial review standards concerning the arbitrability of monopoly disputes were put forward as well.

From the results of the 2016 cases concerning determination of the validity of foreign-related and HMT-related arbitration agreements, reasons other than lack of arbitrability that led to the invalidity of the arbitration agreements include the following: When the applicable law of the arbitration agreement was PRC law and two or more arbitration institutions existed at the chosen place of arbitration, there was no clearly designated arbitration commission in the arbitration agreement.⁹ The arbitration clause in the charter party was not explicitly incorporated into the bill of lading while the standard terms of transport conditions on the back of the bill of lading could not constitute as the effective incorporation of such clause.¹⁰

II. Annulment and Non-enforcement of Foreign-Related or HMT-Related Arbitral Awards

1. Determination of Foreign-related Elements

In *Beijing Capital Co., Ltd. v. Microsoft Mobile (China) Investment Co., Ltd.* concerning the application for revocation of an arbitral award,¹¹ the defendant, a

⁹ The SPC Reply concerning the Confirmation of Validity of the Arbitral Clause in *Hong Kong Bai Teng Trade Co, Ltd. v. Yunnan Huijia Import and Export Trade Co., Ltd.* on the Request of Jiangsu Higer People's Court [(2016) Zui Gao Fa Min Ta No. 10, 25 May 2016].

¹⁰ The SPC Reply concerning the Confirmation of Validity of the Arbitral Clause in *Shandong Provincial Light Industry Supply & Marketing General Corp. v. Laredo Shipping Company* [(2016) Zui Gao Fa Min Ta No. 20, 15 March 2016].

¹¹ (2015) Er Zhong Min Te Zi No. 13516 Civil Ruling by Beijing Second Intermediate People's Court (on 16 February 2016).

wholly foreign-invested company engaged in direct investment in China, argued that Article 70 of the Arbitration Law and other legal provisions on foreign-related arbitration should apply in the judicial review since foreign-related elements were involved in this case. Referring to Article 522 of *the SPC Interpretation on the Application of the PRC Civil Procedure Law* that "[U]nder any of the following circumstances, the people's court may determine a case as a foreign-related civil case: (1) Either party or both parties are foreigners, stateless persons, foreign enterprises or organizations. (2) The habitual residence of either party or both parties is located outside the territory of the People's Republic of China. (3) The subject matter is outside the territory of the People's Republic of China. (4) The legal fact that leads to the establishment, change or termination of civil relationship occurs outside the territory of the People's Republic of China. (5) Any other circumstance under which a case may be determined as a foreign-related civil case," the court, considering that both parties were Chinese legal persons while the main legal relationship and relevant legal facts all occurred in the territory of the PRC, ascertained that the judicial review should be in accordance with Article 58 of the Arbitration Law since this case involved no foreign-related element and was concerning the application for revocation of a domestic arbitral award.

2. Scope of Judicial Review of Arbitration

In *Yunnan Yuntianhua Guoji Chemical Ltd. v. Bangladesh M/Smosharaf Brothers* concerning the application for revocation of an arbitral award,¹² the applicant

¹² (2016) Jing 04 Min Te No.32 Civil Ruling by Beijing Fourth Intermediate People's Court (on 25 August

claimed that the factfinding and award were completely wrong due to the serious procedural defect resulted from the tribunal's failure in determining the identity of Director Z of the third party M/Sunionmer Cantile Ltd. In addition, the tribunal seriously breached the arbitration rules in rejecting its judicial authentication application and evidence production application, resulting in unclear fact finding and a wrong award. The court ascertained that the first ground of the applicant was not a procedural issue for the courts to review over foreign-related arbitration cases, but a substantive issue in hearing the case. The second ground was not within the scope of judicial review either as it was within the scope of the tribunal's power in hearing the arbitration case while both the judicial authentication application and the evidence production application were substantive issues of the case and the tribunals may decide whether to accept judicial authentication applications or evidence production applications under the applicable arbitration rules.

3. Issues of Arbitration Procedures

1) Effective Service

In *U.S. Pepsi Kai International Co., Ltd. v. Anhui Handfull International Trading (Group) Co., Ltd.* concerning the application for revocation of an arbitral award,¹³ the applicant alleged violation by the defendant of Article 8 of the 2012 CIETAC Arbitration Rules regarding service procedure since the defendant had

2016).

13 (2015) Si Zhong Min (Shang) Te Zi No.146 Civil Ruling by Beijing Fourth Intermediate People's Court (on 18 April 2016).

intentionally concealed the applicant's address, resulting in the CIETAC's failure in taking reasonable measures such as inquiring its registered address, enquiring the defendant's representing attorney in the litigation against the applicant in U.S. or contacting the U.S. court for service, and thus leading to the unsuccessful service of the documents. The court ascertained that No.9831 was the service address agreed on by the parties in the contract. The applicant, after changing its administrative office address, business address and postal address, had not informed the defendant of the changes. It was shown in the testimony of the U.S. attorney Richard Lubetzky and in the proof from the U.S. post office that the No.9831 postal address and mailing address of the applicant had not been changed at the post office. Even if the applicant had applied for the change of postal address and mailing address in October 2013, the original address would have remained effective within 18 months after the post office received the application under relevant postal service laws of the U.S. Therefore, No.9831 was still an effective service address when the CIETAC sent the arbitration documents to the applicant in September 2014. According to Article 8 of the 2012 CIETAC Arbitration Rules, any arbitration correspondence to a party shall be deemed to have been properly served on the party if sent to its place of business, place of registration, domicile, habitual residence or mailing address. It was stated in the contract that No.9831 was the applicant's address. Therefore, the CIETAC's correspondence to the applicant should be deemed to have been properly served. The applicant had no sufficient ground for its application of setting aside the arbitral award for the alleged illegal service procedure.

2) Handling of Counterclaims by the Tribunal

In *Shenyang Minxiang Technology Co., Ltd. v. Hanyu Information Technology Co., Ltd. & MPC Co., Ltd.* (MPC) concerning the application for revocation of an arbitral award,¹⁴ the applicant alleged that the CIETAC's acceptance of MPC's counterclaims was not in accordance with the 2012 CIETAC Arbitration Rules since MPC had filed counterclaims beyond the specified time period and failed to pay the arbitration fee within the specified time. The court held that the applicant, as the claimant in the arbitration case, amended its claims on 24 December 2014, 4 months after the delivery of the arbitration documents to both parties on 18 August 2014. For the sake of fairness, MPC, as the respondent, should be entitled to submit new defense or file counterclaims against the changed claims. Otherwise, MPC would have been deprived of the procedural right to submit counterclaims against the amended claims. Furthermore, the arbitration commission had the power to examine whether the procedural requirements had been met or to make decisions on the acceptance of the counterclaims. In this case, the arbitration commission decided to accept MPC's counterclaims and notified the parties thereof after MPC had paid the arbitration fee for its counterclaims within the specified time, thus equally protecting the parties' procedural rights. The applicant had no sufficient legal or factual ground for its allegation of the tribunal's violation of legal procedure for accepting counterclaims. It also failed to prove that it had raised any objection thereto during the arbitration proceeding. Therefore, the application for revocation of the arbitral award was dismissed.

¹⁴ (2016) Jing 04 Min Te No. 26 Civil Ruling by Beijing Fourth Intermediate People's Court (22 December 2016).

3) Application of Other Arbitration Rules

In *Beijing Capital Co., Ltd. v. Microsoft Mobile (China) Investment Co., Ltd.* concerning the application for revocation of an arbitral award,¹⁵ the applicant alleged that the arbitration proceeding was illegal since CIETAC applied the 1998 ICC Rules, which was against the party autonomy and Article 4 of the 2005 CIETAC Arbitration Rules, had ignored the parties' agreement on mediation rules, which was against the PRC mandatory laws and contradictory to the application condition of the 1998 ICC Rules, had wrongfully replaced the ICC Arbitration Court and its staff with CIETAC and its staff, and had failed to submit the terms of reference and award to the ICC Arbitration Court for scrutiny. The court ascertained that the parties had agreed to submit disputes to CIETAC to be heard by a tribunal formed by three arbitrators (excluding Finland or Chinese citizens) under the ICC Mediation and Arbitration Rules in Beijing for a final award in the Equity Transfer Agreement in November 2005. CIETAC sent notices of arbitration to both parties. The applicant replied to CIETAC, requesting for the application of the current CIETAC Arbitration Rules since the ICC Mediation and Arbitration Rules had lost its efficacy. The defendant stated in its response that CIETAC should apply the 1998 ICC Arbitration Rules but it should also apply the 1988 ICC Mediation and Arbitration Rules if so decided by CIETAC. CIETAC decided to apply the 1998 ICC Arbitration Rules in 2011, deeming that the agreed arbitration rules in the contract did not refer to the ICC Mediation and Arbitration Rules since it was not the effective rules at the time of contract execution while

¹⁵ (2015) Er Zhong Min Te Zi No. 13516 Civil Ruling by Beijing Second Intermediate People's Court (on 16 February 2016).

the reference to the ICC Mediation and Arbitration Rules was in conflict with the agreement on the application of "the effective arbitration rules at the time" concerning the appointment of arbitrators. The 1998 ICC Arbitration Rules effective at the time of contract execution should apply to this case except certain parts which were non-applicable or inconsistent with the PRC mandatory laws with reference to Article 6 thereof. The duties of the ICC Court of Arbitration, the Chairman thereof, the Vice-Chairman, the Secretary-General, and the Secretariat should be fulfilled by CIETAC, CIETAC Chairman, the Vice-Chairman, the Secretary-General and the Secretariat respectively. The court ascertained that both parties recognized the 1988 ICC Mediation and Arbitration Rules had lost its efficacy at the time of contract execution and the current effective ICC rules was the 1998 ICC Arbitration Rules. It is stipulated in Article 4.2 of the 2005 CIETAC Arbitration Rules that "[W]here the parties have agreed to refer their dispute to CIETAC for arbitration, they shall be deemed to have agreed to arbitration in accordance with these Rules. Where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings'. CIETAC had the right to decide on the understanding and application of the arbitration rules designated in the arbitral clause since the parties had both accepted the jurisdiction of CIETAC but argued over the applicable arbitration rules and could not reach any new agreement thereon. In this case, CIETAC's discretion over such application was not illegal. Both parties had confirmed receiving CIETAC decision on the

application of the 1998 ICC Arbitration Rules and the parties expressly chosen CIETAC as the arbitration institution for dispute resolution. No matter which arbitration rules was applied in the case, CIETAC's administration over the case as the sole arbitration institution should not be influenced. Therefore, CIETAC's collecting arbitration fees and scrutinizing the award were not illegal. The applicant's allegation of CIETAC's wrong application of arbitration rules and illegal procedure was dismissed.

4) Arbitrator's Obligation of Disclosure of Conflict of Interest

In *Nexthill Investments Limits v. Beijing Huihong Rea Estate Development Co., Ltd. & Beijing Zhaotai Group Co., Ltd.* concerning the application for setting aside an arbitral award,¹⁶ the applicant alleged that the arbitrator co-appointed by the respondents should have disclosed the fact that he had been appointed by each defendant in two previous arbitration cases which were closely connected to the present case. Finding that it is stipulated in Article 5 of the CIETAC Code of Conduct for Arbitrators that "[I]f an arbitrator believes that he or she has a stake or other interests in a case that may prevent the case from being heard in an impartial manner, the arbitrator shall disclose his or her relations with the party in question, for instance, immediate family member, debt relationship, property and monetary relations, and business or commercial cooperation relations, and shall request for withdraw voluntarily," and considering that the arbitrator had no relation with the defendants including immediate family member, debt relationship, property

¹⁶ (2016) Jing 04 Min Te No.40 Civil Ruling by Beijing Fourth Intermediate People's Court (on 29 September 2016).

and monetary relations, and business or commercial cooperation relations, the court held that the arbitrator did not need to make the disclosure or withdraw from the case. The two previous appointments in other cases by the defendant were result of the defendants' exercising their rights under the Arbitration Rules, which did not prohibit parties from appointing the same arbitrator or arbitrators from accepting the same party's appointment for different cases. Therefore, the applicant had no sufficient factual or legal ground for its application to set aside the arbitral award.

In *IPC Laboratories Ltd. v. Huatai Property* (an Indian company) & *Casualty Insurance Co. Ltd. Chongqing Branch* concerning the application for setting aside an arbitral award,¹⁷ the applicant alleged that the presiding arbitrator, Li, violated Article 29 of the 2012 CIETAC Arbitration Rules for not disclosing what he should have disclosed. The defendant argued that Li's practice in the insurance industry had no impact on the arbitration proceeding. The court held that the applicant had no sufficient evidence to prove that there existed conflict of interest between the presiding arbitrator and the defendant, and dismissed the application for setting aside the arbitral award.

5) Multi-party Arbitration

In *Finland Varo Co., Ltd. v. Beijing Kunding International Investment Co., Ltd.* concerning the application for revocation of an arbitral award,¹⁸ the applicant

¹⁷ (2016) Jing 04 Min Te No.15 Civil Ruling by Beijing Fourth Intermediate People's Court (on 30 March 2016).

¹⁸ (2016) Jing 04 Min Te No.9 Civil Ruling by Beijing Fourth Intermediate People's Court (on 10 January 2016).

alleged that the tribunal had violated legal procedure by consolidating arbitrations without the consent of the parties when three independent arbitration agreements were signed by the defendant respectively with the applicant, Guangzhou Savcor Co., Ltd. and Beijing Savcor Co., Ltd., and when the 2012 CIETAC Arbitration Rules stipulated that consolidation of arbitrations shall be made either upon the parties' request or by the tribunals with all the parties' agreement. The court held that as there was a CIETAC arbitration clause in each of the three contracts, i.e. the House and Land Cooperation Framework Agreement between the defendant and Beijing Savcor Co., Ltd. and the Letters of Guarantee issued by the applicant and Guangzhou Savcor Co., Ltd., CIETAC did not violate the Civil Procedure Law or the Arbitration Law in taking the three agreements as a whole and consolidating arbitrations in one procedure for resolution of the disputes between the parties based on the close connection between the principal contract and accessory contracts and the inseparability of the facts and legal relations therein.

6) Appointment of Arbitrators

In *Finland Varo Co., Ltd. v. Beijing Kunding International Investment Co., Ltd.* concerning the application for revocation of an arbitral award,¹⁹ another application ground made by the above same applicant was that there had been no foreign arbitrator appointed to protect the procedural rights of the applicant as it was stipulated in Article 28 of the 2012 CIETAC Arbitration Rules that "[W]hen appointing arbitrators pursuant to these Rules, the Chairman of CIETAC shall

¹⁹ (2016) Jing 04 Min Te No.9 Civil Ruling by Beijing Fourth Intermediate People's Court (on 10 January 2016).

take into consideration the law applicable to the dispute, the place of arbitration, the language of arbitration, the nationalities of the parties, and any other factor(s) the Chairman considers relevant," and the tribunal was formed by three Chinese arbitrators, which resulted in non-conformity of the procedure with the arbitration rules and violation of legal procedure. The court held that the provision of Article 28 of the CIETAC Rules was regarding the elements for consideration in the appointment of arbitrators. The place of arbitration of this case was Beijing where CIETAC is located in, the applicable law was the PRC law, and the arbitration language was Chinese, while the places of registration of the parties except the applicant were in the PRC territory. The applicant had neither appointed an arbitrator within the specified time period, nor participated in the hearing to express its opinion regarding the appointment of arbitrators. The procedure for the appointment of arbitrators was appropriate and the hearing of the case by the three Chinese arbitrators did not constitute violation of the CIETAC Arbitration Rules.

4. Awards beyond Scope of Arbitration

In *U.S. GCC Group v. Yonghua Petrochemical Col, Ltd.* concerning the application for revocation of an arbitral award,²⁰ the applicant alleged that the award was rendered beyond the scope of arbitration since Item 4 in the award involved legal relationship outside the case, i.e., a disputes arising out of the Drilling Project Construction Contract signed by and between the defendant and Yonggang International Co., Ltd. which should had been submitted to the

²⁰ (2016) Jing 04 Min Te No.36 Civil Ruling by Beijing Fourth Intermediate People's Court (on 20 October 2016).

Guangzhou Arbitration Commission as agreed in the Contract. The court held that Item 4 in the award was made on the defendant's counterclaim. The tribunal had determined the nature of both the drilling project costs paid by the defendant to the third party Yonggang International Co., Ltd. and the fines paid by the defendant to the Republic of Congo government as loss occurred in the ex-regional exploration and development project. The tribunal's award on splitting such loss in the ratio of 3:7 between the parties based on Article 7.4.2 and Article 10 of the "Warrant of Defects" of the two Technical Service Contracts was within the scope of the disputes arising out of the performances of the two contracts. The award was neither beyond the defendant's counterclaim nor beyond the scope of arbitration under the arbitration agreement. Therefore, the application for revocation of the arbitral award was dismissed.

In *Dongcheng International Trade Co., Ltd. v. Swiss Gault Group Co., Ltd.* concerning the application for revocation of an arbitral award,²¹ the applicant alleged that the award on the demurrage and attorney fee was beyond the scope of arbitration since there was no agreement thereon in the Sales Contract involved in this case. The court held that the parties had agreed in the Sales Contract that all disputes relevant thereto should be submitted to the CIETAC if no settlement could be made through negotiation, which showed the consensus of the parties of submitting all disputes relevant to the contract to arbitration. The demurrage occurred due to the buyer's breach of contract for its delay in accepting the goods during the contract performance. Thus, the demurrage dispute was relevant to

²¹ (2016) Jing 04 Min Te No.13 Civil Ruling by Beijing Fourth Intermediate People's Court (on 18 July 2016).

the contract. According to Article 50.2 of the Arbitration Rules of CIETAC, the arbitral tribunal has the power to decide in the arbitral award, having regard to the circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case. Thus, the decision over the attorney fee was within the tribunal's power. The tribunal's award on demurrage and attorney fee was in accordance with the contractual provision and the arbitration rules, and within the scope of the arbitration agreement.

5. Offsetting Defence in Enforcement Proceedings

In *Calorifer AG v. Shuangliang Eco-energy Systems Co., Ltd.* concerning the application for enforcement of a foreign-related arbitral award,²² the defendant's ground for non-enforcement was that the applicant had due monetary debt to the defendant under the award. It is stipulated in Article 99 of the PRC Contract Law that '[W]here the parties are liable to one another for obligations that are due, and if the type and nature of the subject matter of such obligations are the same, any party may offset its own obligation against the obligation of the other party'. Llinks Law Offices had sent the applicant a lawyer's letter on behalf of the defendant regarding the offset. As to the remaining debt after offsetting, the defendant had initiated arbitration which was still in progress. Therefore, the defendant should not make payment to the applicant. The court held that the offset alleged by the defendant was not non-enforcement defence but rather a defence on the completion of the payment of the debt. After the defendant sent the lawyer's

²² (2016) Su 02 Min Te No.138 Civil Ruling by Jiangsu Province Wuxi City Intermediate People's Court (on 2 November 2016).

letter regarding offset on 22 April 2016, the applicant applied for the enforcement of the arbitral award on 13 June 2016, showing the applicant's dissent to the defendant's debt offsetting notice. Therefore, the determination on the offset of the defendant's debt under the award could only be made through substantive trial. This case involved judicial review over a foreign-related arbitral award and the court could not review substantial issues regarding the debt offsetting but could only review procedural issues to decide whether the award should be enforced. Thus, the defendant's defence was dismissed. The court ruled to enforce the arbitral award since there was neither non-enforcement situation as stipulated in Article 274 of the PRC Civil Procedure Law nor violation of public interest.

6. Re-Arbitration

In the case concerning application for revocation of an arbitral award by Liu X and Zhang X,²³ the award was beyond the scope of arbitration under Article 274.1.4 of the PRC Civil Procedure Law since the tribunal had determined and awarded on the liquidation of the joint venture and the assets after liquidation. The SPC approved the Beijing Higher People's Court's request for notifying the tribunal to re-arbitrate according to Article 61 of the Arbitration Law, which stipulated that '[I]f, after accepting an application for setting aside an arbitration award, the people's court considers that the case may be re-arbitrated by the arbitration tribunal, it shall notify the tribunal that it shall re-arbitrate the case within a certain time limit and shall rule to stay the setting-aside procedure. If the

²³ The SPC Reply on Beijing Higher People's Court's Request regarding the Case concerning the Application for Revocation of an Arbitral Award by Liu X and Zhang X [(2016) Zui Gao Fa Min Ta No. 29, 8 April 2016].

arbitration tribunal refuses to re-arbitrate the case, the people's court shall rule to resume the setting-aside procedure’.

It can be seen through the cases in 2016 concerning application for revocation or non-enforcement of foreign-related or HMT-related arbitral awards that the main grounds for revocation or non-enforcement are still the common ones such as the violation of the arbitration rules, awards beyond the scope of arbitration, etc. Attention needs to be paid to issues such as the interpretation of the arbitration rules, the appointment of arbitrators, the arbitrators’ obligation in disclosing conflicts of interest and the consolidation of arbitrations with multi-parties, etc. Furthermore, the court’s practice of allowing certain arbitral awards with defects to be re-arbitrated reflects the value orientation of the court in handling judicial review flexibly, avoiding waste of dispute resolution resources so as to reduce the burden of lawsuit for the parties.

III. Recognition and Enforcement of Foreign and HMT Arbitral Awards

1. Scope of Review and Burden of Proof under Article V of New York Convention

In *Noble Resources Co., Ltd. v. Hubei Qinghe Textile Joint Stock Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,²⁴ the defendant, having no objection to the facts alleged by the applicant,

²⁴ (2015) E Yichang Zhong Min Ren Zi No.00001 Civil Ruling by Hubei Province Yichang City Intermediate People’s Court (on 5 July 2016).

alleged that it could not perform the award since it had been bankrupted and liquidated. The Hubei Higher People's Court reported its decision to refuse the recognition and enforcement of part of the award on the ground that it was beyond the scope of arbitration. The SPC replied that, in accordance with Article V of the New York Convention, when reviewing arbitral awards for the circumstances of non-recognition or non-enforcement under Article V(1) thereof, the people's court should only make the review upon the party's request and no review should be made for matters not requested by the party while review can be made on the court's own initiative for circumstances regarding violation of arbitrability or public policy under Article V(2). In this case, as the defendant had not alleged for non-recognition or non-enforcement circumstances under Article V(1) of the New York Convention, the court lacked legal grounds for making the reviewing on its own initiative and for non-recognition and non-enforcement of part of the award.²⁵ Subsequently, the Intermediate People's Court of Yichang, Hubei Province ruled to recognize and enforce the arbitral award rendered by the International Cotton Association (the ICA).

In *Yuancheng Wireless Information Technology Co., Ltd. v. Beijing Guangxin Jiashi Technology Co., Ltd. & Detai (China) Group Co., Ltd.*,²⁶ the court held that parties should request and bear the burden of proof for the five circumstances of non-recognition or non-enforcement of arbitral awards under Article V(1) of the New York Convention while the court should review on its own initiative over the

²⁵ (2016) Zui Gao Fa Min Ta No.12 Reply by the SPC on 20 May 2016.

²⁶ (2014) San Zhong Min (Shang) Te Zi No.12398 Civil Ruling by Beijing Third Intermediate People's Court (on 28 April 2016).

two circumstances for non-recognition and non-enforcement of arbitral awards under Article V(2) thereof. Thus, the burden of proof for the existence of the circumstances for non-recognition and non-enforcement under Article V(1) of the New York Convention in this case rested on the defendant. The defendant should bear the legal consequence for failing its burden of proof since it had been legally summoned by the court but failed to participate in the hearing or submitting its statement of defense. The court ruled to recognize and enforce the arbitral award.

2. Validity of Arbitration Agreements

In *ECOM Agroindustrial Co., Ltd. v. Shenzhen Guotaihua Investment Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,²⁷ the defendant alleged that the recognition or enforcement application should be rejected under Article V(1)(e) of the New York Convention since the arbitration agreement was invalid and the applicant was incapable of signing the cotton sales contract. The court held that Chinese laws should apply to the applicant's capacity under *jus sanguinis*. It is stipulated in Article 36 of the PRC General Principles of the Civil Law that '[A] legal person's capacity for civil rights and capacity for civil conduct shall begin when the legal person is established and shall end when the legal person terminates'. Thus, the applicant was capable of engaging in civil activities such as signing the sales contract, the sales confirmation and the arbitration agreement. The sales contract was signed on 3 May 2012, providing for arbitration under the ICA Bylaws and Rules. The

²⁷ (2014) Shen Zhong Fa She Wai Chu Zi No.60 Civil Ruling by Shenzhen Intermediate People's Court (on 25 May 2016).

arbitration agreement was valid since it was in accordance with Article 6 of the 1996 U.K. Arbitration Act while U.K. laws were applicable thereto. Meanwhile, the validity of the arbitration agreement should not be influenced by the validity of the sales contract or the sales confirmation under Article 7 of the 1996 U.K. Arbitration Act regarding the independence of arbitration agreements. Thus, the defendant's defence against the tribunal's jurisdiction could not be established.

In *Compass Cotton Co., Ltd. v. Shangdong Yanggu Shunda Textile Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,²⁸ the defendant alleged that the arbitration agreement was invalid because there was no agreed arbitration institution but only agreed rules and laws applicable to the arbitration in the sales contract of the case. The court held that the parties agreed in the arbitration clause of the contract that the ICA's effective Bylaws and Rules should be regarded as part of the contract, disputes should be settled through friendly negotiation or arbitration under the ICA Bylaws and Rules of association, and U.K. laws should be applicable thereto. The parties had reached arbitration agreement under Article 6.2 of the 1996 Arbitration Act stipulating that '[T]he reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement'. There were clear stipulations on arbitration and arbitration procedures in the ICA Bylaws and Rules. Thus, the ICA should be the arbitration institution of this case. The defendant's allegation that the arbitration agreement was invalid because

28 (2014) Liao Min Wu Chu Zi No.4 Civil Ruling by Shangdong Province Liaocheng City Intermediate People's Court (on 7 July 2016).

there had been no agreed arbitration institution was groundless.

In *Olam International Ltd. v. Wuxi Natural Textile Industrial Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,²⁹ the court held that the applicant had submitted the notarized sales contract, the notice for contract amendments, the contract amendment agreement and corresponding translation. These documents showed that QC Company and the defendant signed 3 cotton sales contracts on 9 and 17 December 2010, agreeing to submit all relevant disputes to arbitration under the ICA Bylaws and Rules for final awards. Thereafter, the applicant, as the holding company of QC Company, replaced it as the seller and sent the notice for contract amendments and the amended contracts to the defendant. Though the defendant had not signed the notice or the amended contracts, the defendant and the applicant amended certain parts of the contracts and signed the contract amendment agreement on 26 July 2012, confirming the execution of the above contracts and the status of performance, amending stipulations on the letter of credit, the shipment time and the price, and agreeing that, if the defendant failed to perform the agreement, the applicant would be entitled to submit the dispute to the ICA. Thus, the court found the parties had entered into a valid arbitration agreement.

3. Appropriate Notification in Arbitration Proceedings

In *Glencore International Co., Ltd. v. Zhejiang Qiying Energy & Chemical Co., Ltd.* concerning the application for recognition and enforcement of a foreign

²⁹ (2015) Xi Shang Wai Zhong Shen Zi No.4 Civil Ruling by Jiangsu Province Wuxi City Intermediate People's Court (on 15 March 2016).

arbitral award,³⁰ the defendant alleged the arbitration procedure violated the arbitration rules since it did not have a chance to defend itself when it was not properly notified regarding the appointment of arbitrators and the arbitration procedure, furthermore, the tribunal had contacted the parties directly. The court held that the parties had agreed in the contract that all notifications, requests or other contacts according to or relevant to the contract from either the buyer or the seller should be made in English in writing and sent to the addresses stated in the introduction of the contract by fax or email and/or registered mail or correspondent. The tribunal had notified the defendant of the formation of tribunal and other procedural matters by fax, email and other ways. Other procedural documents including the notice of conference meeting and the submission of defence had been serviced not only by email but also by post to the defendant's actual business address. The defendant had made no express indication that its email address was not in use during the arbitration process. In addition, the tribunal, being made aware that the contract address was not the business address of the defendant, serviced the documents to its actual business address after verification thereof. The foregoing showed that the tribunal had exhausted all reasonable means of liaison and service and performed its due diligent notification obligation. The defence by the defendant of not being notified of the appointment of arbitrators and the arbitration procedure was not sustained.

In *ECOM Agroindustrial Co., Ltd. v. Shenzhen Guotaihua Investment Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral

³⁰ (2014) Zhe Yong Zhong Que Zi No.1 Civil Ruling by Zhejiang Province Ningbo City Intermediate People's Court (on 24 June 2016).

award,³¹ the defendant alleged that it did not have a chance to make a defence due to the tribunal's failure of sending the notices of appointment of arbitrators and the formation of tribunal to it according to the U.K. laws and the arbitration rules. The court held that the arbitration notices and documents had been sent to the defendant's registered address in Shenzhen, China by email or courier. Under Article 76 of the U.K. 1996 Arbitration Act, parties are free to agree on the manner of service of any notice or document, and in absence of any agreement, arbitration notices or documents may be serviced by any effective means, including by post to the registered office. It is stipulated in the ICA Bylaws and Rules that notices, documents and any other forms of correspondence may be delivered by mail, prepaid postage or any other internationally recognized delivery method, or by email. Accordingly, this case involved no circumstance for non-recognition and non-enforcement under Article V(1)(b) of the New York Convention.

In *Joint Embossed Egypt Cotton Exporting Company v. Wuxi Natural Green Fibre Technology Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,³² the defendant alleged that it had not been appropriately notified of the appointment of arbitrators. The Jiangsu Higher People's Court stated in its request for the SPC's reply that the recognition and enforcement should be refused under Article V(1)(b) of the New York Convention since the procedural rights of the defendant had been influenced for not being

31 (2014)Shen Zhong Fa She Wai Chu Zi No.60 Civil Ruling by Guangdong Province Shenzhen City Intermediate People's Court (on 25 May 2016).

32 (2013)Xi Shang Wai Zhong Shen Zi No.0005 Civil Ruling by Jiangsu Province Wuxi City Intermediate People's Court (on 9 November 2016).

able to challenge the appointed arbitrators after Alexander Exporter's Association had appointed arbitrators but failed to inform the defendant thereof. The SPC replied³³ that the formation of the tribunal and other procedural matters should be in line with the internal regulations of the Association because the parties had agreed in the contract on the application of the Association's internal regulations. It is stipulated in Article 100 of the Association's internal regulations that the director shall appoint three arbitrators from the management committee members randomly, avoiding any conflict of interest. The New York Convention, though containing mandatory provisions on the appropriate notification for appointment of arbitrators, does not refer to the situation under which the parties are not entitled to appoint arbitrators under the chosen arbitration rules. In this case, the defendant had raised no objection to the formation of the tribunal and submitted the statement of defence, which showed its implied acceptance of the tribunal formation. Thus, the defendant's ground for non-recognition and non-enforcement could not be established. Subsequently, the Intermediate People's Court of Wuxi, Jiangsu Province ruled to recognize and enforce the Association's award.

4. Qualification of Arbitration Agents

In *Xcoal Energy and Resources Limited Partnership v. Zhongneng Binhai Electric Power Fuel Tianjin Co., Ltd.*,³⁴ the defendant alleged the tribunal's invalid service of arbitration documents on Ms. Yang mentioned in the arbitral award on

³³ The SPC Reply on the Request for *Joint Embossed Egypt Cotton Exporting Company v. Wuxi Natural Green Fibre Technology Co., Ltd.* concerning the Application for Recognition and Enforcement of a Foreign Arbitral Award [(2016) Zui Gao Fa Min Ta No.32, 27 June 2016].

³⁴ (2016)Jin 02 Xie Wai Ren No.4 Civil Ruling by Tianjin 2nd Intermediate People's Court (on 26 December 2016).

the ground that though Yang was an employee of the defendant, she had no right to represent it in the arbitration proceeding. The court held that according to the statement in the award, Brandt Chan & Partners, the law firm entrusted by the defendant, notified the tribunal and the parties in December 2013 that it would no longer represent the defendant in handling matters relating to the arbitration case while Samantha Yang, i.e. Ms. Yang, would be the new contact appointed by the defendant. The tribunal had requested Ms. Samantha Yang to confirm her authorization from the defendant to handle the liaison and whether she had possessed a complete set of documents submitted by the parties to the tribunal previously. Meanwhile, the tribunal had requested the defendant to confirm whether there were persons other than Ms. Samantha Yang being authorized by the defendant for the liaison and whether it had entrusted other external legal consultants. The defendant, in its statement of defence in Chinese, had raised no objection to the identity of Ms. Yang. Thus, the defendant lacked factual basis for its allegation that Ms. Yang had no authorization to represent it in the arbitration case.

In *Compass Cotton Co., Ltd. v. Shangdong Yanggu Shunda Textiles Co., Ltd.*,³⁵ the defendant alleged that the application submitted by the applicant had only been signed by the applicant's agent but not been sealed or signed by the applicant, which was not in accordance with the requirements on legal documents. The court ascertained that according to the notarized and certified power of attorney submitted by the applicant's agent, the agent's authority included applying for

³⁵ (2014)Liao Min Wu Chu Zi No.4 Civil Ruling by Shangdong Province Liaocheng City Intermediate People's Court (on 7 July2016).

recognition and enforcement of foreign arbitral awards, draft, transferring or signing legal documents on behalf of the applicant, etc. Thus, the agent was entitled to submit the application for recognition of a foreign arbitral award on behalf of the applicant.

5. Arbitrability

In *Tajco Co., Ltd. v. Yan Yan* concerning the application for recognition and enforcement of a foreign arbitral award,³⁶ the defendant requested non-recognition and non-enforcement of the award since the labour contract disputes involved could not be referred to commercial arbitration under the PRC laws. The court held that according to Article 2 of *the SPC Notice on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China*, China would apply the Convention only to disputes arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the PRC. The economic right and obligation relationship under the contract for the appointment of the general manager signed by the parties was commercial relationship mentioned in the Notice. Thus, the court ruled to recognize the award rendered in Denmark.

6. Awards Beyond Scope of Arbitration

In *FSG Automotive Holding AG v. Wuhan Fanzhou Machinery Manufacturing Co., Ltd.* concerning the application for recognition and enforcement of a foreign

³⁶ (2015)Shen Zhong Min Si Te Zi No.29 Civil Ruling by Liaoning Province Shenyang City Intermediate People's Court (on 9 May 2016).

arbitral award,³⁷ the defendant requested non-enforcement of the award since the award was rendered beyond the scope of arbitration, i.e. part of the award was beyond the arbitration claims as being against the claimant and the joint venture, while the termination of the joint venture contract and the dissolution of the joint venture were against the public policy of China. In addition, the defendant had no obligation of payment thereunder, so the award, with no specific and clear execution objectives, should not be enforced. The SPC confirmed to refuse the recognition and enforcement of part of the award in its reply at the Hubei Higher People's Court's request.³⁸ Accordingly, the Hubei Province Wuhan Intermediate People's Court ruled that the arbitration matters agreed in Article 27.3 of the joint venture contract, i.e. the arbitration clause, included any disputes arising out of or relevant to the contract. First, the joint venture disputes included the parties' differences and disputes in performing the articles of association. Thus, the confirmation of the validity of the joint venture articles of association in the award was not beyond the scope of arbitration. Secondly, the technology licencing contract was attached to the joint venture contract as per Articles 18 and 31 of the latter. If the joint venture seriously breached the former before the expiration of the contract term, the applicant may terminate the joint venture contract before its expiration. Thus, the confirmation of the validity of the technology licencing contract in the award was not beyond the scope of arbitration. Thirdly, Articles

³⁷ (2014) E Wu Han Zhong Min Shang Wai Chu Zi No.0005 Civil Ruling by Hubei Province Wuhan City Intermediate People's Court (on 25 January 2016).

³⁸ The SPC Reply on Request for *FSG Automotive Holding AG v. Wuhan Fanzhou Machinery Manufacturing Co., Ltd.* concerning the Application for Recognition and Enforcement of No. SCH-5239 Award Rendered by Arbitral Centre of the Austrian Federal Economic Chamber [(2015) Min Si Ta Zi No.46, 24 December 2015].

29.1 and 29.2 of the joint venture contract stipulated the shareholders' obligation to cooperate with each other in good faith to fulfil the obligations under the contract, including making the best effort to urge employees to fulfil relevant provisions of the contract. Items 5 (i), (ii) and (iii) of the award were regarding the defendant's obligation of urging its representatives in the joint venture to comply with the joint venture contract and articles of association, involving disputes under Articles 29.1 and 29.2. The subject under such obligation was not the joint venture but the defendant. Thus, such disputes were joint venture disputes. Fourthly, Item 5(iv) of the award resolved the receivables dispute between the applicant and the joint venture. Such disputes were not disputes over the joint venture but involved the joint venture which was not a party of the arbitration agreement. Thus, it was beyond the scope of arbitration. Item 9 of the award was on the defendant's obligation of completing the necessary procedure for the application of dissolution through its representatives in the joint venture and nominating members of the liquidation team. Such dissolution or liquidation disputes were not within the scope of the arbitral clause in the joint venture contract. According to Article 90 of the Regulation on the Implementation of the PRC Law on Chinese-Foreign Equity Joint Ventures, if a joint venture contract is terminated due to a party's fundamental breach of contract, the party performing the contract shall submit the application for dissolution to the authority for approval. The dissolution of the joint venture in the event of breach of contract does not involve the shareholders' obligation in assisting the application for approval. Considering the separability of the afore-mentioned items beyond the scope of arbitration and other award items,

the court refused to recognize and enforce Items 5(iv) and 9 of the award.

7. Public Policy

In *Kema Group Co., Ltd. v. Jiangsu Textile Industry (Group) Import and Export Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,³⁹ the defendant alleged violation of China's public policy since the contract relied on in the arbitral award was against the PRC laws and involved illegal transactions. The court ascertained that the parties had agreed in the contract to interpret the contract according to Singapore laws. The defendant failed to provide sufficient evidence to prove the violation of China's public policy in the recognition and enforcement of the award involved in this case. Thus, the court ruled to recognize and enforce the SIAC award.

In *Olam International Ltd. v. Zibo Yinhua Cotton & Linen Co., Ltd.*⁴⁰ and *Ecom Agroindustrial Co., Ltd. v. Shenzhen Guotai Investment Co., Ltd.*, which all concerning the application for recognition and enforcement of a foreign arbitral award,⁴¹ both courts held that whether a Chinese company had the state-owned trading business qualification for importing and exporting cotton or the import quota did not constitute a violation of public policy under Article V(2)(b) of the New York Convention.

³⁹ (2016) Su 01 Xie Wai Ren No.4 Civil Ruling by Jiangsu Province Nanjing City Intermediate People's Court (on 12 December 2016).

⁴⁰ (2015) Zi Min Te Zi No.1 Civil Ruling by Shandong Province Zibo City Intermediate People's Court (on 19 January 2016).

⁴¹ (2014) Shen Zhong Fa She Wai Chu Zi No.60 Civil Ruling by Guangdong Province Shenzhen City Intermediate People's Court (on 25 May 2016).

In *J & DIB Co., Ltd. v. Tian Kuixiang & Tian Hao* concerning the application for recognition and enforcement of a foreign arbitral award,⁴² the defendants alleged that the guarantee contract was invalid since loan among enterprises was invalid under the PRC laws. Furthermore, the failure of obtaining ex-territorial guarantee approval and registration in the State Administration of Foreign Exchanges for the guarantee contract constituted a violation of public policy of China. The Jilin Higher People's Court held that the defendants' exterritorial guarantee violated China's mandatory foreign exchange administration policy and fell within the circumstances for non-recognition and non-enforcement under Article V(2)(b) of the New York Convention. The SPC stated in its reply⁴³ that the defendants' exterritorial guarantee was not against mandatory provisions under the PRC laws and administrative regulations. The recognition and enforcement of the award should not be deemed as against China's public policy. Subsequently, the Intermediate People's Court of Yanbian, Jilin Province ruled to recognize the award rendered by Korean Commercial Arbitration Board.

In 2016, there was one case of non-enforcement of a Hong Kong arbitral award on the ground of public policy in 2016. In *Swiss Ricor Holding AG v. Taizhou Haopu Investment Co., Ltd.* concerning the application for recognition and enforcement of a Hong Kong arbitral Award,⁴⁴ the defendant alleged that the ICC

42 (2015) Yan Zhong Min San Chu Zi No.858 Civil Ruling by Jilin Province Yanbian Korean Autonomous Prefecture Intermediate People's Court (on 9 September 2016).

43 The SPC Reply on Request for *J & DIB Co., Ltd. v. Tian Kuixiang & Tian Hao* concerning the Application for Recognition and Enforcement of a Foreign Arbitral Award [(2016) Zui Gao Fa min Ta No.38, 27 May 2016].

44 (2015) Tai Zhong Shang Zhong Shen Zi No.00004 Civil Ruling by Jiangsu Province Taizhou City Intermediate People's Court (on 2 June 2016).

Court of Arbitration damaged the judicial sovereignty of Mainland China for rendering an award confirming the validity of the arbitration agreement which had been legally determined void by the people's court in China. The SPC supported the Jiangsu Higher People's Court's request in the Reply for Non-enforcement of No.18925/CYK Arbitral Award by ICC Court of Arbitration.⁴⁵ The SPC held that the ruling that the arbitration clause was invalid by the Jiangsu Higher People's Court, when hearing another dispute between the parties under the same contract on 11 December 2012 had taken legal effect. However, the arbitral award of the present case had been rendered by the arbitrators taking the arbitration clause as valid. The enforcement of such award in Mainland China would conflict with the above effective ruling of the people's court and result in the violation of Mainland China's public interest. The people's courts could refuse to enforce the award involved in this case according to Article 7.1.3 of *the SPC Arrangements on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (the Arrangements). Subsequently, the Intermediate People's Court of Taizhou, Jiangsu Province ruled not to enforce the award rendered by the ICC Court of Arbitration in Hong Kong according to the Arrangements.

8. First Case Recognizing an Award by CIETAC Hong Kong Arbitration Centre

In Ennead Architects International LLP v. Fuli Nanjing Real Estate Development

⁴⁵ (2016) Zui Gao Fa Min Ta No.8, the original case No. (2015) Su Shang Wai Zhong Shen Zi No.0002.

Co., Ltd.,⁴⁶ concerning an application for the enforcement of an arbitral award rendered by the CIETAC Hong Kong Arbitration Centre, the defendant had no objection to the award and had fulfilled the obligation of paying the principal of the designing fee determined therein but failed to pay the interest. It intended to reach a settlement agreement with the applicant. The court, after reviewing the case, ruled to enforce the arbitral award according to Articles 1 and 7 of the Arrangements.

This is the first case that involves enforcement by a Mainland court of an arbitral award rendered by an overseas branch of a Mainland arbitration commission. It is of great significance to the international development of Chinese arbitration commissions and the Belt and Road dispute-resolution initiative. It is clearly stated in the introduction of the Arrangements that ‘the courts of the Hong Kong SAR agree to enforce the arbitral awards made by mainland arbitral institutions in accordance with the Arbitration Law of the People's Republic of China, and the people's courts in the Mainland agree to enforce the arbitral awards made in the Hong Kong SAR in accordance with the Arbitration Ordinance of the Hong Kong SAR’. The PRC Arbitration Law has no stipulation on the nature or nationality of awards rendered by overseas branches of Chinese arbitration commissions. Thus, it is controversial whether awards rendered by Hong Kong branches of Mainland Chinese arbitration commissions are Hong Kong awards. *The SPC Notice on Issues concerning the Execution of Hong Kong Arbitral*

46 (2016) Su 01 Ren Gang No.1 Civil Ruling by Jiangsu Province Nanjing City Intermediate People's Court (on 13 December 2016).

Awards in the Mainland[*Fa (2009) No.415*] stipulates that "[W]here a party applies to the people's court for executing a temporary arbitral award made in the Hong Kong Special Administration Region or an arbitral award made by the Arbitration Tribunal of the International Chamber of Commerce in Hong Kong, the people's court should examine the application under the provisions of the Arrangements. Where the arbitral award does not fall under the circumstances as prescribed by Article 7 of the Arrangements, it may be executed in the Mainland." The Notice does not specify that awards rendered by Hong Kong branches of Mainland arbitration commissions shall be enforced under the Arrangements. The court applied the Arrangement in the enforcement of the award rendered by the CIETAC Hong Kong Arbitration Centre and determined such a award as a Hong Kong award in this case, which is in accordance with the introduction of the Arrangements and is undoubtedly correct. It not only establishes a practical basis for the introduction of the place of arbitration standard in determining the nature of arbitral awards rendered by overseas branches of Mainland arbitration commissions, but also effectively avoids conflicts between Hong Kong courts and Mainland courts over the supervision jurisdiction of such awards. It can be seen through the recognition and enforcement of foreign arbitral awards in 2016 that the people's courts accurately applied the New York Convention, grasped the principle of the Convention in favouring award enforcement, made high-quality rulings on issues such as the validity of arbitration awards, appropriate notification in arbitration proceedings, the interpretation of arbitration rules, the determination of the scope of arbitration, arbitrability and public policy, and greatly enriched

the case resources for the application of the Convention. In the enforcement of the Hong Kong awards, the People's court has an accurate understanding of the scope of the awards to which the Arrangements is applicable, and creates a favourable legal environment for the international development of Mainland arbitration commissions.

Chapter IV Development of China's International Commercial Arbitration in Specific Sectors- Promotion of Resolving Intellectual Property Disputes through Arbitration

With the deepening of China's reform and opening up, the Communist Party and the Chinese government have attached great importance to the healthy and orderly development of the knowledge economy and issued important documents including the Outline of the National Intellectual Property Strategy, Several Opinions on Deepening the Reform of Systems and Mechanisms to Accelerate the Implementation of Innovation-driven Development Strategies and the Plan for the Implementation of Deepening the Science and Technology System Reform. On 17 July 2017, Xi Jinping, General Secretary of the Communist Party, presided over the 16th Central Financial Leading Group Meeting, pointing out in particular that property protection, especially intellectual property protection, is an important aspect of shaping a sound business environment and the construction of intellectual property protection system for emerging undertakings and types of business should be accelerated.¹

¹ Xi Jinping Presided over the 16th Central Financial Leading Group Meeting, Emphasizing the Establishment of a Stable, Fair and Transparent Business Environment and Facilitation of the Construction of New Systems for Developing an Open Economy , published on China court website <http://www.>

In recent years, China's intellectual property disputes have seen a spurt of growth. As shown in the SPC data, the number of newly accepted intellectual property civil first trial cases by the people's courts in 2014, 2015 and 2016 were 96,000, 109,000 and 136,000 respectively, increased respectively by 7.8%, 14.5% and 24.7% as compared to the previous year. The pressure for the trial of intellectual property cases has increased for the people's courts at all levels, and the contradictions of 'more cases but fewer judges' has become increasingly prominent. Therefore, it is necessary to find an ADR resolution system according to the characteristics of intellectual property disputes and to rationalize the diversion of intellectual property cases. Arbitration has become an important way to resolve intellectual property disputes.

This Chapter, based on the basic theories and legal regulations of intellectual property disputes arbitration and intellectual property arbitration cases handled by the CIETAC in recent years, analyzes the status of China's intellectual property disputes arbitration practice, explores the solutions of related problems, and suggests reasonably on the promotion of resolving intellectual property disputes through arbitration. It is of great significance for the healthy and orderly development of China's knowledge economy and the transformation of China into a powerful intellectual property country to accelerate the deepening development of intellectual property arbitration and alleviate the tremendous load on the normal market order caused by the big number of intellectual property cases.

I. Theoretical Basis and Legal Regulations for Intellectual

chinacourt.org/article/detail/2017/07/id/2923504.shtml (last visited on 18 July 2017).

Property Arbitration in China

1. Need for More Professional and Flexible Dispute Resolution Mechanism for Intellectual Property Disputes with Special Features

1) Urgency, Professionalism, Confidentiality, Efficiency and Internationalization of Intellectual Property Dispute Resolution

First, there is a clear timeliness in the profit cycle of intellectual property. Intellectual achievements, as the object of intellectual property rights, have short market elimination cycle due to the quick upgrading of relevant products and technology. In other words, the effective profit period of intellectual property is very limited. Failure to quickly resolve disputes would surely affect the effective profit per unit time of intellectual property. Thus, the dispute resolution must meet the need of urgency.

Secondly, the technicality of intellectual property objects requires professional dispute resolution. Technical issues in intellectual property disputes are usually very complicated while determination of these issues is crucial for dispute resolution. Thus, adjudicators' legal professionalism and special knowledge therein are required.

Thirdly, the resolution of intellectual property disputes places more emphasis on mutual benefit and win-win from economic aspects rather than absolute fairness from legal aspects. This requirement of market-oriented dispute resolution in pursuit of maximized benefits is different from normal property disputes, which

is determined by the intangibility of intellectual property objects and the timeliness of the existence of rights. For example, a considerable number of parties in the CIETAC cases choose to sign settlement agreements before or after the initiation of arbitration and obtain consent awards thereafter.

Finally, as the world economic connections are getting closer, the transformation and utilization of intellectual property are bound to be globalized. The increasing cross-border movements of intellectual property rights and frequent occurrence of transnational intellectual property disputes require the dispute resolution outcomes be recognized internationally and enforced effectively worldwide.

2) Intellectual property arbitration has the advantages of speediness, professionalism, confidentiality, flexibility and internationality. Arbitration, with both contractual and judicial features and strong adaptability and limberness, can meet parties' expectations to a great extent in both the form and effect of dispute resolution.

First, compared with lengthy and complicated litigation proceedings, arbitration emphasizes more on the pursuit of efficiency. The design of the system of 'finality' of arbitral awards fully meets the need of parties to intellectual property disputes to resolve their disputes quickly and finally. For example, summary procedure was applied in 67% of the CIETAC cases in 2015. By analyzing all the cases concluded in 2015 by the CIETAC, it is found that the median time for case conclusion was 143 days after the formation of tribunal while the average

conclusion time of summary procedure cases was 104 days.²

Secondly, the strict selection criteria guarantee the professionalism of the arbitrators. Objectively, professionally experienced arbitrators can accurately determine professional issues of the disputes while subjectively, awards rendered by professional arbitrators may gain the trust and support of the parties more easily. For example, complicated technical issues such as software source codes, real-time operating systems, customer support systems were involved in one CIETAC case in 2016 over computer software copyright licensing contract disputes. The final award contained more than 13,800 words with over 5,000 words for the analysis of technical issues, showing the profound professionalism of the arbitrators.

Thirdly, arbitration avoids the rigid legal determination of ‘right or wrong’ and its feature of flexibility practically meets the needs of parties of intellectual property disputes in their pursuit of the maximum benefits. Compared with litigation, arbitration can better reflect party autonomy. The hearing modes are very flexible and individualized mode with deep compatibility with intellectual property disputes may be created. It avoids lengthy and costly dispute resolution in complicated and modeled litigation proceedings and ensures that the needs of the parties are met to the greatest extent.

Finally, arbitration awards, as the intellectual property dispute resolution result,

² The CIETAC, the 2015 Annual Report on International Commercial Arbitration in China, published on the CIETAC website <http://www.cietac.org/Uploads/201612/58678e45783ae.pdf> (last visited on 20 July 2017).

have more universal validity and enforceability. The occurrence and settlement of intellectual property disputes are no longer within a single country. For example, most of the CIETAC intellectual property dispute cases are foreign-related and one single case may involve parties from various foreign countries, which requires that the dispute resolution result be recognized and enforced in many countries. The New York Convention fully guarantees the recognition and enforcement of arbitral awards worldwide.

2. Application Scope and Legal Provisions of Arbitrability of Intellectual Property Disputes

1) Application Scope of Arbitrability of Intellectual Property Disputes

Arbitrability usually refers to what disputes may be resolved by arbitration according to the laws at the place of arbitration and whether awards may be recognized and enforced by courts at the place of enforcement.³ The definition of arbitrability is essentially the determination of the scope of party autonomy and is used to clarify the jurisdiction boundary between litigation and ADR including arbitration.

The arbitrability of intellectual property disputes should be determined according to the specific types of the disputes. Although intellectual achievements, the object of intellectual property, are invisible, it is still necessary to check the effectiveness of established rights. At the same time, intellectual achievements, having risks in

³ Zhang Aiqing, *Research on Arbitrability of Public Policy Matters in International Commercial Arbitration*, 6 *Law Review* (2007).

use and circulation, will inevitably encounter contract and infringement issues. Therefore, intellectual property disputes can be divided into three main categories under the standard of dispute nature: validity disputes, contract disputes and infringement disputes.

According to Article 2 of the Arbitration Law, intellectual property contract disputes and infringement disputes are contractual disputes and other disputes over rights and interests in property between citizens that are equal subjects and may be arbitrated. It is controversial whether intellectual property validity disputes may be arbitrated in China. The main reasons for opposing arbitration of validity disputes are as follows. First, intellectual property rights are granted by the state. Second, there are special authorities to review the validity of intellectual property right. Third, awards are unpredictable and contradictory awards may result in the loss of public interest.⁴ Another view is that intellectual property rights fundamentally come from the property rights and personal rights of individuals through the creation of intellectual achievements. The examination and registration by the state are mainly administrative rather than legal actions. First, awards have relative binding effect. The determination by the tribunal on the validity of the intellectual property rights is for specific cases and binds only the parties of the cases with no impact on the public effects of administrative registration or public interest out of the reflective effects of the awards. Second, there are excellent examples of resolving intellectual property validity disputes by arbitration worldwide, such as Switzerland,⁵ indicating the feasibility of such

⁴ Ni Jing, *Discussion on Arbitrability of Patent Effectiveness Disputes*, 3 Intellectual Property (2013).

⁵ It is stipulated in Article 128 of Switzerland's Federal Code on Private International Law that all cases of

practice. In theory, all disputes on intellectual property rights as private rights can be submitted to arbitration.

2) Legal Provisions on Arbitrability of Intellectual Property Disputes

China has the Arbitration Law and the Contract Law as the legal basis for the intellectual property arbitration. However, it is up to special laws such as the Copyright Law, the Patent Law and the Trademark Law whether different types of intellectual property disputes can be arbitrated.

According to Article 2 of the Arbitration Law, contractual disputes and other disputes over rights and interests in property between equal subjects may be arbitrated. Exceptions are listed in Article 3 thereof, mainly including disputes over personal relationship and disputes that should be handled by the administrative authorities. According to the provisions in the Arbitration Law, China does not explicitly prohibit intellectual property arbitration, which provides a legal space for China to carry out and promote intellectual property arbitration.

Article 128 of the Contract Law stipulates that ‘[T]he parties may resolve a contractual dispute through settlement or mediation. Where the parties do not wish to, or are unable to, resolve such dispute through settlement or mediation, the dispute may be submitted to the relevant arbitration institution for arbitration in accordance with the arbitration agreement between the parties. Parties to a foreign-related contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration’. This stipulation makes it clear that disputes

a property nature may be subject to arbitration.

over intellectual property contracts, including contracts of copyright, trademarks and patents, can be referred to arbitration. In practice, most intellectual property cases accepted by the vast majority of arbitration institutions involve contract disputes.

Article 55.1 of the Copyright Law stipulates that ‘[A] dispute over copyright may be settled by mediation or be submitted for arbitration to a copyright arbitration institution under a written arbitration agreement concluded between the parties concerned, or under the arbitration clause in the copyright contract’. As authors automatically obtain copyrights upon completion of works, copyright validity arbitration is not involved. It may be inferred from wording of this article that copyright disputes include contract disputes and infringement disputes, both of which can be submitted to arbitration.

Article 45 of the Patent Law stipulates that ‘[W]here, as of the announcement of the granting of the patent by the patent administrative department of the State Council, any entity or individual considers that the granting of the said patent does not conform to the relevant provisions of this Law, it or he may request the Board of Patent Appeals and Interferences to invalidate the patent right’. It can be seen from the article that patent validity is determined by the administrative authorities and parties can not submit relevant disputes to arbitration.

Article 46 of the Trademark Law stipulates that ‘ [W]here, upon expiry of the statutory time limit, the party concerned fails to apply for a review of a decision of the Trademark Office to declare invalidation of a registered trademark or fails

to institute an action in a people's court against the Trademark Appeal Board's decision upon review or ruling to sustain a registered trademark or declare invalidation of a registered trademark, the decision of the Trademark Office or the Trademark Appeal Board's decision upon review or ruling shall take effect'. It can be seen through analyzing this article that the stipulation on administrative procedures is mandatory and trademark validity is for the administrative authorities to review. Though this article mentions that parties may bring lawsuits to courts, such lawsuits are administrative rather than civil and only involves the determination of lawfulness of the administrative authorities' administrative actions. The validity of trademarks will still be determined by the administrative authorities. Article 35.1 of the Regulations on Computers Software Protection stipulates that '[A] dispute over software copyright infringement may be settled by mediation. A dispute over a software copyright contract may be submitted to an arbitration institution for arbitration under an arbitration clause in the copyright contract or under a written arbitration agreement concluded later between the parties'. Thus, software copyright contract disputes may be mediated or submitted directly to arbitration by the parties.

It is obvious that there are big differences among stipulations on the arbitrability of various types of intellectual property disputes in China. The intellectual property disputes which may be arbitrated under clear legal stipulations are copyright contract disputes or infringement disputes, technology contract disputes and software copyright contract disputes. However, disputes over patent or trademark validity should be handled by the relevant administrative authorities

according to law. Under current PRC laws, intellectual property contract and infringement disputes may be submitted to arbitration while there are certain difficulties in submitting validity disputes to arbitration.

II. Status and Main Issues in China's Intellectual Property Arbitration Practice

1. Basic Status of China's Intellectual Property Arbitration

1) Small Caseload of Intellectual Property Arbitration

Compared with the caseload and growth rate of intellectual property litigation, the increase in the caseload and growth rate of intellectual property arbitration is not obvious. For example, the number of intellectual property cases accepted by the CIETAC in 2014 accounts for 1.77% of the total number of foreign-related cases and 4.1% thereof in 2015.⁶ The BAC accepted 43 intellectual property cases in 2014, accounting for 2.11% of the total caseload, accepted 26 such cases in 2015, accounting for 0.88% of the total caseload, and accepted 47 such cases in 2016, accounting for 1.56% of the total caseload.⁷ It is shown that the intellectual property cases accepted by comprehensive arbitration commissions are small in both quantity and proportion of the total caseload. The caseload of

⁶ The CIETAC, the 2014 Annual Report on International Commercial Arbitration in China and the 2015 Annual Report on International Commercial Arbitration in China, published on the CIETAC website <http://www.cietac.org/Uploads/201610/57fc0d50a1742.pdf><http://www.cietac.org/Uploads/201612/58678e45783ae.pdf> (last visited on 20 July 2017).

⁷ The BAC, the 2014 Work Report and the 2015 Work Report, published on the BAC website <http://www.bjac.org.cn/page/gymbh/2014zj.html><http://www.bjac.org.cn/news/view?id=2692><http://www.bjac.org.cn/news/view?id=2909> (last visited on 20 July 2017).

specialized intellectual property arbitration institutions is on the low side as well. Except Shanghai Intellectual Property Arbitration Court which has accepted over 100 cases since establishment, the specialized intellectual property arbitration institutions in Xiamen, Guangzhou, Wuhan and Chongqing accept about 20 to 50 cases each.⁸ The low caseload reflects to a certain extent people's insufficient understanding and knowledge and low willingness to participate in intellectual property arbitration.

2) Single Type of Intellectual Property Arbitration Cases

The intellectual property cases accepted by comprehensive arbitration commissions involve contract disputes for the vast majority, infringement disputes for a small amount and validity disputes for the rare. For example, the contract dispute cases account for 87.5% of the CIETAC's intellectual property caseload from 2014 to 2016. The contract dispute cases account for 50% of the cases accepted by specialized intellectual property arbitration institutions. Some arbitration institutions even directly limit the scope of intellectual property cases to intellectual property contract disputes. Take the Shanghai Intellectual Property Arbitration Court as an example, the case acceptance scope is clearly stipulated as 'specialized in handling arbitration cases involving intellectual property contract disputes'. The Arbitration Court accepted 117 intellectual property cases in 2014, among which 82 involved franchise contract disputes, 18 involved technical service contract disputes, 11 involved technology development contract disputes, 2 involved technology transfer contract disputes, 2 involved technical

⁸ Ni Jing, *Research on Intellectual Property Arbitration Mechanism*, Xiamen University Press (2013), p.273.

consultation contract disputes, 1 involved copyright contract disputes and 1 involved publishing contract disputes.⁹ The single type of intellectual property cases actually reflects the cautious attitude of the arbitration institutions in case acceptance.

2. Main Issues Affecting Development of China's Intellectual Property Arbitration

1) Legislative Blank in Arbitrability of Intellectual Property Validity Disputes

There are differences among countries in the degree of openness to the arbitrability of intellectual property disputes which often involves public policy issues. American scholars have conducted investigations on the arbitrability of intellectual property validity disputes among practitioners and researchers of various nations. It is widely recognized in France, Germany, Austria, Portugal, Greece, Argentina and Japan that all kinds of intellectual property disputes, including intellectual property validity disputes, may be submitted to arbitration while it is reckoned in Russia, Ireland, Colombia, Chile, India, South Korea and China that there is uncertainty in the arbitrability of intellectual property validity disputes in these countries.¹⁰

⁹ Shanghai Intellectual Property Arbitration Court, the 2014 Report on Cases Accepted by Shanghai Intellectual Property Arbitration Court, published on the website of Shanghai Intellectual Property Arbitration Court <http://zscq.accsh.org/index.php?m=content&c=index&a=show&catid=45&id=26&menu=379-45>-(last visited on 21 July 2017).

¹⁰ Trevor Cook, Alejandro Garcia, *International Intellectual Property Arbitration*, Kluwer Law International, 2010, p.52.

Chinese laws lack clear stipulation on the arbitrability of intellectual property validity disputes in Chinese laws and there is big controversy on the issue in the theoretical circle. In fact, validity disputes are seldom submitted to arbitration alone, but often brought as a defense strategy in contract or infringement dispute cases. Fundamental defense based on the validity ground will directly affect the finality of awards in such cases. For example, in a CIETAC foreign-related trademark transfer contract dispute case, the respondent, a foreign company, requested to determine an Indian trademark value in analogy to the trademark price under the North America Trademark Transfer Agreement. The Claimant, a Chinese company, defended that the American trademark was not legal itself. The tribunal rejected the defendant's defense. Therefore, it is necessary to further strengthen the research on the arbitrability of intellectual property validity disputes and make it clear as soon as possible under clear legal statutes.

2) Too Simple Provisions on Interim Measures

Interim measures, as an adjunct measure to facilitate or promote arbitration, are of great significance to the safeguarding of the legitimate rights and interests of parties, advancing smooth arbitration procedures and guaranteeing the final enforcement of arbitral awards. Interim measures involve property preservation, evidence preservation, behavior preservation and other regulatory measures. The specific functions include: preventing parties from destroying evidence or avoiding possible adverse awards in the future through delay in submitting documents, avoiding impossibility of realizing creditors' rights of winning parties, preventing parties from hiding, transferring or selling property by way of

impounding, sealing up or freezing property, or requesting one party to provide security for expenses, etc., and avoiding more damage caused by the change of status due to parties' acts or omissions.¹¹ In fact, interim measures largely determine the ultimate validity of arbitral awards and affect the confidence and choice of arbitration by parties of intellectual property dispute cases, especially infringement dispute cases.

In current Chinese procedural laws, Articles 28 and 46 of the Arbitration Law stipulate the property preservation and evidence preservation in domestic arbitration respectively. Article 68 of the Arbitration Law and Article 258 of the Civil Procedure Law stipulate the property preservation and evidence preservation in foreign-related arbitration respectively. In substantive laws, Articles 50 and 51 of the Copyright Law, Articles 66 and 67 of the Patent Law and Articles 65 and 66 of the Trademark Law also stipulate on preservation measures, but are all for litigation. The provisions on interim measures in arbitration in Chinese laws are abstract and simple with many imperfections.

An analysis of the above stipulations on interim measures in arbitration in China shows the following problems: relatively simple type of interim measures, no definite stipulation whether behavior preservation is applicable to arbitration, no specific criteria for applying for interim measures, making the application outcome unpredictable,¹² no clear stipulation on applicants of pre-arbitration

¹¹ Zhou Lixia, *Discussion on Exterritorial Enforcement of Interim Measures in International Commercial Arbitration*, 6 Hebei Law Science 2011.

¹² Zhang Shengcui, *Discussion on Reconstruction of China's Interim Measure Mechanism*, 2 Journal of Shanghai University of Finance and Economics 2016.

interim measures or parties' direct application to courts therefor, lack of legal provision on interim measures during the period from case acceptance to tribunal formation, no stipulation on the conditions for terminating or cancelling interim measures either by tribunals on their own initiatives or upon request of the party, no stipulation on the duration of pre-arbitration interim measures after parties' application for arbitration within the statutory time limit, no clear stipulation on the enforcement of interim measures decided by overseas arbitral tribunals, etc.

3) Low Efficiency in Dispute Resolution Caused by Litigious Arbitration

One of the important reasons for the birth and development of arbitration lies in that parties abandon the long and complicated litigation mechanism and try to set up a more convenient and efficient dispute resolution mechanism other than litigation. However, with the continuous development of arbitration and as disputes becoming more complex and dispute amounts increasing continuously, arbitration proceedings begin to be more procedural and formalized, resulting in the tendency of litigious arbitration. This change is both for the more cautious safeguard of parties' rights and fairness of cases and an important way to ensure the stability of arbitration institutions in increasing risks. But the cost is the complexity of dispute resolution process, decrease in dispute resolution efficiency and increase in dispute resolution cost.

The trend of litigious arbitration has led to the gradual loss of the traditional advantages of efficient dispute resolution, and especially in highly specialized cases such as complicated intellectual property dispute cases. The time used

in resolving the dispute may be as long as that of same-type litigation cases. For intellectual property rights with limited profit cycles, the most important need of the parties is to resolve the disputes quickly to achieve a smooth profit. The attractiveness of arbitration to intellectual dispute parties will be greatly influenced by its capability of meeting their urgency demand.

III. Proposals for Promotion of In-depth Development of China's Intellectual Property Arbitration

At present, China's intellectual property arbitration is still in its infancy. It is necessary to give full play to the advantages of arbitration in intellectual property dispute resolution through a series of measures so as to ease the enormous caseload caused by frequent intellectual property disputes on the normal market order, expand the social influence of arbitration, and promote further development of intellectual property arbitration.

1. Reasonable Expanding of the Jurisdiction for Intellectual Property Arbitration

According to relevant provisions in the Arbitration Law, the most controversial issue in practice regarding the jurisdiction of the arbitration commission is the understanding of the expression 'contractual disputes and other disputes over rights and interests in property'. In accordance with the commercial reservation declaration made by China upon its accession to the New York Convention, China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national

law of the PRC. "Legal relationships, whether contractual or not, which are considered commercial" means the economic rights and obligations arising from contracts, torts or relevant legal provisions, such as purchase and sale of goods, lease of property, project contracting, processing, technology transfer, equity or contractual joint adventure, exploration and development of natural resources, insurance, credit, labor service, agency, consultation service, marine, civil aviation, railway or road passenger and cargo transportation, product liability, environment pollution, marine accident, and ownership disputes, except disputes between foreign investors and the host government. Obviously, the connotation and denotation of 'disputes over rights and interests in property' as defined in China are relatively narrow in comparison with the concept of 'non-contractual disputes' in the New York Convention.¹³ In practice, Chinese courts face difficulties and uncertainties in judging the arbitrability of disputed matters. Therefore, it is necessary to clarify and rationally expand the jurisdiction for intellectual property arbitration.

2. Assisting Parties to Accelerate Intellectual Property Arbitration Proceedings

Arbitration, with party autonomy as the leading principle, has proceedings different from the strict legal proceedings of litigation. Parties may control the approximate time and specific steps of arbitration proceedings through communication and negotiation. In fact, the speed and efficiency of arbitration are

¹³ Liu Xiaohong, *Discussion on Theoretical and Practical Basis of Intellectual Property Arbitration*, Contemporary International Law (Volume 6), Law Press, 2006, p.219.

up to the arrangements of the parties over each step of arbitration proceedings in many cases. In certain degree, parties may individualize arbitration proceedings and rules in full accordance with their own will and special needs of each case just like permutating and combining numbers.

In general, parties may choose the following three ways to accelerate arbitration proceedings. First, parties may negotiate and set limitation on the time required for each step of arbitration proceedings by signing agreements or memorandums. Secondly, parties may individualize the arbitration rules, including but not limited to amending, simplifying or omitting certain unnecessary steps in the rules.¹⁴ Thirdly, major international arbitration institutions generally offer special sets of expedited or summary arbitration rules in addition to the general ones. Parties, if agreeing thereon, may directly apply such special rules. For example, under the WIPO Expedited Arbitration Rules, sole-arbitrator tribunals are appointed to save the time for tribunal discussion, oral hearing time is cut short to less than 3 days, hearing time is limited to within 3 months while the time for rendering final awards is less than 1 month. Each step is compressed to save time, which results in great acceleration of the entire arbitration process.

The procedural uniqueness of intellectual property arbitration should be manifested in the particularity of arbitration rules. In order to meet the urgency demand in intellectual property dispute resolution, intellectual property arbitration mechanism should be timely adjusted. Arbitration commissions may assist

¹⁴ Zhang Weibin, *Comparison and Experience in Fast Track Arbitration Rules*, 6 *Journal of Political Science and Law* 2016.

intellectual property dispute parties by tailoring the arbitration rules according to the characteristics of each case so as to shorten the arbitration time, accelerate arbitration proceedings, cut arbitration cost and realize the purpose of resolving disputes efficiently. Chinese arbitration institutions generally have similar special rules. For example, the 2015 CIETAC Rules contains detailed provisions on ‘summary procedure’ including the dispute amount, the formation of tribunals, the hearing mode and the time limit for awards, etc. in the 9 articles of Chapter IV. Summary procedure is adopted in a large proportion of the CIETAC intellectual property cases with the average case concluding time of 4.5 months from the initiation of arbitration to rendering the final awards.

3. Improving Provisions on Interim Measures in Intellectual Property Arbitration

The current interim measure mechanism of arbitration cannot meet the relief requirements in fast changing intellectual property dispute cases. A diversified and open mechanism should be established to satisfy the complex practical demands. Meanwhile, mandatory interim measures of arbitration may have a negative impact on the rights and interests of respondents. Therefore, detailed and careful provisions on the application conditions are required to avoid possible abuse and adverse consequences.

Interim measures in intellectual property arbitration may be improved from the following aspects. First, more types of interim measures of arbitration need to be provided. According to Article 26.2 of the UNCITRAL Arbitration Rules as

adopted in 2013, '[A]n interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party...' There are only two types of interim measures of arbitration in China, i.e. property preservation and evidence preservation. The relatively narrow scope of the measures could hardly meet the practical needs. An expansion is needed to provide more types of interim measures of arbitration with more detailed contents. Secondly, the application conditions for interim measures of arbitration need to be regulated. China lacks specific provisions on such conditions. The application conditions should be specified with unified review standards to avoid uncertainty in the application results. The following factors may be considered for decisions on interim measures of arbitration with reference to Article 26.3 of the UNCITRAL Arbitration Rules: Emergency circumstances of the cases, irreversible potential consequences, balance of parties' interests and appropriate security by the applicants as the pre-condition thereof to reduce abuse risks. Furthermore, tribunals should be empowered to decide on interim measures. There is a clear difference between the exclusive decision on interim measures by courts in China and the international mainstream practice allowing the tribunal to decide thereon. The arbitration laws of U.S., U.K., Germany, Switzerland, Singapore, the Netherlands, South Korea and Brazil clearly provide for the 'dual track' approach, empowering both courts and tribunals to issue interim measures.¹⁵ Therefore, certain jurisdiction over interim measures should be given to tribunals to ensure the convenience and smoothness of arbitration proceedings.

¹⁵ Fang Mo, *Interim Measures before Formation of Tribunals-from the Perspective of SIAC Rules*, 6 Social Scientists 2013.

Under the circumstances that the amendments on the Arbitration Law has not been put on the agenda of the legislature yet, some arbitration commissions, represented by the CIETAC, have tried certain reform and innovation on the tribunals' power of deciding interim measures in their rules to meet practical demands, follow the latest trends of arbitration development and enhance international competitiveness. Both the 2012 and 2015 CIETAC Rules have adopted the general international practice of allocating powers in deciding interim measures, stipulating that '[A]t the request of a party, the arbitral tribunal may decide to order or award any interim measure it deems necessary or proper in accordance with the applicable law or the agreement of the parties and may require the requesting party to provide appropriate security in connection with the measure'. Article 23 of the 2015 CIETAC Rules is titled 'Conservatory and Interim Measures', stipulating on the tribunal's power to take interim measures according to the applicable law of the case. The concepts of 'conservatory measures' and 'interim measures' are respectively adopted and the emergency arbitrator procedure is included. The two concepts are distinguished in the provision to meet the practical needs in domestic and international arbitration.

Summary of the Year

At present, the global economic structure is undergoing radical changes and globalization of economy is having in-depth development. China has become the second largest economy and the largest trading nation in the world, and is now at a crucial stage of transform from a major trading nation to a trading power. Along with the continuous increase of Chinese enterprises' investment and trade activities in the Belt and Road countries, Chinese enterprises are facing higher legal risks and having more and higher demands on dispute resolution services. The year of 2016 marks the CIETAC's 60th anniversary. Over the past 60 years, the CIETAC has enjoyed fame both at home and abroad with its independent, impartial and efficient arbitration services and made positive contributions to the development of China's international commercial arbitration.

In retrospect of the year 2016, the development of China's international commercial arbitration can be summarized from the following five aspects.

First, the number of China's international commercial arbitration cases has increased steadily. Since the implementation of the PRC Arbitration Law in 1995, Chinese arbitration commissions have maintained the increase in caseloads and dispute amounts for more than 20 consecutive years with an average annual growth rate of over 30%. Altogether, over 1.2 million civil and commercial disputes have been handled and the total dispute amount is over RMB 2,260 billion. In 2016, 251 arbitration commissions in China accepted a total of 208,545

cases, 71,621 cases more and an increase of 52% as compared to 2015. The total dispute amount was RMB 469.5 billion, with an increase of RMB 58.3 billion at an increase rate of 14% as compared with 2015. Among them, 62 arbitration commissions accepted 3,141 foreign-related, HMT-related cases, accounting for 1.5% of the national total caseload. The development of the 62 arbitration commissions concerning the handling of international commercial arbitration cases is very unbalanced.

Second, China's legal system of international commercial arbitration is improving. Compared with the 2015 SPC Interpretation on the Civil Procedure Law covering almost all aspects of judicial supervision over arbitration, judicial interpretations and opinions of the SPC in 2016 were more specialized, stipulating on various puzzling judicial practice issues in property preservation, clarifying the status and role of arbitration in the ADR mechanism, and attaching importance to the role of arbitration in implementing the Belt and Road Initiatives and constructing pilot FTZs, which will have a profound impact on China's international commercial arbitration.

Third, party autonomy is fully respected in China's international commercial arbitration. Tribunals are professional in understanding and applying the Incoterms. The development and level of China's international commercial arbitration are shown in the tribunal's comprehensive discussion of the Incoterms contents, applicable laws, specific contractual provisions, contract performance of parties and trade practices in the awards on the Incoterms-related disputes with combination of the Incoterms and trade practices. Under the current international

trade environment, the launch and implementation of the Belt and Road Initiatives will lead to more new-type transaction modes and transport or payment methods. In China's international commercial arbitration practice, the number of the Incoterms-related cases may increase as well. It is necessary to remind international trade participants to rationally design the trade modes, correctly apply the Incoterms, minimize legal risks and safeguard their legitimate rights and interests.

Fourth, the fundamental principle of "pro-arbitration" is reflected in the judicial supervision of China's international commercial arbitration. The people's courts fully respect the finality of arbitral awards and strictly follow the principle of judicial review over issues stipulated in laws and insist on the trial mode of determining applicable laws for foreign-related arbitration agreements first and then determining the form and substantive validity of arbitration agreements accordingly. The people's courts accurately grasp the main theme of the New York Convention favoring the enforcement of awards, make high-quality rulings on issues regarding the validity of arbitration agreements, appropriate notification in arbitration proceedings, interpretation of arbitration rules, arbitrability and public policy, and greatly enrich the case resources for the application of the New York Convention. The People's Court's ruling on enforcing the award by the CIETAC Hong Kong Arbitration Centre is the first case for the enforcement of awards rendered by overseas branches of Mainland arbitration commissions. It is of great significance to the international development of Chinese arbitration commissions and the Belt and Road dispute resolution.

Fifth, the intellectual property arbitration mechanism has basically taken shape and will be further developed under the background of China's transformation into an intellectual property power. Arbitration, with its flexible hearing modes, has strong potential and individualized hearing modes corresponding to intellectual property disputes may be formed to avoid time and cost consuming dispute resolution in complicated and modelled litigation proceedings and to meet parties' individual needs to the greatest extent. Major arbitration commissions such as the CIETAC try to meet the special needs in intellectual property dispute resolution through reasonable classification of arbitrators' professions, case-based adjustments to arbitration rules and other ways. It is necessary to give full play to the advantages of arbitration in intellectual property dispute resolution through a series of measures, including reasonably expanding the case acceptance scope of intellectual property arbitration, assisting parties to accelerate intellectual property arbitration proceedings and improving relevant provisions on interim measures in intellectual property arbitration so as to push forward the in-depth development of intellectual property arbitration.

The Fourth Plenary Session of the 18th Central Committee of the Communist Party of China made an important plan for the development of foreign-related legal services and put forward specific requirements. The Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Commerce and the Legislative Affairs Office of the State Council jointly issued the Opinion on the Development of Foreign-related Legal Services on 8 January 2017, clearly pointing out that the development of foreign-related legal services is for the purpose of meeting

demands in the economic globalization process, forming a new system of opening up to the outside world and responding to new challenges in maintaining national security and stability, and of great significance in safeguarding legitimate rights and interests of Chinese citizens and enterprises outside China and those of foreign citizens and enterprises in China. With the implementation and promotion of the Belt and Road Initiatives, the CIETAC will strive to play a more active role in the research and construction of the Belt and Road ADR mechanism. From carrying out the research on the Belt and Road arbitration system to enhancing exchanges with dispute resolution institutions in the Belt and Road countries and regions, from the training of internationalized arbitrators to the overall layout of branches in different industries and regions, the CIETAC will make full use of the development opportunities for dispute resolution under current international situation and promote international economic and trade cooperation and development with efficient, independent and impartial arbitration services.



the Summit

Glimpse of China Arbitration Summit 2016

China Arbitration Summit 2016 was held in Beijing from 28 to 29 September 2016. Themed ‘Inheritance, innovation and harmonization’, the Summit reviewed the 60 year history of China’s foreign-related arbitration, discussed new trends and cutting-edge hot issues in the development of international arbitration and Chinese arbitration, proposed countermeasures, shared development achievements and promoted the development of arbitration. The Summit was co-hosted by the

SPC, the China Council for the Promotion of International Trade (the CCPIT) and the CIETAC, with Renmin University of China, All China Lawyers Association, Beijing Bar Association and the UNCITRAL Regional Centre for Asia and the Pacific as co-organizers.

Mr. Wan E-Xiang, Vice Chairman of the NPC Standing Committee, sent a congratulatory letter to the Summit and the CIETAC's 60th Anniversary, pointing out that the Fourth Plenary Session of the 18th CPC Central Committee had proposed to 'improve the arbitration system and enhance the credibility of arbitration', indicating the clear direction for further development of Chinese arbitration. He hoped the CIETAC would take the 60th anniversary as a new starting point to follow the correct direction of serving the socialist market economy with Chinese characteristics with foreign-related arbitration, carry forward the fine tradition of foreign-related arbitration, never forget the beginning, keep moving forward, seize the opportunities, accelerate the development, improve the system and mechanism, innovate the service means, constantly enhance the credibility and international competitiveness of China's foreign-related arbitration and strive to build an international brand of arbitration in China so as to make new and greater contribution to the development of Chinese arbitration and the construction of rule of law in China.



H.E. Mr. Zhou Qiang, the SPC President, addressed the opening ceremony

H.E. Mr. Zhou Qiang, President of the SPC, attended the opening ceremony and delivered a speech. He pointed out that new requirements have been set for the development of international arbitration and new challenges have been brought about along with the in-depth development of economic globalization, the continuous promotion of social informationization and the profound changes in global governance system. China attaches great importance to the promotion of rule of law in arbitration. In recent years, the SPC has actively pushed forward the reform on the ADR mechanism. It promulgated the Opinions on Further Deepening the Reform of the ADR mechanism, calling for courts' better connection with arbitration institutions, active supporting the reform of the arbitration system and fully embodying Chinese courts' positive attitude and firm stand of favoring arbitration. He said that China's opening-up was in a new historical period. Chinese arbitration industry should cherish the unprecedented historical opportunities, pioneer and innovate, act actively and build China into an internationally recognized arbitration center with great influence as soon as possible. He emphasized that it was necessary to strengthen the study of

arbitration theories, vigorously push forward the development of arbitration, take active measures to further improve the system of judicial review over arbitration in China, continue to innovate arbitration concepts and continuously promote the reform of Chinese arbitration system and mechanism. He expressed the hope that all the honored guests of the Summit would learn from each other, build consensus, strengthen exchanges and deepen cooperation to promote the development of arbitration and make greater contribution to the progress of judicial justice and the rule of law civilization in the world.



Mr. Jiang Zengwei, the CCPIT Chairman, attended the Summit and delivered a speech

Mr. Jiang Zengwei, the CCPIT Chairman, attended the Summit and delivered a speech, pointing out that President Xi Jinping, in the just concluded G20 Hangzhou Summit, had put forward the initiative of building an open world

economy and continuing to promote trade and investment liberalization and facilitation. It could be foreseen that with the deepening of economic globalization and the ever-closer economic and trade exchanges and cooperation among various countries, trade frictions and disputes would be inevitable. International commercial arbitration, as an important measure to handle international economic and trade disputes, would play an increasingly important role in China's opening-up and the development of international economy and trade. He said that over the past 60 years, Chinese arbitration had made tremendous progress, won good reputation internationally and made positive contributions to the development of China's foreign trade and economic cooperation and maintaining the international economic and trade order. Chairman Jiang pointed out that, for the further development of Chinese arbitration, arbitration commissions represented by the CIETAC should actively push forward the improvement of the arbitration legal system, establish a judicial environment conducive to international arbitration, vigorously promote their own construction, strengthen training and cultural construction of Chinese arbitration, actively participate in the formulation of international arbitration rules, deeply integrate into the governance of international arbitration and continuously improve the international status and influence. The CIETAC would continue to give full play to its advantages, blaze new trails in a pioneering spirit, never forget the beginning and keep moving forward. Chairman Jiang said that the CIETAC would work with friends from arbitration circles both at home and abroad to enhance communication and cooperation, strive to improve credibility of arbitration and continue to make new and greater contributions to the sustained healthy and stable development of the global economy.

Mr. Zhang Wei, Vice Chairman of the CCPIT, pointed out in his speech at the opening ceremony that China had become the second largest economy and largest trading nation of goods in the world. For the first time, China's outward direct investment ranked the second in the world in 2016. China was also the largest trading partner of more than 130 countries. Along with the steady implementation of the Belt and Road Initiative, Chinese enterprises had accelerated their 'going-out' gradually.



Mr. Zhang Wei, Vice Chairman of the CCPIT, delivered a speech

As the largest developing country in the world, China had a great potential for economic development with ample space and a bright future. He believed that the prosperity and development of China's economy and society could not be separated from the support and guarantee of the rule of law. Commercial arbitration, as an important part of the rule of law construction in China, would play an active and important role in economic development under the new situation of promoting the rule of law in an all-round way. He said the CCPIT was willing to work together with the national legislative and judicial authorities and all social sectors to continuously promote more friendly environment for arbitration, actively promote transforming China into an international arbitration center and make the utmost efforts for the development of arbitration in China.



Mr. Reno Soli, the UNCITRAL Secretary General, addressed the opening ceremony

Mr. Reno Soli, Secretary General of the United Nations Commission on International Trade Law (the UNCITRAL), mentioned in his speech that this year marked the 60th anniversary of the CIETAC and the 50th anniversary of the UNCITRAL. The UNCITRAL, since its establishment, had been committed to promoting the development of international commercial arbitration, enhancing the unified application of the 1958 New York Convention

and popularizing the UNCITRAL Model Law on International Commercial Arbitration. He fully affirmed the positive contribution by Chinese legislature in creating a favorable legal environment for the modernization of commercial arbitration in China and highly value the UNCITRAL's cooperation with the SPC, the Ministry of Commerce and Chinese arbitration circles represented by the CIETAC. He deemed that China, as an active participant in the UNCITRAL and various working groups, was playing a more and more important role. The UNCITRAL and the CIETAC would lay foundation for further cooperation in more aspects through co-hosting conferences and other ways.

Mr. Donald Donovan, President of the International Council for Commercial Arbitration (the ICCA), delivered a video address to the Summit, saying that for the past 55 years, the ICCA had benefited a lot from suggestions and opinions of experts from the CIETAC and other Chinese arbitration commissions. He believed that the source of the development of many international arbitration institutions was rooted in the area and legal culture where they are located. The CIETAC, in its practices, had shown the rich traditions of Chinese laws and dispute resolution ways while continuously increasing the participation of non-Chinese arbitrators and lawyers in order to better fulfill its mission as an international arbitration institution. The good adaptability of international arbitration allowed for a diversity of legal practices with different legal and cultural backgrounds. He firmly believed that international commercial arbitration could enhance economic and trade activities, seek benefits for humankind and make contributions to world peace. He congratulated the 60th anniversary of the CIETAC.



Donald Donovan, Chairman of the International Federation of Commercial Arbitration Institutions (the IFCAI) delivered a video address



Ms. He Rong, Vice President of the SPC, made a keynote speech

Ms. He Rong, Vice President of the SPC, attended the opening ceremony and made a keynote speech, pointing out that China was working with other countries to jointly push forward the Belt and Road construction and continue to make major achievements in international economic cooperation such as the Asian Development Bank and the Silk Road Fund. The exchanges among various countries were getting closer and the world economy was deeply integrated. The participation of Chinese parties and arbitration commissions in international arbitration cases was rapidly increasing. The stage for the international development of Chinese arbitration and the development of international arbitration in China were more extensive. She said that justice had always been a strong supporter and facilitator of arbitration. Smooth arbitration proceedings and the enforcement of arbitration agreements and arbitral awards were inseparable from the strong judicial support. The SPC had attached great importance to the status and role of commercial arbitration in dispute resolution, fully respected

party autonomy, fulfilled the support and supervision function of judicial review over arbitration in accordance with law and achieved remarkable results. She believed that China's commercial arbitration had entered a completely new development stage with the deepening of China's opening-up, the rapid growth of Chinese economy and the proposal of 'improving the arbitration system and enhancing the credibility of arbitration' in the Fourth Plenary Session of the 18th CPC Central Committee. The SPC was carrying out some explorations and attempts in building a new pattern for the judicial review over arbitration. First, it was constructing a general pattern of judicial support for arbitration in the Belt and Road construction. Second, it was vigorously promoting the specialization of arbitration judicial review. Third, it was further improving the arbitration judicial review mechanism. Fourth, it was relying on information technology to promote judicial openness. Fifth, it was actively cultivating specialized arbitration judicial review teams. She said that in the new historical period, judiciary and arbitration should uphold the spirit of openness and tolerance, strengthen their interaction and cooperation at domestic and international levels with diverse and mutually-beneficial thinking, and work together to promote social fairness and justice. Chinese courts would continue to support the development of arbitration with a broader international perspective and a more open judicial concept. The judicial review system would be improved continuously to safeguard and promote the development of arbitration and create a sound rule-of-law environment for ADR.

Mr. Lu Pengqi, Vice Chairman of the CCPIT and the CIETAC, presided over the opening ceremony.



Mr. Lu Pengqi, Vice Chairman of the CCPIT and the CIETAC, presided over the opening ceremony

Mr. Wang Shengming, Vice Chairman of the NPC Internal Affairs Judicial Committee, Ms. Anna Lindstedt, Swedish Ambassador to China, representatives of the SPC, the Ministry of Commerce, Taiwan Affairs Office, HKSAR Government Beijing Office, participants from home and abroad and representatives of the older generation arbitrators of the CIETAC were invited to the Summit.

This Summit also invited Prof. Dr. Kaj Hobér, President, Arbitration Institute of the SCC, Mr. Johan Gernandt, Former Chairman of the SCC, Prof. Doug Jones AO, Immediate-Past President, Australian Centre for International Commercial Arbitration (the ACICA), Dr. Nikolaus Pikkowitz, Vice President, Vienna International Arbitration Center (the VIAC), Ms. India Johnson, President of International Center for Dispute Resolution (the ICDR), American Arbitration Association (AAA), Mr. José Ricardo Feris, Deputy Sectary General,

International Court of Arbitration of the ICC Court, Prof. Dr. Marcelo Huck, Member of Superior Council, Chamber of Conciliation, Mediation and Arbitration of the Center of Industries of the State of São Paulo/Federation of Industries of the State of São Paulo (the CIESP/FIESP), Brazil, Mr. Ko-Yung Tung, Former Secretary General, International Center for the Settlement of Investment Disputes (the ICSID), Mr. Robert Davidson, Executive Director of Arbitration Practice, Judicial Arbitration and Mediation Services, Inc. (the JAMS), Justice Steven Chong, Justice, Supreme Court, Singapore, Datuk Professor Sundra Rajoo, Director, Kuala Lumpur Regional Centre for Arbitration (the KLRCA), Mr. Thomas Weimann, Member of the Board, Chinese European Arbitration Center GmbH, Ms. Ndanga Kamau, Registrar, LCIA-MIAC Arbitration Center, the HMT arbitration experts and other directors of leading international institutions from 14 countries and regions in Asia, Africa, Latin America, the Americas and Oceania as the speakers. More than 600 representatives from major arbitration institutions in over 40 countries and regions, as well as judges, experts, arbitrators, lawyers and business people from over 40 countries attended the conference, of which 160 were from abroad.



Mr. Wang Chengjie, Vice Chairman and Secretary General of the CIETAC, presided over the closing ceremony

43 speakers had in-depth discussions in 5 sessions on issues including the trends of internationalization and localization in arbitration, hot topics in international arbitration, achievements and prospects of Chinese arbitration, judicial practice supporting arbitration in the Belt and Road countries and arbitration in the eyes of general legal counsels in the one and half days of the Summit.



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02

- 01. Justice Steven Chong, Justice, Supreme Court, Singapore
- 02. Mr. Ko-Yung Tung, Former Secretary General, the ICSID
- 03. Mr. Johan Gernandt, Former Chairman of the SCC
- 04. Prof. Doug Jones AO, Immediate-Past President, the ACICA
- 05. Datuk Professor Sundra Rajoo, Director, the KLRCA



03



05



04



Ms. Ndanga Kamau, Registrar, LCIA-
MIAC Arbitration Center



Mr. Thomas Weimann, Member of the
Board, Chinese European Arbitration
Center GmbH



Mr. Philip Yang, International
Arbitrator



Mr. Emmanuel Jacomy, partner in
Shearman & Sterling



Speakers

At present, the development of international commercial arbitration is showing the coexistence of internationalization and localization. On the one hand, many countries or regions have recently amended the arbitration laws and major international arbitration institutions have updated the arbitration rules one after another, showing the convergence of rules in the trend of internationalization of arbitration. On the other hand, countries or regions and arbitration institutions have paid attention to local situation of arbitration and demands of main arbitration users and developed systems and practices with their own characteristics. Under the theme of the trends of internationalization and localization in arbitration, the keynote speakers discussed new changes in arbitration legal system around the world, new development of arbitration rules and practice, how arbitration institutions handle issues in the internationalization and localization of arbitration and how to balance the relationship between the two.

After nearly two centuries of development, especially after World War II, a complete system of international commercial arbitration has been established in the world. Commercial arbitration is widely used in today's international



speakers

exchange and economic activities and has shown unprecedented prosperity with new topics emerging continuously. To promote Chinese arbitration in line with international standards, lawyers from well-known international law firms and international arbitrators delivered speeches on cutting-edge topics in international arbitration such as investment arbitration, parallel procedure issues in arbitration, application of interim measures and third-party funding.

With the Government Administration Council's approval in 1954 for setting up the CCPIT Foreign Trade Arbitration Commission as the symbol, the modern commercial arbitration system in China was established. After 60 years development, especially after the promulgation of the PRC Arbitration Law, Chinese arbitration has made great progress in a relatively short period of time. In order to review the past and look forward into the future, the keynote speakers reviewed the achievements and experience of Chinese arbitration in the past 60 years, discussed the role and status of arbitrators and lawyers in arbitration, and had in-depth exchanges on issues such as measures to enhance the attractiveness of Chinese arbitration and the international competitiveness of Chinese arbitration commissions, the prospect of amending the PRC Arbitration Law and the future

direction of Chinese arbitration.

The Belt and Road is a major cooperation initiative proposed by President Xi Jinping. It is a Chinese proposal for promoting global cooperation and development and the top-level design for China's opening-up and economic diplomacy in the new era. With the deepening implementation of the initiative, the enthusiasm of Chinese enterprises to participate therein has been on the rise. However, they also face many difficulties in trade and investment cooperation with other countries along the Belt and Road. The lack of comprehensive and effective legal service support is quite outstanding. In particular, the Summit set the session of judicial practice supporting arbitration in the Belt and Road countries, focusing on the enforcement of arbitral awards, especially foreign ones, in China, Chinese courts' support to arbitration, frontier issues and prospects of judicial supervision over international commercial arbitration in China, judicial practices concerning the determination of validity of arbitration agreements, interim measures and enforcement of arbitral awards in the Belt and Road countries and the enforcement of Chinese arbitral awards in the Belt and Road countries, so as to give impetus to the proper resolution of civil and commercial disputes among enterprises in the Belt and Road countries and Chinese arbitration commissions to grasp the historic development opportunities.



Wang Liming, Vice Chairman of the CIETAC, Executive Vice President of Renmin University of China, made a special speech



Mr. Zhang Yongjian, Chief of Fourth Civil Division of the SPC, made a keynote speech



Mr. Yu Jianlong, Vice Chairman of the CIETAC, Secretary General of China Chamber of International Commerce, made a keynote speech



Mr. Liu Jingdong, Deputy Chief, Fourth Civil Division of the SPC, presided over the Fourth Session



Dr. Li Hu, Vice President of the CIETAC Court of Arbitration, made a keynote speech



Mr. Ren Xuefeng, Presiding Judge, Fourth Civil Division of the SPC, delivered a keynote speech



The Summit also invited keynote speakers from business circles to discuss how to strengthen risk control management, set up perfect dispute resolution mechanism, handle disputes properly and defend their own legitimate rights and interest, what to consider when drafting arbitral clauses, selecting places of arbitration, arbitration institutions, arbitrators, arbitration language, arbitration rules and substantive laws as well as arbitration fees if arbitration is adopted, what role corporate legal counsels played in arbitration, what challenges Chinese enterprises faced in overseas arbitration, such as different legal and social systems, cultures and languages and how to deal with them, what experiences and lessons Chinese



The Summit

enterprises learned in overseas arbitration and suggestions for ‘going-out’ enterprises, etc. from the perspective of business practices and in light of their own systems and experiences.

In recognition of their significant contribution and great achievements in the 60-year development of the CIETAC, the Summit presented Special Contribution Award to Mr. Ren Jianxin, former President of the SPC and Honorary Chairman of the CIETAC, and Prof. Tang Houzhi, consultant of the CIETAC and Mr. Fei Zongyi, former Judicial Committee Member of the SPC, and Lifetime Achievement Award to Mr. Johan Gernandt, Former Chairman of the SCC.



Ms. Niu Lizhi, Wife of Mr. Ren Jianxin, former President of the SPC and Honorary Chairman of the CIETAC, received the award on behalf of Mr. Ren



Mr. Wang Shengming, Vice Chairman of the NPC Internal Affairs Judicial Committee presented the award to Prof. Tang Houzhi, consultant of the CIETAC



Mr. Yu Jianlong, Vice Chairman of the CIETAC, Secretary General of China Chamber of International Commerce presented the award to Mr. Fei Zongyi, former Judicial Committee Member of the SPC



Mr. Wang Chengjie, the CIETAC Vice Chairman and Secretary General presented the award to Mr. Johan Gernandt, Former Chairman of the SCC

2016 中国 China

2016年9月27-29 September



中国仲裁高峰论坛 China Arbitration Summit

China
Arbitration Week
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China
Arbitration Summit
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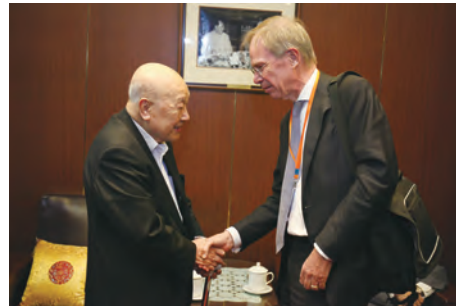
27日-29日 北京
October 2016 Beijing

国际贸易仲裁委员会
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of International Trade

中国国际经济贸易仲裁委员会
China International Economic and Trade Arbitration Commission

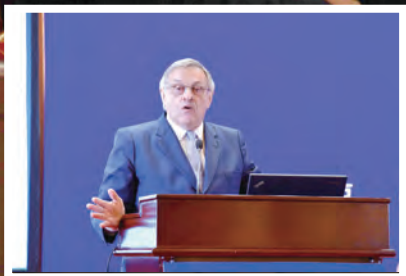
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International Economic and Trade Arbitration Commission



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