ANNUAL REPORT ON
INTERNATIONAL COMMERCIAL ARBITRATION
IN
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(2020~2021)

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China International Economic and Trade Arbitration Commission

The China International Economic and Trade Arbitration Commission (CIETAC) is one of the major permanent arbitration institutions in the world. CIETAC independently and impartially resolves economic and trade disputes, as well as investment disputes by means of arbitration.

Headquartered in Beijing, CIETAC has so far established South China Sub-Commission, Shanghai Sub-Commission, Tianjin International Economic and Financial Arbitration Center (Tianjin Sub-Commission), Southwest Sub-Commission, Zhejiang Sub-Commission, Hubei Sub-Commission, Fujian Sub-Commission, Silk Road Arbitration Center, Jiangsu Arbitration Center, Sichuan Sub-Commission, Shandong Sub-Commission, Hainan Arbitration Centerand Xiongan Sub-Commission. CIETAC also set up its Hong Kong Arbitration Center in Hong Kong, European Arbitration Centre in Vienna and North America Arbitration Center in Vancouver. CIETAC and its sub-commissions/arbitration centers constitute a single arbitration institution.

CIETAC's current arbitration rules are effective as from January 1,2015. The latest renewal of its Panel of Arbitrators is in 2021, engaging 1,698 arbitrators.Among them, 1,215 arbitrators are from mainland China, covering all provinces, regions and cities; and 483 arbitrators are from Hong Kong, Macao, Taiwan and foreign countries.

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China International Economic and Trade Arbitration Commission

EDITORIAL COMMITTEE

The English version of this Report is translated by Wolters Kluwer China.

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Foreword

The rule of law is an important part of a country's core competitiveness. At present, the world is undergoing unprecedented changes in a century. Peace and development remain the theme of the times. However, the instability and uncertainty of the international environment are on the rise, and the impact of the COVID-19 pandemic is extensive and far-reaching. China is growing stronger and getting closer to the center of the world stage. At the Central Committee's Working Conference on Comprehensive Rule of Law on 16 November 2020, General Secretary Xi Jinping stressed the importance to promote the rule of law at home and foreign-related rule of law in a coordinated manner. It is crucial to accelerate the strategic layout of the foreign-related rule of law, coordinate the promotion of domestic and international governance, and better safeguard national sovereignty, security, and development interests. Meanwhile, it is also necessary to focus on cultivating a number of world-class arbitration institutions and law firms and provide more effective protection and services for the foreign-related rule of law.

As the flap ship of international permanent arbitration institutions in China, the China International Economic and Trade Arbitration Commission (CIETAC) has more than 60 years of rich experience in handling international commercial disputes and constantly promotes the innovation of foreign-related arbitration system and the development of the rule of law in China. In recent years, CIETAC ranks among the top international arbitration institutions in terms of the number of cases administered, the total amount of subject matters involved, and the number of parties with diverse nationalities. The arbitral awards rendered by CIETAC have been enforced in over 100 countries and regions around the world, and the international credibility and influence of China's arbitration have been exemplified and reinforced in numerous cases administered thereby. In May 2021, CIETAC was ranked one of the five most preferred arbitration institutions in the world in the industry's authoritative international arbitration survey,

marking the first time that a Chinese arbitration institution has ranked among the top five. This reflects the recognition and trust of the international arbitration community and arbitration users on the rule of law in arbitration in China.

On 22 September 2015, CIETAC released its inaugural "Annual Report on International Commercial Arbitration in China (2014)" in Beijing, which was the first annual summary on the development of international commercial arbitration in China (i.e., foreign-related arbitration in China, in general sense). The Annual Reports on International Commercial Arbitration in China for 2014, 2015, 2016, 2017, 2018-2019 and 2019-2020, released in both Chinese and English, have received extensive attention from the academia and the industry both at home and abroad. In order to further summarize the rule of law development of international commercial arbitration in China, promote the improvement of China's international commercial arbitration system, industry development and information exchange, increase China's voice and strengthen influence in the stage of international commercial arbitration, and provide reference for China to further develop the international commercial arbitration business, CIETAC has decided to continue to prepare and release the "Annual Report on International Commercial Arbitration in China (2020-2021)".

In addition to the Foreword and Annual Summary, the "Annual Report on International Commercial Arbitration in China (2020-2021)" is divided into five chapters, namely, "Overview of the Development of International Commercial Arbitration in China", "Development and Practice of International Commercial Arbitration under the COVID-19 Pandemic", "Special Observation on Financial Arbitration Cases", "Research on Hot Issues of Arbitrators' Conflicts of Interest and Grounds for Refusals", and "Overview of the Judicial Review of Foreign-Related Commercial Arbitration by Chinese Courts in 2020". This Annual Report adopts the research method of combining empirical analysis and theoretical research to demonstrate the highlights of the

development of international commercial arbitration in China. Specifically, on the basis of analyzing the data on international commercial arbitration cases in China in 2020 and the practical development of China's arbitration legal system, this Annual Report synchronously tracks the research trends in commercial arbitration theories at home and abroad, discusses the judicial review of international commercial arbitration in China, analyzes the development and practice of international commercial arbitration under the COVID-19 pandemic, studies the hot issues on conflicts of interest and arbitrator refusal, and observes the development of commercial arbitration this year based on financial arbitration cases. This Annual Report timely puts forward countermeasures and suggestions regarding possible arbitration disputes and legal issues arising under the impact of the COVID-19 pandemic and how to actively respond to such issues in arbitration practice, which reflects the timeliness of the research work.

The research group of the "Annual Report on International Commercial Arbitration in China (2020-2021)" is led by Arbitrator DU Huanfang (Executive Vice Secretary of the Party Committee and Vice Dean of the Law School of Renmin University of China) and Arbitrator YAO Junyi (Director of the CIETAC Arbitration Court). The key members of the research group include Judge SHEN Hongyu (Deputy Chief Judge of the Fourth Civil Division of the Supreme People's Court), Arbitrator SONG Lianbin (professor at the School of International Law of the China University of Political Science and Law), Arbitrator DONG Xiao (partner of AnJie Law Firm), Arbitrator CHEN Xijia (partner and co-head of China Office of Pinsent Masons LLP (UK)), and YANG Qiang (partner of Lantai Partners). YANG Peiru and GUO Jingjing, PhD candidates from the Law School of Renmin University of China, participated in the writing of part of the content. The content of this Annual Report is drafted with collaboration of the experts: Foreword and Annual Summary by DU Huanfang, First chapter by DU Huanfang, YANG Peiru, and GUO Jingjing; Second chapter by DONG Xiao; Third chapter by YANG Qiang; Fourth chapter by SONG Lianbin and CHEN Xijia; Fifth chapter by Judge SHEN

Hongyu. YAO Junyi and DU Huanfang consolidated the first draft of the Report. WANG Chengjie (Deputy Director and Secretary General of CIETAC), XU Yanbo (Secretary of the Party Committee and Deputy Secretary General of CIETAC), and GU Yan and XIE Changqing (Vice Presidents of the CIETAC Arbitration Court) reviewed this Annual Report.

The publication of the "Annual Report on International Commercial Arbitration in China (2020-2021)" is fully supported by the Fourth Civil Division of the Supreme People's Court which authored the Fifth Chapter "Overview of the Judicial Review of Foreign-Related Commercial Arbitration by Chinese Courts in 2020". The Public Legal Services Administration of the Ministry of Justice, the Law School of Renmin University of China, the School of International Law of China University of Political Science and Law, AnJie Law Firm, Lantai Partners, and Pinsent Masons LLP have provided convenience and strong assistance in terms of information submission, preparation of first draft, and mid-term review. WU Zhenguo, PhD candidate from the School of International Law of China University of Political Science and Law, provided materials and assistance for part of the Report. SU Sa, ZHANG Bei, and XU Tianshu from the CIETAC Arbitration Court have put a lot of effort into the project initiation, division of tasks and coordination, collection of typical cases and data, and text proofreading for this Annual Report. SHEN Xiaoying, the Director of Legal and Economic Publishing Branch of the Law Press·China, and MAO Jingcheng have meticulously planned the editing, proofreading, binding design and typesetting and printing for this Annual Report. We would like to express our heartfelt thanks.

Research Group of the Annual Report on International Commercial Arbitration in China (2020-2021)

August 2021

Chapter One

Overview of the Development of International Commercial Arbitration in China

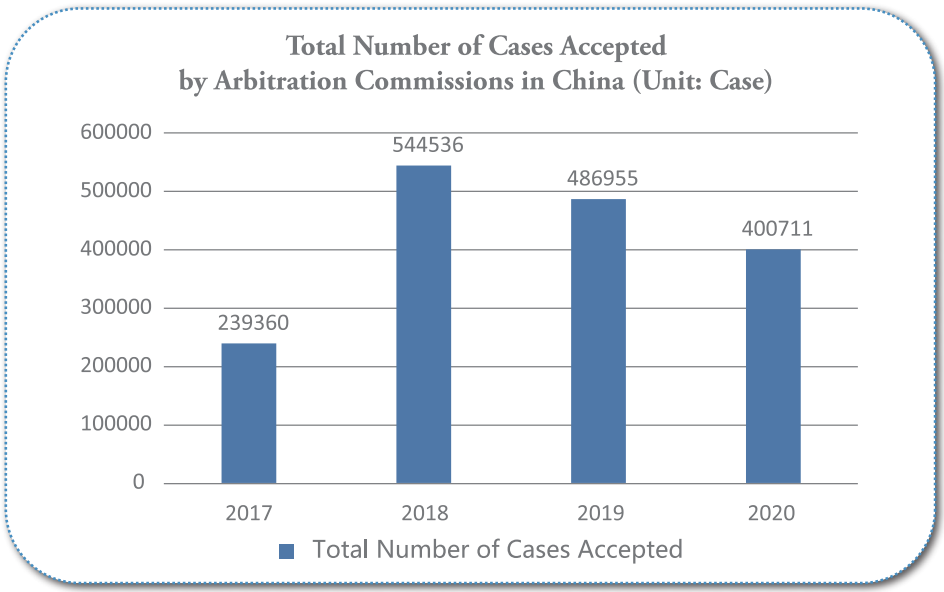
I. DATA ANALYSIS OF INTERNATIONAL COMMERCIAL ARBITRATION CASES IN CHINA

A. Cases Accepted by Arbitration Commissions in China

1. Caseloads and the value of subject matter

In 2020, affected by the sudden COVID-19 pandemic, the world's economic development and trade flows were severely impacted, and the arbitration industry was not spared. In general, although China's arbitration industry was affected to a certain extent in 2020, it still maintained a positive and steady development trend.

In 2020, 259 arbitration commissions in China accepted a total of 400,711 cases, of which 261,047 cases involve traditional commercial arbitration, dropped 20,364 cases from the number in 2019, declined by 7% year-on-year. To be specific, 47 arbitration commissions handled 139,664 cases by means of online arbitration, a decrease of 65,880 cases compared with that in 2019 or a decrease of 32% year-on-year. In 2020, the total value of subject matter of arbitration cases was RMB718.7 billion, a decrease of RMB 41.1 billion or a decrease of 5.4% year-on-year.



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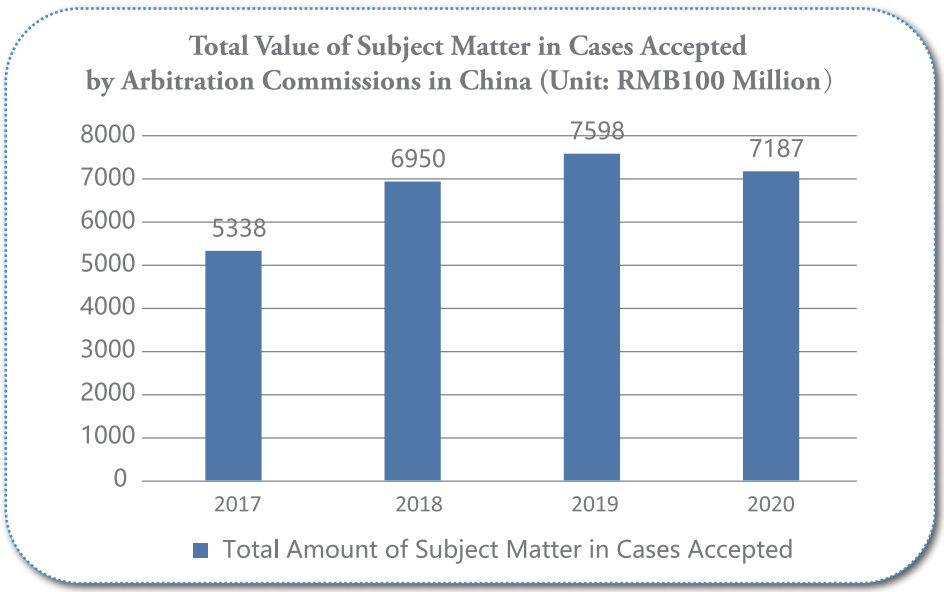

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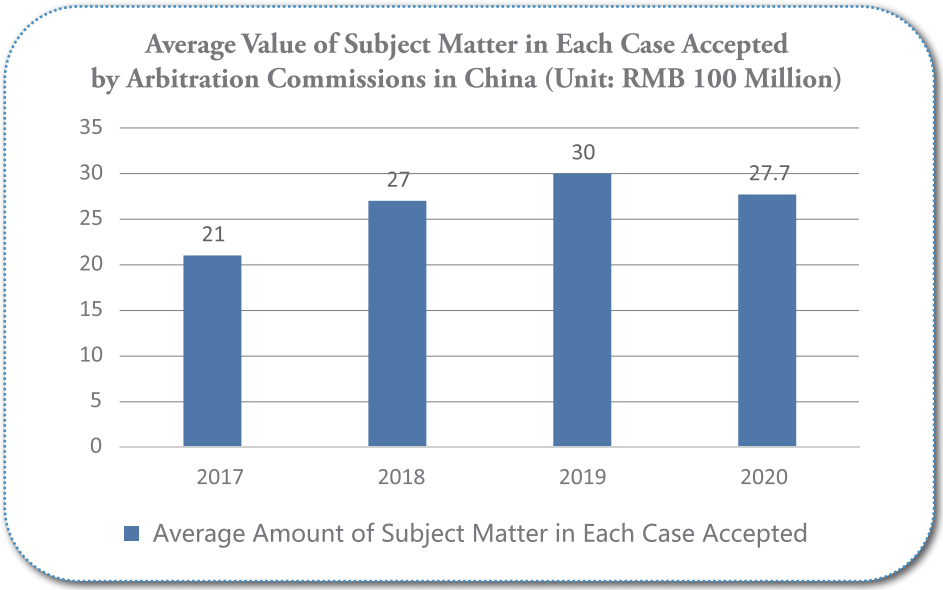

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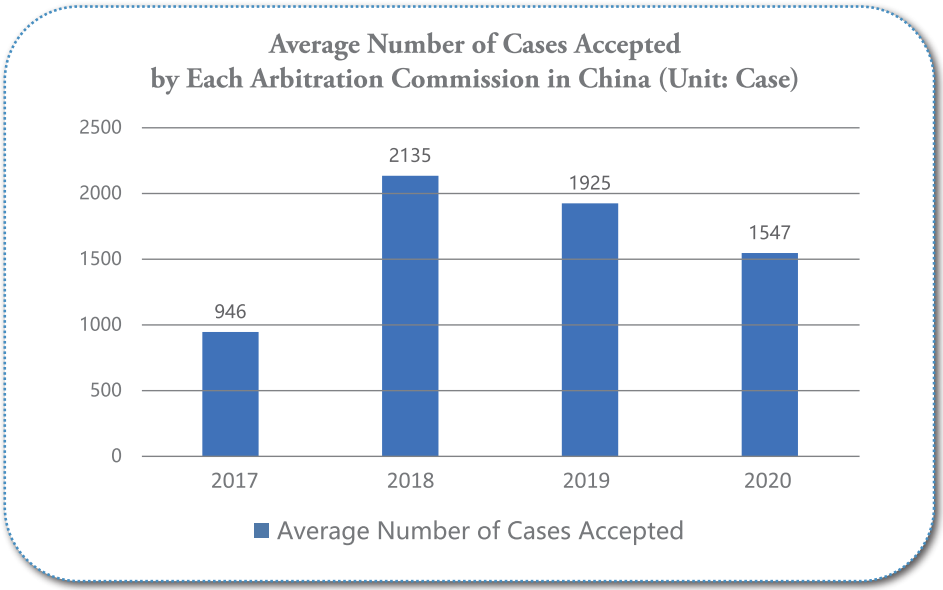


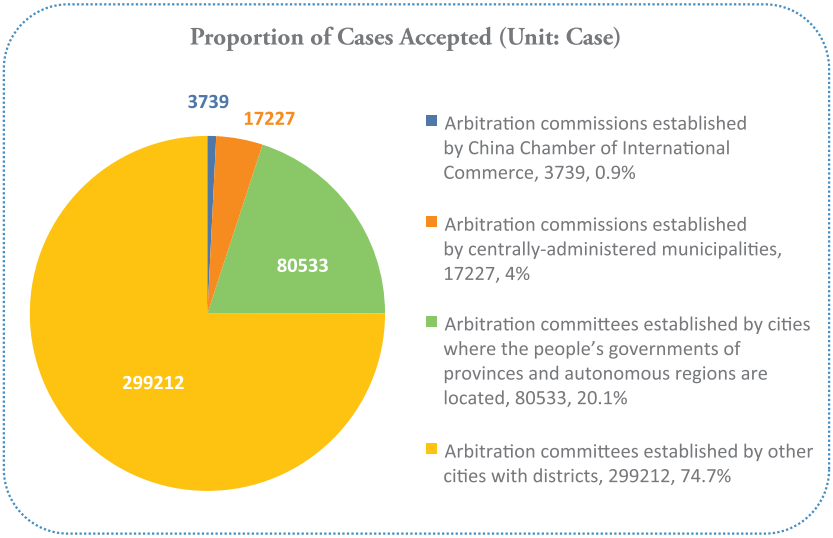
Figure 1-4

In 2020, among the 259 arbitration commissions in China, the three arbitration commissions established by the China Chamber of International Commerce (namely, the China International Economic and Trade Arbitration Commission, the China Maritime Arbitration Commission, and the Arbitration Center Across the Straits) accepted 3,739 cases, accounting for 0.9% of the total number of cases nationwide. The total value of subject matter was RMB113.1 billion, accounting for 15.7% of the total value of subject matter nationwide. Among them, the China International Economic and Trade Arbitration Commission accepted 3,615 cases, accounting for 96.7%, and the total value of subject matter was RMB112.1 billion, accounting for 99.1%.

The five arbitration commissions established by the centrally-administered municipalities handled 17,227 cases, accounting for 4% of the total number of cases nationwide. The total value of subject matter was RMB184.4 billion, accounting for 25.7% of the total value of subject matter nationwide.

The 27 arbitration commissions established by the cities where people's governments of provinces or autonomous regions are located handled 80,533 cases, accounting for 20.1% of the total number of cases nationwide. The total value of subject matter was RMB144.1 billion, accounting for 20% of the total value of subject matter nationwide.

The 224 arbitration commissions established by other cities with districts handled 299,212 cases, accounting for 74.7% of the total number of cases nationwide. The total value of subject matter was RMB277.3 billion, accounting for 38.6% of the total value of subject matter nationwide.



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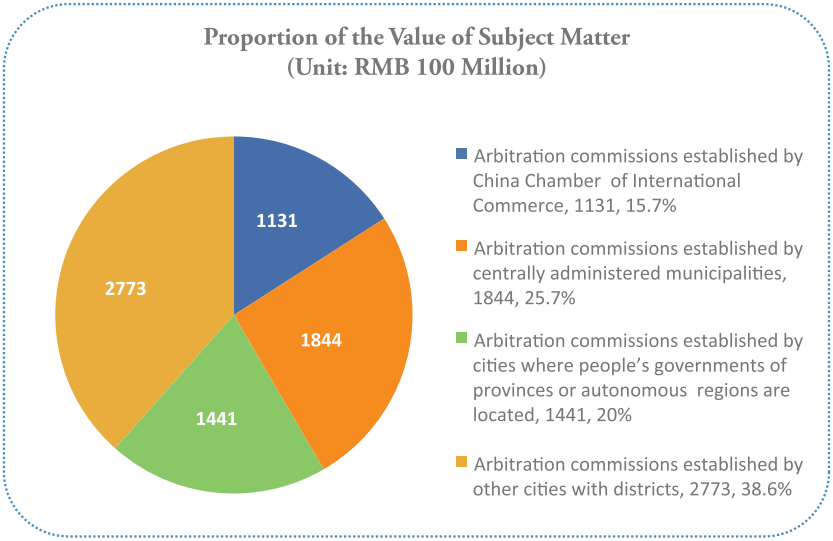

Figure 1-6

2. Types of major cases accepted

In terms of the number of cases handled by China's arbitration commission in 2020,there are 225,673 cases in the financial category, accounting for 56.32% of the total number of cases nationwide; 38,075 cases in the real estate category, accounting for 9.5%; 18,978 cases in the sales category, accounting for 4.74%; 14,358 cases in the traffic accident compensation category, accounting for 3.58%; 13,340 cases in the construction category, accounting for 3.33%; 12,053 cases in the leasing category, accounting for 3.01%; 11,871 cases in the property category, accounting for 2.95%; 7,181 cases in the insurance category, accounting for 1.79%; 5,393 cases in the e-commerce category, accounting for 1.35%; 2,416 cases in the equity transfer category, accounting for 0.6%; 394 cases in the land transaction category, accounting for 0.1%; 1,992 cases in the intellectual property category, accounting for 0.48%; 303 cases in the medical dispute category, accounting for 0.08%; and 158 cases in the agricultural production and operation category, accounting for 0.04%.

In terms of the value of subject matter in various cases, the value of subject matter in financial cases is RMB204.8 billion, accounting for 28.5% of the total value of subject matter in national cases; RMB105.8 billion for equity transfer, accounting for 14.72%; RMB101.9 billion for construction projects, accounting for 14.18%; RMB48.7 billion for purchase and sale, accounting for 6.78%; RMB42.2 billion for real estate, accounting for 5.88%; RMB21.6 billion for land transaction, accounting for 3.01%; RMB16.6 billion for lease, accounting for 2.3%; RMB5.1 billion for insurance, accounting for 0.72%; RMB3.8 billion for intellectual property, accounting for 0.52%; RMB2 billion for e-commerce, accounting for 0.28%; RMB1.2 billion for agricultural production and operation, accounting for 0.17%; RMB1 billion for property, accounting for 0.13%; RMB0.6 billion for traffic accident compensation, accounting for 0.08%; and RMB100

million for medical dispute compensation, accounting for 0.01%.

3. Average number of cases handled

In 2020, 259 arbitration commissions in China handled 1,547 cases on average, a decrease of 378 cases or 19.6% compared with that in 2019. The average value of subject matter is RMB2.8 billion, down by RMB200 million or 6.7% compared with that in 2019.

In 2020, 31 provinces, autonomous regions and centrally-administered municipalities handled 396,972 cases, with the total value of subject matter reaching RMB605.6 billion. The average number of cases in each province, autonomous region and centrally-administered municipality handled is 12,806, down by 2,787 cases or 18% compared with that in 2019. The averagevalue of subject matter is RMB19.5 billion, down by RMB1.1 billion or 5% compared with that in 2019.

4. Mediation, reconciliation, and judicial supervision

In 2020, the number of cases settled by mediation or reconciliation reached 91,981, accounting for 35% of the total number of traditional commercial cases and an increase of four percentage points from 31% in 2019.

In 2020, there were 103 arbitration awards ruled to be revoked by people's courts, accounting for 0.03% of the total number of cases, maintaining the same revocation rate as that of 154 arbitration awards in 2019; and there are 852 arbitration awards ruled to not be enforced, accounting for 0.21% of the total number of cases, which was a significant decrease compared with 2,076 case and 0.43% non-enforcement rate in 2019, down 0.22 percentage points in total. No arbitral award rendered by a domestic

institution in 2020 has been found to be denied enforcement abroad.

5. Acceptance of foreign-related cases and cases involving Hong Kong, Macao, or Taiwan

In 2020, 61 arbitration commissions accepted a total of 2,180 cases involving Hong Kong, Macao and Taiwan and foreign-related cases, down by 40 cases compared with that in 2019. Cases were mainly filed in Beijing, Shanghai, Jiangsu, Zhejiang, Fujian, Guangdong and other provinces and municipalities. Therein, there were 938 cases related to Hong Kong, 64 cases related to Macao, 108 cases related to Taiwan, and 1,070 cases related to foreign countries. Five arbitration commissions had handled more than 100 cases involving Hong Kong, Macao or Taiwan and foreign-related cases, namely, the China International Economic and Trade Arbitration Commission handling 739 cases, the Shenzhen Court of International Arbitration handling 310 cases, the Guangzhou Arbitration Commission handling 284 cases, the Beijing Arbitration Commission handling 215 cases, and the Shanghai International Economic and Trade Arbitration Commission handling 112 cases.

B. Comparison of China's International Commercial Arbitration Practice

This chapter intends to compare the international commercial arbitration practice in China with the practice of the world's major arbitration institutions in 2020, and to summarize the prominent features and trends of international commercial arbitration practice in China. Given that most international commercial arbitration practice in China take the institutional arbitration model, this chapter selects the following leading arbitration institutions as comparison objects: the China International Economic and Trade Arbitration Commission ("CIETAC"), the International Chamber of Commerce International Court of Arbitration ("ICC Court of Arbitration"), the London Court of

International Arbitration ("LCIA"), the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), the Singapore International Arbitration Centre ("SIAC"), and the Hong Kong International Arbitration Centre ("HKIAC"). In this chapter, we make a comparative analysis of the annual reports published by the above international commercial arbitration institutions through official channels, with focus on the highlights and trends of China's international commercial arbitration practice in 2020.

1. Number of cases accepted

In 2020, a total of 3,615 cases were accepted by CIETAC, up 8.5% year-on-year, and the number of arbitration cases accepted has increased year by year. In particular, there were 739 foreign-related cases in total involving 76 countries and regions including Hong Kong, Macao, or Taiwan (including 67 international cases in which both parties were overseas parties), up 20% year-on-year. There were 102 cases which agreed to use English or both Chinese and English. The internationalization of cases has increased significantly, with a significant increase in the number of cases with foreign elements, and there were more cases in which the parties concerned chose to apply international conventions and overseas laws including the *United Nations Convention on Contracts for the International Sale of Goods* and laws of Hong Kong, the Cayman Islands, England, South Korea, the United Kingdom, etc.

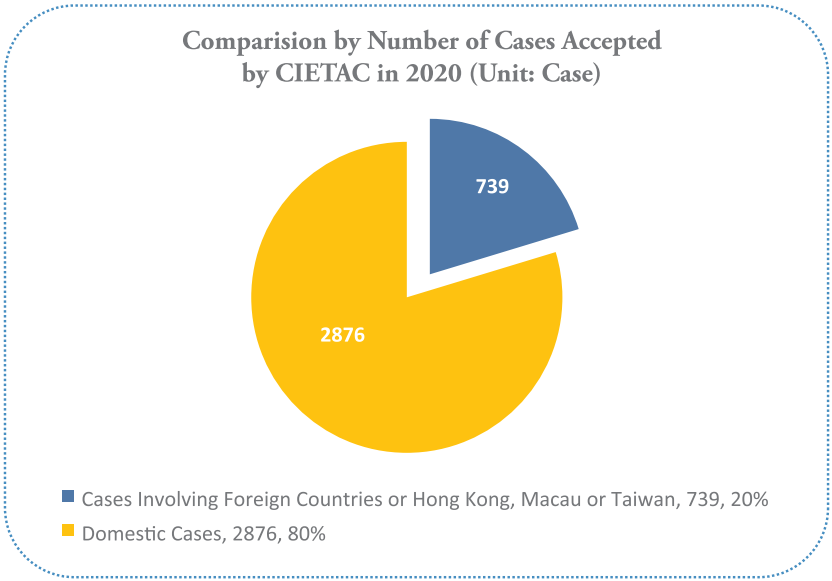

Figure 1-7

ICC Court of Arbitration accepted 946 cases, setting a record high, up 8.9% year-on-year. These cases involved 145 jurisdictions and 113 seatsof arbitration.[1]

In 2020, the number of cases accepted by SIAC increased significantly, up 125% year-on-year, marking the highest record since its establishment. In 2020, SIAC accepted 1,080 cases in total, 94% of which had international foreignelements and only 6% were Singapore domestic cases. The cases involved 60 jurisdictions and 20 governing laws, among which Singaporean law (76%), British law (9%), and Indian law (2%) were often referred to.

In 2020, LCIA accepted 444 cases, of which 407 cases were brought under the *London Court of International Arbitration Rules*, both setting a record high. The number of small claimcases decreased, while the number of cases involving large claims or multiple

1 The ICC has only released some of the data so far, and the rest of the detailed data has not yet been released.

contracts or multiple parties has increased.

In 2020, the SCC accepted 213 cases, the second highest since its establishment, up 22% year on year. In particular, 105 cases hadinternational elements and 108 were domestic cases of Sweden.

In 2020, HKIAC accepted 318 cases, of which 72.3% had foreign-related elements, including 31.8% of cases with non-Hong Kong parties and 6.6% of cases with non-Asian parties. In terms of choice of governing laws, Hong Kong laws still ranked first, followed by English laws and laws of the People's Republic of China. In addition, laws of California and New York (of the United States), the Cayman Islands, Delaware (of the United States), Germany, Italy, Singapore and other countries or regions were also applicable.

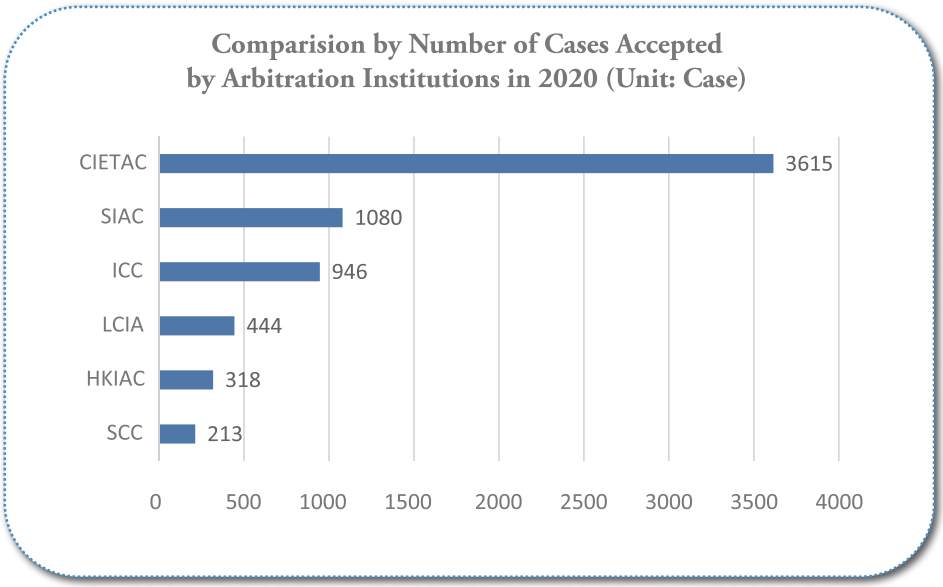

Figure 1-8

2. Parties to the Cases

In terms of international commercial arbitration, the internationalization level, international reputation, and recognition of anarbitration institution mainly depend on the internationalization level of the cases it accepted, which is mainly reflected in the internationalization level of the parties to the cases and the disputes. In 2020, the countries or regions where the relevant parties to the arbitration cases are from are as follows:

The parties to the cases accepted by CIETAC were from 76 countries and regions, including the Hong Kong SAR, the United States, the British Virgin Islands, Germany, South Korea, Chinese Taiwan, the Cayman Islands, Singapore, the United Kingdom, Australia, Japan, Ethiopia, France, Canada, India, Russia, the United Arab Emirates, Italy, Vietnam, Pakistan, etc.

The cases accepted by ICC involved 2,507 parties from almost all major economies in the world, continuing to have a significant internationalization profile. In particular, the United States (232 parties, 9.3%) and Brazil (150 parties, 6%) were the jurisdictions with the largest number of parties, while the parties to the cases in other jurisdictions did not exceed 5%, reflecting the broad and dispersed globalization profile. In addition, cases with parties of state entities accounted for 19.8% of the newly registered cases.

In the cases accepted by SIAC, the numbers of parties from India, the United States and China, which were 690, 545, and 195 respectively, ranked top three. The remaining parties were from countries and regions such as Switzerland, Thailand, Indonesia, the Hong Kong SAR, Vietnam, Japan, and the Cayman Islands. There was a significant increase in the number of parties from the United States, Switzerland, Vietnam, and the Cayman Islands compared with that in 2019. In addition, in one case, a party was a sovereign state.

In the cases accepted by LCIA, the parties were from 88 different countries and territories, among which the United Kingdom, Switzerland, and Russia arethe top three in termsof the number of parties, accounting for 13.4%, 7.5%, and 6.8%, respectively. Compared with 2019, the number of parties from the United Kingdomdecreased slightly, while the number of parties from Switzerland, the United States, Cyprus, and the British Virgin Islands increased significantly.

Among the 213 cases accepted by the SCC, 108 involved onlySwedish parties and 105 were international cases with parties from 42 countries and regions. Excluding Sweden (363), the number of partiesfrom Norway (19), Finland (19), and Ukraine (17) ranked high.

In the cases accepted by HKIAC, the parties were from 45 countries and regions. The countries and regions with the highest number of parties were: the Hong Kong SAR, mainland China, British Virgin Islands, the United States, the Cayman Islands, Singapore, South Korea, Malaysia, the United Kingdom, and the United Arab Emirates.

3. Types of disputes

In 2020, CIETAC accepted a total of 21 types of cases, which mainly included disputes over the purchase and sale of general goods, mechanical and electrical equipment, equity investment and equity transfer, service contracts, and construction projects, etc. To be specific, the number of cases of disputes over the sale and purchase of general goods ranked the first, with a total of 508 cases; the number of cases of disputes over mechanical and electrical equipment increased significantly (459 cases in 2020, up 148 casescompared with that of last year); and cases of disputes over equity investment and equity transfer, service contract, and construction projects kept a relatively high number (449, 397, and 336 cases respectively). In addition, there were 143 cases of domain name

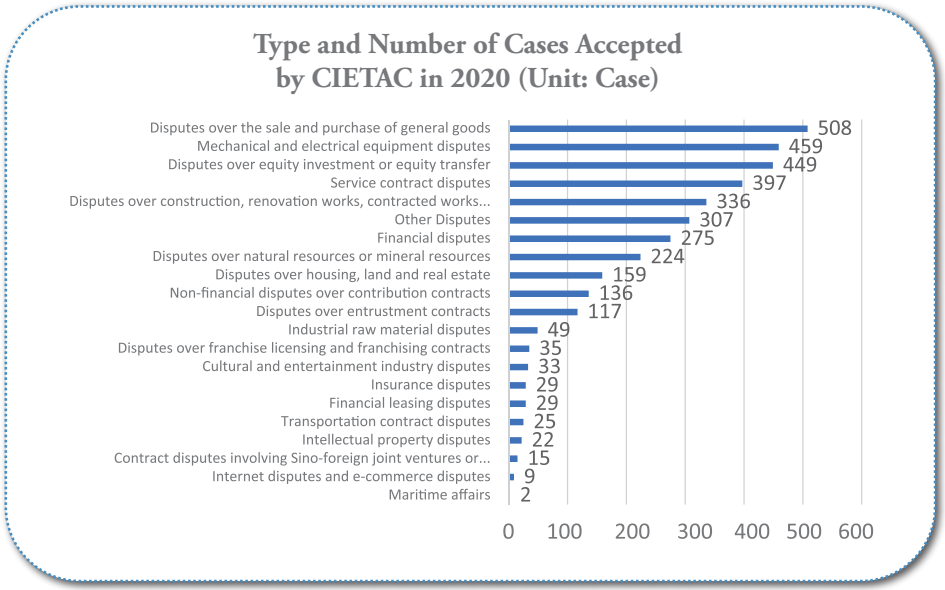

Figure 1-9

dispute, including 59 cases of ".cn" domain name dispute and 84 cases of generic top-level domain name (gTLD).

In 2020, the types of cases accepted by ICC were mainly construction project cases (20.9%) and energy project cases (18%), including oil and gas (upstream, downstream and transit) and power projects.

In 2020, the types of cases accepted by SIAC were mainly trade cases (64%), other cases (11%), commercial cases (8%), enterprise cases (7%), maritime cases (6%), and construction projects cases (4%), etc.

In 2020, LCIA mainly accepted the following types of cases: goods sales cases (20%), service trade cases (21%), equity disputes (20%), and lending cases (16%).

In 2020, disputes accepted by the SCC mainly came from service contracts, delivery contracts, and commercial acquisitions. Types of cases mainly include service cases (25.8%), delivery cases (21.6%), commercial acquisitions cases (14.6%), M&A and corporate cases (9.9%), construction works cases (8.5%), and lending cases (4.7%).

In 2020, the types of cases accepted by HKIAC mainly include: international sales of goods cases (27%), maritime cases (18.6%), enterprise cases (18.3%), banking and financial services cases (13.5%), construction projects cases (10.7%), professional service cases (7.2%), insurance cases (2.2%), intellectual property cases (2.2%), and employment relations cases (0.3%).

4. Seat of arbitration

The choice of a seat of arbitration is crucial to international commercial arbitration and is a matter of the jurisdiction in which an arbitral award is subject to judicial review. According to the "2021 International Arbitration Survey" published by the Queen Mary University of London, the five most preferred seats of arbitration in 2020 are London (54%), Singapore (54%), Hong Kong SAR (50%), Paris (35%), and Geneva (13%). Beijing (12%) and Shanghai (8%) ranked 6th and 8th respectively on the list.[2] Compared with 2019, Singapore and Hong Kong SAR jumped significantly in the rankings, while Dubai and Stockholm have fallen. In the 2019 survey, the reputation and recognition of the seat of arbitration are the most important consideration when the parties select a seat of arbitration. Other factors include the domestic law of the seat of arbitration, the enforceability of an award, and the list of arbitrators, etc.[3] In the 2020 survey, the primary consideration for parties to select a seat of arbitration shifts to "greater

2 2021 International Arbitration Survey: Adapting arbitration to a changing world, see http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/, last visit 23 May 2021.

3 2019 International Arbitration Survey: The Evolution of International Arbitration, see http://www.arbitration.qmul.ac.uk/research/2019/, last visit 30 April 2021.

support for arbitration by local courts and judiciary", followed by "increased neutrality and impartiality of the local legal system", "better track record in enforcing agreement to arbitrate and arbitral awards", and "ability to enforce decisions of emergency arbitrators or interim measures ordered by arbitrate tribunals". This shows that when selecting a seat of arbitration, the parties are shifting from mainly considering factors such as the reputation of a seat of arbitration to being pragmatic and attaching more weight to the outcome and the enforceability of arbitral awards. In the 2020 survey, Beijing as the seat of arbitration is very attractive to parties from the Asia-Pacific region, Africa region, Europe, and the Middle East. In Europe, the Middle East and Africa, Beijing's attraction (30%, 29%, and 32% respectively) as a seat of arbitration surpasses Hong Kong (26%, 27%, and 18% respectively). For the parties in China, the first choice of seat of arbitration are the Asia-Pacific countries or regions. Compared with well-established international seats of arbitration such as London and Paris, Beijing has the laws and policies supporting arbitration, international commercial flows, internationally-renowned arbitration institutions represented by CIETAC, cost-effective arbitration costs, well-equipped facilities, and highly qualified arbitrators, which deserve wide attention from the parties.

5. Arbitrators

In 2020, among the cases accepted by CIETAC, 72 cases were heard by foreign arbitrators and 102 cases were agreed to communicated in English or Chinese-English bilingual.

In 2020, 145 arbitrators of SIAC accepted 288 appointments, including 186 appointments of foreign arbitrators. Foreign arbitrators are mainly from the United Kingdom, the United States, Australia, Malaysia, India, Canada, etc. Among the 143

appointments of arbitrators initiated by SIAC, 46 arbitrators were female, accounting for 32.2%.

In 2020, 293 arbitrators of LCIA accepted 533 appointments, of which 45% were designated by the parties, 42% were appointed by LCIA; cases with three-member arbitration tribunal account for 52%, and cases with sole arbitration tribunal accounted for 48%. In addition, the cases with appointment of female arbitrators reached 33%, a slight increase from 29% in 2019.

In 2020, 255 arbitrators of the SCC accepted appointments, the vast majority of whom were from Europe (247). There were also arbitrators from North America (6), Australia (1), and South America (1). Female arbitrators accounted for 31% and male arbitrators 69%.

In 2020, HKIAC had 149 appointments of arbitrators. Among these arbitrators, 74 were appointed for the first time in the past three years, accounting for 49.7%. 34 arbitrators were female, accounting for 22.8%. Arbitrators were mainly from the following countries or regions: the Hong Kong SAR (22.8%), the United Kingdom (18.8%), Australia (10.1%), Singapore (5.4%), Malaysia (5.4%), mainland China (4%), and Canada (4%).

6. The disputed amount in arbitration cases

In 2020, the value of subject matter of arbitration cases accepted by CIETAC surged to RMB122.13 billion, breaking the last record of RMB100 billion. There are 203 cases each with the value of subject matter exceeding RMB100 million, among which 14 cases each with the value of subject matter exceeding RMB1 billion. The disputed amount of foreign-related cases reached RMB37.79 billion, of which the value of subject matter of foreign-related cases in which both parties are foreign parties was RMB3.73 billion (up

23.9% year on year).

In 2020, the total disputed amount of pending cases at ICC Court of Arbitration reached US$258 billion, and the average dispute amount in each case was US$145 million. In addition to large and complex cases, ICC Court of Arbitration also had a large number of cases with a relatively small disputed sum. In 2020, 37.6% of the newly registered cases have the disputed amount less than US$3 million.

In 2020, the total value of subject matter of disputes accepted by SIAC was US$8.49 billion, and the average disputed amount of each case was US$1.926 million, among which, the value of subject matter of the case with the highest disputed amount was US$930 million.

In 2020, the SCC accepted cases with a total value of subject matter of EUR 2 billion, including cases governed by the general *Arbitration Rules*, cases resolved under the *Rules for Expedited Arbitration*, and cases resolved under the *Emergency Arbitrator Rules*.

In 2020, the total value of subject matter of dispute accepted by HKIAC was US$8.8 billion, and the average value of subject matter of each case was US$32.4 million.

7. Summary

Through statistical analysis of the annual reports and case data of the above-mentioned major international commercial arbitration institutions, the following basic conclusions could be drawn:

First, in terms of the number of cases accepted in 2020, several arbitration institutions including CIETAC, ICC, SIAC, LCIA, SCC, and HKIAC, showed an upward trend. Among the international commercial arbitration institution sin China, CIETAC is

outstanding in terms of the total value of the subject matter of the cases accepted, the number of foreign-related cases accepted, the degree of internationalization of the parties concerned, and the complexity of the application of the law, etc. CIETAC is the most influential and representative international commercial arbitration institution in China.

Second, in terms of the types of disputes, the types of cases accepted by the international commercial arbitration institutions in China continue to increase. On the one hand, traditional disputes such as disputes over the purchase and sale of goods, mechanical and electrical equipment, and equity are still the main types of disputes. On the other hand, disputes over the Internet, entertainment, and intellectual property rights have also emerged. The boundless, instantaneous, and global nature of the Internet poses many challenges to the protection of traditional rights and interests. Meanwhile, the emergence of new types of rights and disputes over such rights has placed a higher demand on the professional competence of arbitration institutions and arbitrators.

Third, in terms of the total value of subject matter involved, each international arbitration institution has witnessed a significant increase in 2020. In particular, for arbitration cases accepted by CIETAC, the total value of subject matter once again broke the RMB100 billion record, with a particularly high number of cases with a value of subject matter exceeding US$100 million. The substantial increase in the value of subject matter in the cases also reflects that the quality of services and professional competence of the international commercial arbitration institutions in China have been recognized by the parties concerned. The return of cases with a large value of subject matter will undoubtedly promote the steady development of the international commercial arbitration in China.

Fourth, in terms of internationalization, the number of international cases accepted

by CIETAC has increased significantly, and the parties concerned in the cases are more widely distributed in different countries and regions, reflecting the growing international influence of China's international commercial arbitration institutions. With the increasing number of China's transnational commercial activities, international commercial dispute resolution has become an important link in optimizing the business environment in China and promoting the rule of law in global governance. In the aforementioned "2021 International Arbitration Survey", CIETAC ranked fifth, right after ICC, SIAC, HKIAC, and LCIA, in the list of arbitral institutions most favored by the parties. This means that CIETAC, as the flagship of China's international commercial arbitration, has been recognized by more and more parties to international commercial disputes. On the institutional level, the international commercial arbitration institutions in China have established close institutionalized ties with international dispute resolution institutions and organizations around the world by relying on the "Belt and Road" construction platform at abroad and expanding access to the arbitration market based on China's free trade zones ("FTZs") at home. This has promoted the exchange and cooperation between China's arbitration institutions and advanced international arbitration institutions, as well as the sound development of China's arbitration ecology.

II. RESEARCH TRENDS IN COMMERCIAL ARBITRATION AT HOME AND ABROAD

This part sorts and summarizes the main research trends of domestic and foreign commercial arbitration since 2020 on the basis of the Chinese and English research literatures on commercial arbitration collected in various Chinese and English databases, national libraries, and print periodicals in 2020.

A. Domestic Research Developments

In 2020, the research literatures in Chinese contain two parts: in-depth and developed on the basis of past research, and the new research in response to the new problems in the field of international commercial arbitration. These literatures mainly concern the *Civil Codeand* arbitration, party autonomy, international commercial arbitration in the time of COVID-19, online arbitration, the *ad hoc* arbitration system in China's FTZs, and the development of international commercial arbitration under the "Belt and Road Initiative".

1. *Civil Code* and arbitration

The *Civil Code* comes into force as of 1 January 2021, and from the date the *Civil Code* takes effect, the *General Rules of the Civil Law*, the *General Principles of the Civil Law*, the *Contract Law*, the *Real Rights Law*, and other relevant laws are repealed simultaneously. There are 18 articles in the *Civil Code* which explicitly provide for "arbitration". According to the legislative purpose and function, these articles can be divided into the following four categories:

The first category concerns provisions that arbitration can be a method of resolving a particular dispute (Articles 233, 944 and 229). The *Contract Law* stipulates that "The parties may apply to an arbitration institution for arbitration in accordance with their arbitration agreement. The parties to a foreign-related contract may apply to a Chinese arbitration institution or any other arbitration institution for arbitration in accordance with their arbitration agreement. Where the parties did not conclude an arbitration agreement, or the arbitration agreement is invalid, either party may bring a lawsuit to a people's court." After the implementation of the *Civil Code* and the repeal of the *Contract Law*, the legal status of arbitration as the main formof dispute resolution will not be affected. This is because the *Civil Code* is a substantive law, and it does not repeal or

replace procedural laws such as the *Arbitration Law* and the *Civil Procedure Law*. Article 2 of the *Arbitration Law* clearly stipulates that "Contract disputes and other disputes over property rights and interests between citizens, legal persons and other organizations as equal subjects may be arbitrated."

The second category concerns provisions on limitation of arbitration (Articles 195, 198, 594, and 694). The statute of limitations for arbitration, which is provided for in the *Civil Code*, has a profound implication. Different jurisdictions tend to disagree on whether the limitation of arbitration is a procedural issue or a substantive issue. If the statute of limitation for arbitration is a procedural issue, then the arbitral tribunal has the right to decide whether the claims are inadmissible or should be rejected on the ground that the claims are time-barred for arbitration. If the limitation of arbitration is a substantive issue, then the arbitral tribunal must respect the party's right to claim and decide the issue only when the parties raise a defense on the limitation of arbitration; thus, it is inappropriate for the arbitral tribunal to take the initiative to decide whether the parties' claims are time-barred for arbitration. The *Civil Code* draws upon the tradition of arbitration and judicial practice in China by stipulating the limitation of arbitration in the substantive law, which indicates that under China's legal system, the limitation of arbitration is considered as a substantive issue rather than a procedural one.

The third category is about the jurisdiction of arbitration institutions over specific disputes (Articles 147, 148, 149, 150, 151, 533, 565, 580, and 585). Arbitration has the dual nature of contractuality and state authorization. Clarifying in the *Civil Code* the right of arbitration tribunals to adjudicate on specific ambiguous issues is conducive to eliminating differences, balancing the power distribution between judiciary and arbitration institutions, and allowing the parties concerned to make a rational choice between arbitration and litigation in advance. The *Civil Code* treats judiciary and arbitral

institutions equally, stipulating that arbitral institutions and people's courts have the same rights to confirm and decide the claims in the settlement of disputes involving material misunderstanding, fraud, coercion, obvious unfairness, change of circumstances, rescission or termination of contracts, adjustments to liquidated damages, etc.

The fourth category is about prior arbitration as general surety's assumption of suretyship liability (Articles 687 and 693). The *Civil Code* classifies suretyship liability into general suretyship liability and joint and several suretyship liability. A general suretyship liability refers to a liability where the parties agree in a suretyship contract that the surety shall bear suretyship liability when the principal debtor fails to pay. A general suretyship is relatively weak as the surety in a general suretyship is entitled to assert *beneficium ordinis* to reduce his burden. To balance the obligations and rights of the surety in a general suretyship, the *Civil Code* stipulates that whether a dispute over the master contract has undergone legal proceedings (arbitration or litigation) is one of the indicators for a general surety to bear suretyship liability.[4]

2. Party autonomy

Party autonomy is the core of international commercial arbitration, which runs through the entire arbitration procedure and is also the important difference between arbitration and litigation. However, in addition to traditional arbitrable issues, some scholars have put forward whether the parties can further expand the scope of party autonomy in international commercial arbitration, more specifically such as whether the cases without foreign elements can be submitted to other countries for arbitration, and whether the two parties can agree on the grounds for revocation, non-recognition, or non-enforcement of an international commercial arbitration award.

4 Wang Changsheng, "A Brief Description of the Provisions of the Civil Code Relating to Arbitration" http://www.legaldaily.com.cn/Arbitration/content/2020-09/02/content_8295570.htm\.

As to whether foreign-related arbitrations can be submitted to a foreign country for arbitration, scholars believe that if one can break through the current traditional criteria for determining "internationality" in international commercial arbitration and give a new interpretation of foreign-related elements — allowing the parties submit cases without foreign-related elements to arbitration in other countries and ensuring that purely domestic commercial arbitration awards made in other countries are recognized and enforced globally in accordance with the *New York Convention* — the parties to the arbitration will enjoy more freedom of choice and freedom of decision, and the theory of party autonomy will be enriched. As to whether an arbitral award can be set aside by mutual consent of the parties, there is no uniform convention for the setting aside of international commercial arbitral awards in the field of international commercial arbitration. At present, many countries generally rely on Article V (the grounds for refusing the recognition and enforcement of an award) of the *New York Convention* to set aside an arbitral award. To unify the standards for implementing the *New York Convention*, almost all countries have not made clear provisions as to whether the grounds for revocation of an award can be modified, and the parties generally do not have the freedom to change the grounds for revocation of an award. As to whether the parties can change the grounds for non-recognition and non-enforcement of international commercial arbitration awards, Article V of the *New York Convention* enumerates seven reasons for non-recognition and non-enforcement of arbitral awards. However, the *New York Convention* does not clarify the nature of this Article, and the parties can raise defenses based on other grounds. If the parties are allowed to raise defenses based on other grounds during the recognition and enforcement of an arbitral award, the parties' autonomy would be fully realized. Some scholars believe that this freedom to expand the exercise of party autonomy conflicts with the general practice in international commercial arbitration and seriously deviates from the original purpose of

the *New York Convention*, which is to promote the unified enforcement of international commercial arbitral awards worldwide. Based on the experience of arbitration practice, even if the parties are unable to amend the grounds for non-recognition and non-enforcement of an international commercial arbitration award, they can still indirectly expand such autonomy by filing a lawsuit with a court for relief.[5]

In addition, some scholars have studied the issue of excessive managerial power of arbitration institutions. They argue that excessive managerial power of arbitration institutions will lead to conflicts within the boundaries of party autonomy in arbitral proceedings. The main manifestation is the incompatibility between arbitration rules and the arbitration agreement. The protection of the parties' interests is inseparable from respect for their autonomy of will. The expansion of managerial power of arbitration institutions should be moderate and respect the autonomy of the parties. In pursuit of a balance between the managerial power of arbitration institutions and the autonomy of will of the parties, rather than simply combining the willingness of the parties with the arbitration rules, a "conflict guide" should be created in the arbitration rules to raise the parties' reasonable expectations about the arbitral proceedings, so as to effectively resolve the conflict between the expansion of managerial power of arbitration institutions and the boundary of autonomy of the parties.[6]

3. International commercial arbitration affected by COVID-19 pandemic

The outbreak of COVID-19 in China in early 2020 made it impossible for some Chinese enterprises engaged in foreign trade to perform all or part of their international commercial contracts, which triggered a series of international commercial arbitration

5 Sun Jianli, "Research on Party Autonomy in International Commercial Arbitration", doctoral dissertation, University of International Business and Economics, 2020, pp. 16-17.

6 Du Huanfang and Li Xiansen, "Conflict and Balance of Boundary of Procedural Autonomy of Parties in International Commercial Arbitration", Law Review, Issue No. 2, 2020.

disputes. Whether and how the *force majeure* clauses in the traditional template of international commercial contracts are applicable to the COVID-19 pandemic are the legal focuses of such international commercial disputes. Proper resolution of these issues requires the analysis of the statutory conditions of *force majeure* in various legal systems and the stipulation on *force majeure* clause in international commercial contracts. At the time of dispute resolution, arbitration institutions will identify the law applicable to the international commercial contract in question, resulting in different situations such as application of Chinese law, foreign law, or international treaties (such as the *United Nations Convention on the International Sale of Goods* ("CISG")). Therefore, whether the COVID-19 pandemic constitutes *force majeure* or hardship in a particular case requires a specific analysis of the relevant legal issues and facts.

Force majeure (in French, or "superior force" in English) is a general principle in civil law which means "an event or effect that can be neither anticipated nor controlled". There is no doctrine of "*force majeure*" in common law (although common law countries accept the existence of "*force majeure*" clause in commercial contracts); a concept similar to "*force majeure*" in common law is frustration of contract. There are still some differences between frustration of contract and *force majeure*. CISG does not follow the concepts of "*force majeure*" or "frustration of contract" in continental law or Anglo-American law as a basis for exemption; instead it stipulates in Article 79 uncontrollable impediment as a ground for exemption from contractual liability.

In general, *force majeure* clauses in international commercial contracts bear the basic principle of autonomy of will in contract law. When concluding the contract, if the parties explicitly specify whether the specific scope of *force majeure* includes "infectious diseases" such as COVID-19 pandemic, then the parties shall give priority to the application in accordance with the agreement. If the parties do not expressly specify it,

whether the *force majeure* clause in international commercial contract is applicable to "infectious disease" shall be determined by referring to the governing law applicable to international commercial arbitration. The *United Nations Convention on Contractsfor the International Sale of Goods* is one of the "governing laws" that may be applicable to international commercial contracts. According to the *United Nations Commission on International Trade Law*, as of 31 May 2016, the total number of cases involving CISG before national courts is 4,500. Among these cases, more than 30 cases involved Article 79 of CISG, only five cases of which were successful exempted from contractual performance by the sellers — none of these five directly related to "infectious diseases". According to Article 180 of the *Civil Code of the People's Republic of China*, a party that fails to fulfill civil obligations due to *force majeure* will not bear civil liability. The spokesman for the Legislative Affairs Commission of the Standing Committee of the National People's Congress said that in view of the COVID-19 situation in China, the government has taken corresponding prevention and control measures to protect public health. Thisis an unforeseeable, unavoidable, and insurmountable *force majeureevent* for the party that is unable to perform the contract as a result of such events.

When analyzing the contract disputes over the *force majeure* COVID-19 pandemic, the causation between the events and non-performance of the contract, such as the development stage of the pandemic and the extent of the impact of the pandemic, should also be considered. The party claiming *force majeure* shall bear the burden of proof. If the pandemic only has an indirect impact on the performance of the contract, or brings some inconvenience in performance, it can only be considered as a general commercial risk of trading activities. However, if the pandemic results in the company being subject to compulsory measures such as isolation and closure imposed by the government, or the personnel cannot circulate as required by laws and regulations, which leads to the failure

to perform the contract, then this establishes a direct causal relationship between the non-performance of the contract and the pandemic. In the settlement of disputes over international commercial contracts, the arbitration body should also consider whether the non-performing party has commercially reasonable alternative means to performance — this needs to be analyzed on a case-by-case basis. In short, the parties to international commercial contracts shall not generally take the pandemic as *force majeure* or take it for granted that their liability for breach of contract can be exempted.[7]

4. Online arbitration

In recent years, China's cross-border e-commerce trade has been developing rapidly. Under the large-scale cross-border e-commerce transactions, disputes between cross-border e-commerce merchants and various consumers have emerged frequently. Accordingly, cross-border e-commerce merchants and consumers need more efficient and rapid dispute resolution services, andthus online arbitration emerges.[8] Meanwhile, in recent years, online arbitration tribunals have been established in cities with advanced e-commerce such as Beijing, Shanghai, Guangzhou, Shenzhen, and Hangzhou, and some online arbitration companies have emerged to provide preliminary evidence integration and other services for the parties concerned. These companies have taken online arbitration to new heights by carrying out extensive cooperation with arbitration institutions. Compared with traditional offline arbitration, online arbitration is faster and more flexible; not only does it shorten the time limit for arbitration, but also the arbitration process is not confined to a fixed location, which saves costs in venue use, transportation, and travel, etc. In addition, the documents may be served electronically

7 Gong Bohua, "Legal Analysis on the Application of Force Majeure Clause in International Commercial Contracts to the COVID-19 Epidemic", Journal of Shanghai University of International Business and Economics, Issue No. 2, 2020.

8 Luo Biao, "On the Establishment of International Commercial Arbitration System with Chinese Characteristics", China Business Theory, Issue No. 2, 2020.

and saved in electronic data. Therefore, online arbitration is well-suited for resolving long-distance cross-border commercial arbitration disputes.

However, since the current online arbitration mechanism in China is relatively simple and limited to binding arbitrationin the traditional sense, there are still many aspects that cannot satisfy the needs of cross-border e-commerce dispute arbitration.

First, the validity of online arbitration agreements. The existence of a valid arbitration agreement between the parties concerned is a prerequisite for arbitration. Article 16 of the *Arbitration Law of the People's Republic of China* stipulates that an arbitration agreement shall include the expression of intention to apply for arbitration, the matters to be arbitrated, and the arbitration commission selected. Nevertheless, the arbitration agreement entered into by the parties involved in cross-border e-commerce disputes who are willing to resolve their disputes through online arbitration often fails to meet these "three elements" of arbitration agreement stipulated in Article 16 of the *Arbitration Law of the People's Republic of China*, and thus the arbitration agreement is considered invalid. Therefore, to expand the application of online arbitration in cross-border dispute resolution, some scholars have suggested amending the *Arbitration Law of the People's Republic of China* to relax the requirements for the validity of online arbitration agreements on cross-border e-commerce. Specifically, it should be made clear that any arbitration agreement with the intention to arbitrate between the parties concerned is deemed a valid arbitration agreement, and a standard cross-border e-commerce electronic arbitration agreement should be given legal effect.[9]

Second, the issue of electronic service. In some cases, the contract entered into by and between the parties provides that "all materials related to the arbitration can be sent in

9 Xu Fang and Huang Ziqing, "On the Application of Non-Contractual Online Arbitration Mechanism in Cross-border E-Commerce Consumer Dispute Resolution", Times Economic and Trade, Issue No. 4, 2021.

the form of email, text message, etc., and the date of receipt is deemed as the date of service." However, some courts hold that this type of standard terms fails to highlight and give special instruction on the electronic service, which does not help the person subject to enforcement to fully understand the meaning of electronic service when signing the agreement; and that there are also some situations where the party subject to enforcement fails to receive the information due to the change of mobile phone number or the abandonment of e-mail address, therefore the arbitration commission fails to confirm the content of the standard terms on electronic service with both parties, and directly serves the standard terms electronically instead, which is insufficient to protect the basic procedural rights of the respondent. These courts do not recognize the validity of standard terms on electronic service entered into by and between the parties before the submission of the case to online arbitration. However, some scholars are of the view that since the parties have agreed upon the mode of service before the arbitration, both parties know or should have known the details of the standard terms, and thus the absence of a special instruction on electronic service in standard terms shall not be used as a defense.[10]

Third, the recognition and enforcement of online arbitration. The difficulty in determining the seat of arbitration is an important factor affecting the enforcement of online arbitration awards. Cross-border online arbitration proceedings often involve many places, such as the domicile of the arbitration institution, and the domiciles of the parties and arbitrators, etc. The parties agreeing to use online arbitration to resolve disputes generally do not specify the seat of arbitration. This makes it difficult to identify the seat of online arbitration. Given that some arbitration proceedings need to rely on the help of the court in the seat of arbitration, the confirmation of the seat of arbitration

10 Xie Shu, "The Effectiveness of Online Arbitration from the Perspective of Enforcement Cases", Legal Expo, Issue No. 32, 2020.

may have serious impact on the preservation and even enforcement procedures of online arbitration.[11]

5. *Ad hoc* arbitration system in China's free trade zones

Ad hoc arbitration refers to the form of arbitration in which the parties to a dispute enter into an arbitration agreement to submit their dispute to an *ad hoc* arbitration tribunal and be bound by the award rendered thereby. The opposite of *ad hoc* arbitration is institutional arbitration, that is, a permanent arbitration institutionwill hear and decide cases. *Ad hoc* arbitration, which is the primary method for the parties to resolve commercial disputes prior to the emergence of institutional arbitration, remains the form of dispute resolution recognized by many countries.[12]

China's *Arbitration Law* adopts an ambiguous attitude towards *ad hoc* arbitration and adopts a double standard in practice, that is, do not recognize *ad hoc* arbitration in domestic commercial arbitration, but grant limited recognition of foreign *ad hoc* arbitral awards by virtue of relevant conventions and *ad hoc* arbitration for bilateral investment disputes by virtue of bilateral treaties. However, with the steady progress of China's Belt and Road Initiative, it is necessary for the pilot free trade zones ("FTZs"), as an important platform for the Belt and Road Initiative, to innovate the diversified dispute resolution mechanism within FTZs. This makes the introduction of *ad hoc* arbitration into FTZs an important topic. To support the innovation of the dispute resolution mechanism in FTZs, the Supreme People's Court ("SPC") issued the *Opinions of the Supreme People's Court on Providing Judicial Protection for the Development of FTZs* (hereinafter referred to as the "Opinions on Providing Judicial Protection") in December

11 Yu Wenjin, "Online Arbitration: A New Model for Resolving Online Consumer Disputes in the Internet+ Era", Journal of Western Studies, Issue No. 10, 2021.

12 Tang Xia, "The Dilemma and Relief of the Application of *Ad Hoc* Arbitration System in China's Free Trade Zone", Journal of International Economic Law, Issue No. 4, 2020.

2016. Article 9.3 of the *Opinions on Providing Judicial Protection*, breaking through the requirement of Article 16 of China's *Arbitration Law* that the arbitration agreement must select an arbitration committee, require courts at all levels to recognize an arbitration agreement between enterprises in FTZs which agrees to submit disputesto arbitration by a "specific person" in a "specific place" in accordance with the "specific arbitration rules", thereby recognizing the validity of *ad hoc* arbitration agreement in essence. In response to the supportive position set forth in the *Opinions on Providing Judicial Protection* on *ad hoc* arbitration in FTZs, and to promote the effective implementation of *ad hoc* arbitration in FTZs, the Hengqin New Area Administration of Guangdong Pilot Free Trade Zone and the Zhuhai Arbitration Commission jointly promulgated China's first set of *ad hoc* arbitration rules, namely, the *Ad Hoc Arbitration Rules of the Hengqin Pilot Free Trade Zone*. Subsequently, the China Internet Arbitration Alliance ("CIAA") promulgated the *CIAA Rules on Interconnection between Ad Hoc Arbitration and Institutional Arbitration* (the "CIAA Interconnection Rules"), with a view to establishing a mechanism for the transformation of *ad hoc* arbitration procedures and awards to institutional arbitration procedures and awards. The promulgation of the three documents reflects the loosening of China's official position on *ad hoc* arbitration in FTZs and the public's positive attitude towards the introduction of *ad hoc* arbitration in FTZs. However, the three documents are not official legislative documents in terms of nature and content and have many flaws. They cannot form a complete and universal legal system and rules, nor are they sufficient to support the effective implementation of *ad hoc* arbitration in FTZs.

Therefore, some scholars have put forward the following suggestions for the improvement of *ad hoc* arbitration in China's FTZs:

(1) Suggest that the State Council propose to the National People's Congress and its Standing Committee to suspend the application in FTZs of the provision of Article

16 and Article 18 of the *Arbitration Law* which provide "The arbitration agreement should have a selected arbitration committee", so as to recognize the legitimacy of *ad hoc* arbitration in FTZs in a flexible manner.

(2) Suggest that the Ministry of Commercecollaborate with the China Chamber of International Commerce (China Council for the Promotion of International Trade) to formulate *ad hoc* arbitration rules that are neutral and generally applicable to FTZs,by referring to the mechanism and model of *UNCITRAL Arbitration Rules of the United Nations Commission on International Trade Law*, as well as the advanced experience in arbitration rules such as the *Arbitration Rules of Hong Kong International Arbitration Center* and the *Arbitration Rules of Singapore International Arbitration Centre*, so as to curb the possible trend that arbitration institutions located in FTZs will compete with each other to formulate *ad hoc* arbitration rules.

(3) To systematically promote the implantation of ad hoc arbitration system by drawing upon the reasonable experience in the *UNCITRAL Model Law on International Commercial Arbitration* and foreign arbitration laws.[13]

6. Development of international commercial arbitration under the Belt and Road Initiative

The Belt and Road Initiative led by China has greatly promoted economic, trade and investment cooperation among countries along the route. Given the steady increase in cross-border transactions, the development of the Belt and Road Initiative urgently requires a robust and reliable legal framework to support and promote intra-regional economic integration. When resolving their disputes,most investors generally do not

13 Li Jianzhi, "China's Attempts at *Ad Hoc* Arbitration: Institutional Dilemmas and Realistic Paths - A Perspective from China's Pilot Free Trade Zone", Rule of Law Studies, Issue No. 2, 2020.

trust foreign court proceedings with which they are unfamiliar. In addition, most countries along the Belt and Road routes rely on the *UNCITRAL Model Law on International Commercial Arbitration* and the *New York Convention* for their domestic arbitration laws, and their arbitration laws have become highly harmonized. These will make international commercial arbitration the most favored, even the most desirable and dominant, mechanism for resolving commercial disputes.[14] On 7 November 2019, the first Belt and Road Initiative Roundtable Forum for Arbitration Institutions was held in Beijing by CIETAC in conjunction with eight renowned global arbitration institutions to exchange in-depth views on commercial dispute resolution in respect of the Belt and Road Initiative and cooperation among arbitration institutions, and these institutions jointly issued the *Beijing Joint Declaration by Arbitration Institutions for the Belt and Road Initiative* (hereinafter referred to as the "Beijing Declaration"). According to the *Beijing Declaration*, international arbitration, as a globallyrecognized major method to promote fair and just resolution of trade and investment disputes, will play an irreplaceable and important role in the development of the Belt and Road Initiative. Regional and global cooperation among arbitration institutions is the trend of the times. With more and more diverse participants in arbitration activities, traditional, single, and conservative arbitration services can no longer meet the needs of the times. Innovation, sharing, and cooperation are the future development directions of international arbitration. Countries should accelerate the establishment of closer cooperation relationship in the international arbitration community, uphold the concept of open, shared, and service-oriented development, jointly explore the respective advantages, convergence and coordination of arbitration, mediation, and litigation for dispute resolution, and promote the application of diversified dispute resolution on a global scale.[15]

14 Gu Weiya and Tang Yi, "The Integration between China's "Belt and Road" Development and International Commercial Arbitration in Asia", International Law Studies, Issue No. 1, 2020.

15 Zhang Wei and Buy Yuanyuan, "Joint Declaration by Arbitration Institutions for the Belt and Road Initiative" [EB/OL], 12 November 2019.http://www.chinalaw.gov.cn/Department/content/2019-11/12/612_3235567.html.

Against this background, some scholars have put forward the following suggestions on the future development path of international commercial arbitration in China:

(1) to promote the development of the arbitration system towards "respecting autonomy of will";

(2) to further improve the efficiency and convenience of arbitration rules, and to provide efficient and rapid services for the parties;

(3) to raise the recognition and enforcement ratio of arbitral awards by signing international treaties, bilateral or multilateral agreements, etc.;

(4) to strive to eliminate the two-track system of domestic review of arbitral awards, and establish the concept of "seat of arbitration";[16]

(5) to improve the quality of arbitrators, select excellent arbitrators with strong professional skills and foreign language proficiency as soon as possible, and strengthen their exchange and study with relevant foreign institutions, so as to make them the backbone of the Belt and Road International Arbitration Center. At the same time, efforts shall be made to strengthen the building of a reserve team, and systematically train and reserve talents for international arbitration for the Belt and Road Initiative among law students at relevant domestic universities; and

(6) to change the existing chaos of rushing to establish various international arbitration institutions in different regions, and to integrate and establish a unified and authoritative international arbitration mechanism for the Belt and Road Initiative as soon as possible, and establish a specialized arbitration center that truly complies with international

16 Du Zeqing, "Research on the Development Path of International Commercial Arbitration in China under the Belt and Road Initiative", Journal of Harbin College, Issue No. 11, 2020.

standards.[17]

B. Foreign Research Developments

Research on international commercial arbitration abroad in 2020 is partly devoted to the study of traditional issues in international commercial arbitration such as the conflict between confidentiality and transparency, the principles of equity and justice, etc., and partly to new study in response to new issues in the field of international commercial arbitration, such as the impact of the COVID-19 pandemic on international commercial arbitration procedures. It is worth mentioning that some foreign scholars have made in-depth research on China's international commercial arbitration system.

1. Impact of the COVID-19 pandemic on international commercial arbitration

In 2020, COVID-19 pandemic rages on worldwide. To prevent and control the pandemic, many countries have implemented strict pandemic prevention policies, restricting or prohibiting the movement of people across cities, provinces, and borders. These pandemic prevention and control policies have changed not only the way people work and live, but also the traditional procedure of international commercial arbitration. Some foreign scholars have begun to pay attention to the challenges brought about by the pandemic to the arbitration procedures of international commercial arbitration and ponder the corresponding countermeasures. Specifically, the challenges mainly include the following:

(1) Remote hearings may be the greatest challenge to international arbitration posed by the pandemic. Although many arbitration institutions have provided in their rules that hearings may be held remotely and many arbitral tribunals have held remotely online

17 Xu Chuanxi, "Establishment of a Uniform and Authoritative International Arbitration Mechanism for the Belt and Road Initiative", Study Times, p. 2. 22 January 2020.

hearings at some stage of the arbitration, hearings have never been held almost entirely online. Some scholars believe that the three most significant disadvantages of online hearings are that lawyers may not be able to defend effectively, that cross-examinations may not be able to take place effectively, and that witness statements may not be complete. To address these problems, scholars have suggested installing two cameras in the witness room to ensure that no one else is present and make it easy to observe the witness's body language, and that witnesses and lawyers conduct cross-examination in the same place.

Due to these shortcomings of online hearings, one scholar suggested that arbitral tribunals should decide, on a case-by-case basis, whether to hold online hearings or to postpone the hearings. The scholar has also proposed an analytical framework on whether remote hearings should be held, and how they can be planned and organized. These suggestions provide good guidance to parties, lawyers, and arbitrators.[18]

(2) In ongoing arbitration proceedings, several arbitral tribunals have received requests from parties for suspension and extension of arbitration proceedings due to the pandemic. For example, some parties have applied to arbitral tribunals for suspension of arbitration proceedings due to financial constraints caused by the pandemic and inability to pay arbitration costs, and some parties have applied to arbitral tribunals for suspension and extension of arbitration proceedings due to key witnesses suffering from the COVID-19 diseases. Scholars hold that such applications must be well-founded, and that applicants must clearly explain how the pandemic caused them to fail to comply with the established arbitration procedures.

(3) The rules of some arbitral tribunals stipulate that documents in arbitration cannot be

18 Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework",Journal of International Arbitration, Vol.37:4(2020).

archived only electronically. This forces one of the arbitrators to take all the documents home and archive, and hire a private courier to deliver the parcel to the other party. Some scholars have argued that much of the workload of arbitrators could be reduced if arbitration rules allow arbitrators to file electronically through the online document sharing platform.

Faced with the challenges posed by the pandemic to international commercial arbitration, some well-known international commercial arbitration institutions have made corresponding adjustments to the arbitration rules and published the revised rules and guideline. For example, ICSID and ICC have used electronic filing as the default means for arbitration applications and post-award applications. LCIA stipulates that all parties to the arbitration shall submit their claims through their online system or by e-mail, and requires the arbitrators to submit their awards by e-mail.[19]

2. Confidentiality and transparency issues

One of the obvious advantages of international commercial arbitration over litigation is its confidentiality. However, in recent years, an increasing number of foreign scholars have called for more transparency in international commercial arbitration to strengthen the effectiveness and reliability of international commercial arbitration. Transparency in international commercial arbitration refers to the extent of public disclosure of matters, such as a dispute between the parties to the arbitration, the process of appointing an arbitrator, the background of a potential arbitrator, the arbitral tribunal's handling of the case, and the final arbitral award etc.

Despite that scholars are still debating whether to improve the transparency of

19 María Solana Beserman Balco, "COVID-19 and New Ways of Doing Arbitration: Are they Here to Stay?", Revista Brasileira de Arbitragem, Vol.17:67(2020).

international commercial arbitration, transparency has become a well-recognized principle in international investment arbitration. ICSID, in its 2019 working paper III on the proposed amendments to its procedural rules, stated that the parties will be deemed to have agreed to the publication of a full ICSID award unless they raise objections to an investment arbitration within the 60-day period. The increasing transparency in international investment arbitration responds to public interest concerns in international investment arbitration cases. Yet, scholars in the field of arbitration law hold two views on whether to increase the transparency in international commercial arbitration. A more traditional view is that international commercial arbitration should adhere to confidentiality and need not be very transparent. The basis of this view is that matters traditionally involving the "public interest", such as consumer cases, health and safety issues, and employment issues, are rarely present in international commercial arbitration proceedings. Moreover, adhering to the confidentiality of international commercial arbitration would help reduce the adverse effects on the parties to the arbitration, and keep international commercial arbitration attractive to potential clients. However, some other scholars believe that international commercial arbitration should be more transparent for the following main reasons:

(1) Confidentiality of international commercial arbitration aggravates information asymmetry, making it difficult for clients to determine whether arbitrators and lawyers really provide a valuable-for-money service.[20]

(2) Although commercial arbitration is a private dispute, the outcome of commercial arbitration may alsohave an impact on the non-parties to the arbitration, such as affecting commercial certainty, future potential litigants, public confidence, etc.

20 Luke Nottage, "Confidentiality and Transparency in International Arbitration:Asia-Pacific Tensions and Expectations", Asian International Arbitration Journal, Vol.16:1(2020).

(3) "Public interest" does not apply exclusively to investment arbitration; commercial arbitration may also involve public interests. For example, a claim for damages between two private parties to commercial arbitration or between multinational corporations may violate human rights or violate environmental protection obligations.[21]

3. Principles of fairness and justice (*ex aequo et bono*)

Ex aequo et bono means judicial or arbitral decisions based on"justice and fairness" or considerations based on"equity and conscience", rather than pre-established rules.[22] Arbitrators in international commercial arbitration should undoubtedly exercise their discretion in accordance with the terms of the contract, the governing law and custom. However, some scholars argue that arbitrators should resort to their subjective views of what is fairness and conscience when these coercive legal rules do not lead to fair and just outcomes. This subjective view of fairness and justice by arbitrators is to identify the parties' intentions to ultimately "fill the gaps" within the scope of mandatory legal rules.

Scholars who support arbitrators' subjective views of fairness and justice to fill the blank of international commercial arbitration law believe that this approach not only effectively responds to the rapidly changing realities, but also provides a way to deal with the excessive judicature of international commercial arbitration. In addition, to prevent uncertainties in arbitrators' subjective views, these scholars explore mechanisms to ensure that arbitrators produce effective and subjective views of fairness and justice, and analyze the common values shared by international commercial arbitrators. Based on parties' autonomy and the different aspects of the seat of arbitration, scholars have proposed a single localization theory (assuming that arbitration is an integral part of the

21 Srishti Kumar, Raghvendra Pratap Singh, "Transparency and Confidentiality in International Commercial Arbitration", The International Journal of Arbitration, Vol.86:2(2020).

22 Giulio Palermo, Panagiotis Kyriakou, "Leveraging the Standard of Ex Aequo et Bono to Increase Diversity, Flexibility and Efficiency: Insights from the Basketball Arbitral Tribunal", ASA Bulletin, Vol.38:4 (2020).

national order at the seat of arbitration), pluralism theory (assuming that arbitration is rooted in the legal order of multiple countries), and transnational theory (assuming that arbitration is an autonomous and independent legal order). The arbitrators will base their decisions on one theory or a combination of the theories. The norms emanating from these theories (or values) of arbitration and accepted by international commercial arbitrators may reflect in part the arbitrator's impartiality and conscience. Thus, the singular regionalists would argue that fairness derives from the legal order of the seat of arbitration; the pluralists would argue that fairness should be based on the legal system of the seat of arbitration and the legal system of the jurisdiction where a party is most likely to seek to enforce an arbitral award; and the transnationalists hold that fairness derives from a self-governing legal order of arbitration.[23]

4. Future and development of international arbitration in China

The Belt and Road Initiative has greatly promoted the economic and trade exchanges and development of the countries along the route. Accordingly, China's international arbitration has maintained a rapid development momentum. It is worth mentioning that foreign scholars have carried out certain study on the development of the dispute settlement mechanism for the Belt and Road Initiative. Scholars believe that such mechanism has played an important role in resolving international commercial disputes between the parties. Some foreign scholars mentioned that under the guidance of the *Supreme People's Court's Provisions on Several Issues Concerning the Establishment of the International Commercial Court* in 2018, SPC has established the international commercial courts in Shenzhen and Xi'an, respectively. Some foreign scholars believe that the international commercial court which combines the advantages of court procedure and arbitration procedure in resolving international commercial disputes

23 Nobumichi Teramura, "Ex Aequo et Bono and Arbitration Theories: An Arbitrator's Subjective Perspective of Fairness as the Final 'Gap-Filler'", ASA Bulletin, Vol.38:2(2020).

is very popular throughout the world. The International Commercial Court of SPC aims to provide an efficient, low-cost, and fair mechanism for international commercial disputes, and will play an important role in resolving disputes under the Belt and Road Initiative. In addition, some foreign scholars also mentioned that the jurisdiction of the International Commercial Court can be established based on the broad standard of "international commercial matters".The International Commercial Court has made a breakthrough from China's *Civil Procedure Law* which "prohibits the appointment of non-China nationals as judges", by appointing some non-China nationals as member of the SPC International Commercial Expert Committee.[24]

24 Lutz-Christian Wolff, "Legal Responses to China's 'Belt and Road' Initiative: Necessary, Possible or Pointless Exercise?", Journal Transnational Law & Contemporary Legal Problems (2020) vol. 29, issue 2, pp. 249-325.

Chapter Two

Development and Practice of International Commercial Arbitration under the COVID-19 Pandemic

I. OVERVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE UNDER THE COVID-19 PANDEMIC

The sudden outbreak of COVID-19 in 2020 has had a huge impact on human production and life: the raging coronavirus is not merely a threat to human health and normal life, the various anti-pandemic and control measures taken by countries to contain the pandemic at the same time have dealt a major blow to the normal operation of all industries. As pointed out by the International Monetary Fund, the various crises caused by the pandemic have morphed into a global economic recession.[1]

Bearing the brunt of the pandemic in international economic activities is the day-to-day operation of many enterprises in various countries. Anti-pandemic control measures taken by governments around the world have led to quarantine of people, project shelving, logistics disruption, etc., which have restricted the day-to-day operation of many enterprises. With the transmission of the effects of various pandemic prevention and control measures, many enterprises have limited production capacity and increased cash flow pressure, which has led to enterprises being unable to fulfill their contractual

1 For more details, see the study published on the International Monetary Fund's website, http://www.imf.org/en/Publications/SPROLLs/covid19-special-notes. Accessed 23 April 2021.

obligations. In international commercial arbitration, the impact of the pandemic has also been evident. On the one hand, under the pressure of the pandemic, many enterprises in various industries have breached contracts, many of which use *force majeure* or frustrated performance of contract as a basis for defense. In arbitration cases heard by domestic and foreign arbitration institutions, different arbitral tribunals have responded and evaluated the matter as to whether pandemic can be a defense of *force majeure* or frustrated performance of contract, and further developed the identification of these legal issues and the application of legal rules. On the other hand, the pandemic control measures have also made it impossible for arbitration institutions at home and abroad to arrange the hearing of arbitration cases through the traditional on-site hearing procedures. In order to continue to resolve commercial disputes, arbitration institutions have adopted online arbitration procedures based on remote network technology; and all kinds of procedural issues arising from these procedures deserve full attention.

Based on the 2020 arbitration statistics released by major arbitration institutions, we can see that, although the COVID-19 pandemic has an impact on on-site hearings, the number of new cases accepted by most arbitration institutions and the amount in dispute have increased as compared to the same period in previous years. This shows that, even under the raging pandemic, the parties still have a strong, even greater, demand for arbitration dispute resolution services. These statistics also show that during the pandemic, most arbitration institutions have worked hard to maintain their normal operation and basically achieved a shift from traditional offline hearings to online hearings, while avoiding rising arbitration costs due to procedural delays. In 2020, the number of new cases accepted by renowned international commercial dispute resolution service institutions in China, represented by the China International Economic and Trade Arbitration Commission ("CIETAC"), has increased significantly, with prominent

influence in international commercial arbitration activities.

CIETAC, as China's leading commercial arbitration dispute resolution service provider, has witnessed a significant increase in the number of new cases accepted in 2020. In 2020, CIETAC has accepted a total of 3,615 new cases, a year-on-year increase of 8.5%. According to a report released by CIETAC, the total amount of disputes it accepted in 2020 was RMB112.13 billion (approximately US$17.3 billion), up 34% year-on-year. In addition, the number of foreign-related cases accepted by CIETAC has also increased significantly, with a total of 739 cases, up 20% from the same period last year. Among the newly-accepted foreign-related cases, the number of cases in which both parties were foreign parties was 67, the highest ever. In terms of online dispute resolution, CIETAC has also set up an online hearing centre to cope with the impact of the pandemic, with 819 cases filed online, which is an increase of 628 cases year-on-year.[2]

The Hong Kong International Arbitration Centre ("HKIAC") has broken several of its own records. In 2020, HKIAC has accepted 318 new cases, the record high in more than a decade. Meanwhile, in 2020, the total disputed amount involved in new arbitration cases accepted by HKIAC in 2020 was HK$68.8 billion (approximately US$8.8 billion), also the highest since 2011. In terms of mutual judicial assistance between the Mainland China and Hong Kong SAR, in 2020, HKIAC handled 22 applications for preservation (including preservation of evidence, property, or conduct) filed by the parties concerned with the Mainland courts under the *Arrangement on Mutual Assistance in Preservation of Arbitral Proceedings between the Courts of the Hong Kong Special Administrative Region and the Mainland*, which came into force in October 2019. The total amount of applications for preservation was approximately RMB6.4 billion (approximately US$988 million), of which the total amount of preservation applications approved by the Mainland courts

2 For details, see the statistics published on the official website of CIETAC, http://cietac.org.cn/index.php?M = Page & a = index & id = 24. Access 8 April 2021.

was RMB4.4 billion (approximately US$683.3 million). This demonstrates the rapid development of mutual assistance in preservation of arbitral proceedings between the Mainland China and Hong Kong SAR. In 2020, HKIAC has also conducted online trial more widely. According to data, out of the 117 hearings conducted by HKIAC in 2020, 80 were conducted fully or partially online, and only 37 were conducted offline.[3]

The Singapore International Arbitration Centre ("SIAC") broke its previous record in terms of caseload in 2020. According to data released by SIAC, SIAC administered a total of 1,080 arbitration cases in 2020, exceeding the benchmark of 1,000 for the first time. The total amount of the subject matter in these cases was US$8.49 billion (S$11.25 billion), an increase of 4.9% from 2019.[4]

The International Chamber of Commerce ("ICC") also announced another record high caseload in 2020, with a total of 946 new cases accepted by ICC in 2020, the highest record since 2016. Among them, 929 were institutional arbitration cases administered by ICC, and the remaining 17 were *ad hoc* arbitration cases in which ICC acts as the appointing authority.[5]

According to statistics published by the London Court of International Arbitration ("LCIA"), the number of arbitrations accepted by LCIA in 2020 was 444, an increase of 10% compared to 2019.[6]

In 2020, the Swiss Chambers' Arbitration Institution ("SCAI") accepted 83 new

3 For details, see the statistics published on the official website of HKIAC, http://www.hkiac.org/zh-hans/about-us/statistics. Accessed 8 April 2021.

4 For details, see the statistics published on the official website of the Singapore International Arbitration Centre, http://mp.weixin.qq.com/s/2ZKk9cfaVcvOYuWtUbkjAg. Accessed 8 April 2021.

5 For details, see the statistics published on the official website of ICC: http://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/. Accessed 8 April 2021.

6 For details, see the statistics published on the official website of the London Court of International Arbitration, http://www.lcia.org/News/record-number-of-lcia-cases-in-2020.aspx. Accessed 8 April 2021.

arbitrations, 61 of which were international arbitrations. Although the number of new cases accepted in 2020 was not the highest record by SCAI in recent years, its average growth trend over the past decade continued in 2020.[7]

Based on statistics published by most prominent arbitration institutions, we can see an overall increase in the number of new cases accepted by arbitration institutions in all countries in 2020 and the total disputed amount involved in these cases, with many of these institutions breaking previous records. This suggests that commercial arbitration, with its flexibility and efficiency, has become an effective way to resolve commercial disputes in the context of global crises over the past year, despite the harsh objective environment. Another significant impact of the COVID-19 pandemic on commercial arbitration is the shift from offline hearings to online hearings. How to ensure the high-quality completion of online hearings, while ensuring that the rights of the parties to arbitration are not impaired, has become a hot topic of common concern in the industry.

II. INTERNATIONAL COMMERCIAL DISPUTES CAUSED BY THE COVID-19 PANDEMIC

The COVID-19 pandemic has been described by many as a crisis. Indeed, the ravages of pandemic has brought risks and difficulties to almost all countries, societies, industries, and sectors. People are suffering from a health threat on a scale never seen in a century. As a result, governments around the world have adopted various levels of restrictive measures, such as shutdown, prohibitions on going out, suspension of work and production, and traffic controls. In consequence, almost all economic exchanges between enterprises have been severely affected. People, being restricted for travel, rely primarily on the Internet for business purposes. At the beginning of the outbreak, the public knew

7 For details, see the statistics published on the official website of the Swiss Chamber's Arbitration Institution, http://swissarbitration.org/News/. Accessed 8 April 2021.

nothing about the coronavirus, and the rapid spread of the disease has made it impossible to predict how long the crisis will last. Under these circumstances, many businesses, faced with high operating costs and dwindling profits, have been forced to default on contracts in response to the pandemic. Against this backdrop, this Chapter will first analyze the impact of the COVID-19 pandemic from the perspectives of industry development and legal practice, starting from a number of important economic sectors. Second, this Chapter will focus on the breach of contract by businesses in international commercial activities, analyze the nature of the pandemic and government anti-pandemic measures, and the causation between *force majeure*/change of circumstances and the pandemic, as well as the theories and practices related to the frustration of contract under common law.

A. Analysis of Key Industries under the COVID-19 Pandemic

1. International trade sector

International trade is the most directly affected by the pandemic. For example, the Canton Fair, known as China's foreign trade "barometer", has been postponed. The Guangdong Provincial Department of Commerce said that given the current global pandemic situation, the 2020 Spring Canton Fair has to be called off. As a major foreign trade province, Guangdong has borne the brunt of the foreign trade crisis. From January to February 2020, Guangdong's foreign trade exports declined by 17.5% year-on-year.[8] Zhejiang, also a major foreign trade province, saw its exports drop significantly. From January to April 2020, the province's total import and export value was RMB 870.46 billion, down 3.6% year-on-year, of which, the total export value was RMB 616.96

8 For details, see statistics from Guangzhou Customs in Guangdong, http://guangzhou.customs.gov.cn/eportal/ui?pageId=381573&currentPage=9&moduleId=57c3be637b8f4a93a14aed08342a8a71& staticRequest=yes. Accessed 6 April 2021.

billion, down 6.8%, and the total import value was RMB 253.50 billion, up 5.1%.[9]

As a direct result of the pandemic, a lot of foreign trade enterprises have to delay or refuse to perform contracts. This has led to the increasing proportion of international trade disputes in the new cases accepted by arbitration institutions. Impediments to the contractual performance of international sales of goods caused by pandemics are usually due to the following reasons:

For the seller, impediments to the contractual performance are usually caused by a disruption of the supply chain. Specifically, international trade activities are generally made up of transactions between the buyer and the seller, and other arrangements formed around imports and exports. Normally, after the buyer and the seller negotiate and conclude a purchase and sales contract, the seller will seek supply from the upstream supply chain according to the buyer's needs. The seller can purchase raw materials (including product packaging, design, etc.) from the downstream supply chain and process them into finished goods required by the buyer, or act as a middleman to seek orders from the companies that produce the goods required by the buyer. If the seller falls into the first situation, which is to purchase the raw materials and process by themselves, then the seller needs to maintain its own production activities until the goods are completed. After the goods are manufactured, the seller will arrange transportation, including signing the contract with the specific carrier, arranging for export formalities etc., and at last the carrier delivers the goods to the buyer. The above process may seem simple. Yet it is actually very complicated in practice — procurement, processing, and manufacturing may involve various subcontracting, and the materials and equipment required must be adequately supplied, and transshipment links are involved in the transportation process, etc. In international trade, the pandemic has an impact on all

9 For details, see data released by Hangzhou Customs in Zhejiang, http://www.customs.gov.cn//hangzhou_customs/575609/zlbd/575611/575613/3585392/index.html. Accessed 6 April 2021.

the links mentioned above and the breakdown of any link may threaten the key element of the purchase and sales contract signed by and between the buyer and the seller. If the seller is acting as a "middleman", then the seller must ensure that its end-supplier can perform properly, so as to avoid a breach of contract itself.

Supply chain breakdown generally causes the seller's delay or failure to deliver the goods due to three main reasons: impediment to raw material supply, labor shortage, and impediment to transportation:

• First, the pandemic will impact on the seller's upstream supply chain, which in turn affects the manufacturing or production by the seller. The seller usually needs to purchase the required raw materials from upstream supply chain and then use such raw materials to produce goods that the buyer will purchase under the contract. If the upstream supply chain of the seller is affected by the pandemic and is therefore unable to supply raw materials to the seller on schedule, the deadline for delivery of the goods by the seller to the buyer will be affected. The seller may be forced to seek other sources to purchase raw materials at higher costs, resulting in an increase in the total cost. In this situation, the seller may wish to negotiate an increase to the contract price with the buyer. If the parties are unable to conclude a new term, the seller may refuse to deliver the goods, thus leading to dispute.

• Second, the pandemic will impact on the seller's own production and operation. Government's anti-pandemic measures to contain the pandemic are likely to quarantine the seller's employees in their residence, or cause the seller to suspend its production and operations under government orders. In that event, the seller will be unable to deliver the goods to the buyer within the time agreed upon in the contract.

• Third, the pandemic will impact on logistics and transportation. In international

trade activities, it often happens that multiple carriers complete cargo transportation in sections. If any impediment arises in any of the sections, it will be difficult to proceed in the subsequent section. In the situation where a vessel is chartered for bulk cargo and if the impact of the pandemic causes the shipowner or second shipowner(s) to be unable to deliver the vessel on time, the parties to the purchase and sale contract will need to seek a substitute vessel, which usually means a significant increase in the transportation cost.

From the buyer's perspective, the buyer may refuse to pay the price due to transportation barriers or lack of downstream market:

• First, the pandemic is likely to cause great distress to the buyer's home country, so the government may decide to stop import trade activities or suspend transport carriers for quarantine, etc. In such a situation, the buyer cannot receive the goods on time and may seek supplies from other domestic suppliers.

• Second, the pandemic can put pressure on the buyer's capital chain or cash flow, that is, the buyer is unable to sell the goods due to the lack of downstream market, resulting in reduced revenue and greater cash flow pressure. When the pandemic the buyer's cash flow to break or suffer from great pressure, the buyer may choose to default on the payment of contractual price.

2. Construction sector

Unlike other sectors, construction projects are inherently sensitive and vulnerable, making it difficult to resist the impact of the pandemic. This sensitivity and vulnerability mainly stem from the complexity of a construction project itself. In general, a construction project often involves multiple parties, such as the project owner, developer, general contractor, sub-contractor, and suppliers of materials required for the project,

transporters, etc. Numerous parties and complex workload require that each link of the construction project, as a systematic project, must maintain normal operation. If there is a slight delay or error, the entire project schedule may be at risk of disruption. The subject matter of a construction project is composed of various small parts and materials, and needs to be purchased in large quantities from multiple sources. In addition, it also requires the participation of multiple labor forces and construction workers. However, in response to the pandemic, the government has introduced a series of control measures, such as traffic control, project suspension, quarantine for people, etc., which caused a shortage of human resources and materials, resulting in the disruption of various construction projects.

China is the first country in Asia to implement widespread controls to prevent the spread of the virus, including traffic control in parts of the country, closure of borders, and home quarantine. In the early days of the COVID-19 outbreak, almost all construction projects were put on hold, and only major infrastructure construction (e.g., water supply, gas supply, electricity supply, communications, and other facilities) as well as construction of new medical facilities to cope with the COVID-19 pandemic were proceeding steadily. Until February 2020,[10] domestic construction projects gradually resumed, and all staff members were required to wear masks and maintain social distancing throughout the construction process. People from risk areas, especially those who are abroad, are still unable to return to the project site on time to participate in the resumption of work.

In Europe, countries such as Italy, France, and Spain, where the spread of the pandemic is more serious, also halted most construction projects earlier. Except for the necessary municipal works and defense works that remain under construction, construction

10 See the story published by China Business News on 17 February 2020, http://www.cb.com.cn/index/show/zj/cv/cv13478491269. Accessed 23 April 2021.

projects were unable to resume until May 2020. The Middle East and Latin America are roughly in a similar situation.

The pandemic has caused varying degrees of delay and disruption to construction projects around the world, which eventually leads to increasing cash flow pressure on the parties involved in the construction projects. Usually, the developer pays the contractor upon completion of a certain phrase of the construction or upon completion of certain work. The delay in construction progress renders the payment impractical, and therefore the general contractor will not be able to receive payment from the developer, which in turn impacts cash flows of subcontractors and material suppliers. Meanwhile, due to the suspension of construction as a result of the pandemic, construction costs have continued to rise, and investments in the maintenance of materials and existing projects, personnel cost and pandemic prevention measures entail higher cost. Furthermore, financial pressure and deteriorating operational conditions may affect several parties including the shareholders, employees, creditors, and guarantors, which may lead to the risk of systemic default. It can be foreseen that the international commercial arbitration cases in the field of construction engineering caused by the pandemic will show a significant increase in the coming years.

The pandemic has also brought many changes to the international arbitration of construction engineering disputes. International construction engineering arbitration cases involve not only multiple parties, multiple contracts, and numerous technical issues, but also a large number of case materials or documents — project progress reports, schedules of various projects, statistical tables of various materials, procurement records, meeting minutes, construction drawings, various survey statistics, and correspondence between various parties. Therefore, international construction engineering arbitration cases usually have four notable characteristics: *first*, the facts and technical issues are very

complex; *second*, it involves a huge amount of evidence; *third*, it involves multiple parties or even multiple parallel cases; and fourth, the value of the subject matter in dispute is huge. These characteristics impose stricter requirements on arbitration activities under the pandemic, for example,

• during the evidence presentation session, the file transfer linkage and the server of the arbitration agency should be stable to receive a large amount of case evidence;

• during the hearing session, the connection to the whole videoconference must be stable, especially if more than one party or witness are located in different regions, how the tribunal can maintain an effective order of the online hearing and efficiently organize parties to express their opinions and cross-examine witnesses on different issues are also important issues for the tribunal to deal with;

• during the hearing session, how to facilitate quick access to case materials by the tribunal and save the time spent searching for the materials; and

• if the witnesses or parties use a language other than the language of arbitration, it may also be necessary to connect their interpreters to the meeting room.

3. Aviation sector

Measures taken by governments of various countries to close borders and suspend or reduce flights in response to the pandemic have caused huge losses to the aviation industry. According to the International Air Transport Association (IATA), by April 2020, the number of flights worldwide had declined by 70%, and by the end of the year 2020, the entire sector's liabilities had surged from $120 billion to $550 billion.[11] North

11 See the annual report published on the official website of the International Air Transport Association, https://www.iata.org/contentassets/c81222d96c9a4e0bb4ff6ced0126f0bb/iata-annual-review-2020.pdf. Accessed 8 April 2021.

America, Europe, and the Asia-Pacific region are the areas where the aviation industry most severely hit by the pandemic. The International Civil Aviation Organization said the COVID-19 pandemic has added an estimated US$195 - US$255 billion in costs to the aviation industry worldwide. The impact of the pandemic on the aviation sector is broadly distributed in two ways:

• First, demand for flights has plummeted due to the pandemic. Statistics show that passenger demand fell by 98.4% in April 2020 compared with the same period.[12] No passenger means no market or revenue, and the shutdown of a large number of civilian aircrafts and their infrastructure means higher maintenance costs. Moreover, according to the IATA statistics, there were US$35 billion worth of airline tickets awaiting refunds as of April 2020.

• Second, increases in labor costs, fuel costs, and operating costs. Labor costs account for a significant proportion of the total cost of the civil aviation industry. To counter the impact of the pandemic, airlines have had to call on employees to voluntarily reduce pay or even work for free, in order to reduce labor costs. Fuel costs accounted for 23.7% of total costs in 2019, and despite a plunge in international fuel prices in March 2020, the global aviation sector still lost nearly US$4.65 billion in hedging transactions.

In fact, about 40% of the world's commercial aircraft are leased by airlines from specialized aircraft leasing companies or banks. Not all aircrafts belong to airlines. Aircraft finance lease agreements usually contain a "hell or high water provision" clause, which requires the lessee to pay rent on a monthly basis regardless of the circumstances; and *force majeure* clauses are generally not contained in finance lease agreements.[13]

12 *Ibid.*

13 Johnny Champion, Rupali Sharma, Patrick Bettle, "Chapter 14: COVID-19 and Aviation Disputes", in Maxi Scherer, Niuscha Bassiri, *et al*. (eds), International Arbitration and the COVID- 19 Revolution, (© Kluwer Law International; Kluwer Law International 2020), pp.251-265.

Therefore, after the outbreak of the epidemic, many airlines, as lessees, choose to default directly on their aircraft lease contracts. In addition to airlines, manufacturers of commercial aircraft are also facing the dilemma of rescheduling delivery schedule, changing models of aircraft already in manufacturing plans, and even cancelling orders.

4. Financial sector

The most important impact of the pandemic on the financial sector is to change the guiding principles of reducing fiscal deficits and conservative fiscal policies that various countries have established since the 2008 financial crisis. In response to the depression due to COVID-19 pandemic, countries have begun to use public finances or government borrowing on a wide range of industries. The pandemic is a public health crisis, at the same time it is also a crisis for economic development. The economic impact of the pandemic is like a domino effect — first, tourism, leisure, automobiles, hotels were directly affected, followed by a sharp drop in demand from the aviation sector, which has further affected the energy sector. After the real economy has suffered a setback, the crisis in the financial sector become apparent — the first thing the government has to do is to increase investment and budget in the areas of public health and medical care, followed by providing subsidies for the unemployed in all walks of life, and then helping to keep all sectors afloat as much as possible. The private sector has to increase borrowings from banks and other financial institutions. Frequent breach of contracts have increased pressure on insurance companies. Deteriorating business conditions have forced some debts to default, and financial institutions' financial chains are likely to be broken as a result.

Defaults in the financial sector under the pandemic could lead to create systemic liquidity risks, so rapid dispute resolution is crucial for the financial sector. In this

regard, arbitration has become the best dispute-resolution model in the financial sector — when the pandemic has a negative impact on the office efficiency of the judiciary, commercial arbitration has shown its advantages of flexibility and efficiency. Moreover, the confidentiality of arbitration is favored by the financial sector.

Due to the lack of unified allocation of judicial resources, the financial risks and disputes faced by western countries cannot be effectively managed and resolved in a short time. However, judiciary and arbitration institutions in some countries have begun to classify and sort financial cases, especially those faced by large financial institutions (such as banks, insurance companies, trusts, etc.).[14] These cases, which often involve a large value of disputed matter and more critical relevant stakeholders and have a significant impact on the economic stability of the whole country, will be the first priority of courts and arbitral institutions. Moreover, due to the numerous disputes and the fact that the cash flow of the breaching party is disrupted, arbitral institutions, regulators and parties have to adopt a more efficient dispute resolution approach — diversified dispute resolution — to supplement the dispute resolution toolkit offered by traditional arbitral processes, and use mediation, negotiation, and good offices to recover damages as much as possible.

B. COVID-19 Pandemic and Performance of International Commercial Contracts

As mentioned above, the outbreak of COVID-19 has become a global public health event, which has brought a huge impact on the production and management of many industries and enterprises, resulting in their inability to fulfill their contractual obligations. Therefore, a considerable number of enterprises hope to reduce or exempt the liability

14 Philippa Charles, "Chapter 16: Finance Disputes and a Pandemic: The Eye of a Perfect Storm?", in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2020), Vol.37 Issue 4, pp.309 – 339.

for breach of contract caused by delayed performance or failure to perform the contract, by virtue of the *force majeure* provision in the contract or under the law. At the level of domestic laws, the Legislative Affairs Commission of the National People's Congress has made it clear that COVID-19 pandemic can constitute *force majeure*,[15] which provides guidance for the resolution of disputes over breach of contract between domestic parties due to pandemic. However, in the practice of international commercial arbitration, there are still different rules and complex evaluation criteria for the nature of pandemic and the identification of *force majeure* events.

At the level of international arbitration, as there are different rules and judging standards for the identification of *force majeure* events according to various laws and regulations, the governing law for the contract should be determined first, and then the issues of *force majeure*, the contract performance, and liability for breach of contract should be discussed. The doctrine of *force majeure* under Chinese law, together with relevant legal provisions on *force majeure* in international commercial arbitration, are analyzed below.

1. *Force majeure* and change of circumstance under Mainland China law

Article 180 of the *Civil Code of the People's Republic of China* provides that: "If the failure to perform civil obligations is caused by force majeure, no civil liability shall be borne. Where it is otherwise provided by law, such provisions shall prevail. *Force majeure* is an objective circumstance which is unforeseeable, unavoidable, and insurmountable".

Article 563 stipulates that: "The parties may rescind the contract in any of the following circumstances: (1) it becomes impossible to achieve the purpose of the contract due to an event of *force majeure* …."

15 See the National People's Congress Legislative Affairs Commission at the Press conference on 10 February 2020, http://www.npc.gov.cn/npc/c30834/202002/23100ec6c65145eda26ad6dc288ff9c9.shtml. Accessed 19 April 2021.

Article 590 stipulates that: "If a party is unable to perform the contract due to a *force majeure* event, it shall be exempted from liability, in part or in whole, in light of the impact of the *force majeure* event, except where it is otherwise provided by law. If the party is unable to perform the contract due to a *force majeure* event, it shall timely inform the other party to mitigate the losses that may be caused to the other party, and shall provide evidence within a reasonable period of time."

Article 533 provides that: "After a contract is established, where the basic conditions of the contract have undergone major changes which cannot be foreseen by the parties at the time of conclusion of the contract and are not a commercial risk, if the continuous performance of the contract is obviously unfair to one of the parties, the party adversely affected may re-negotiate with the other party; if the negotiations fail within a reasonable period of time, the parties may petition a people's court or an arbitration institution to modify or rescind the contract. The people's court or arbitration institution shall, based on the merits of the case, modify or rescind the contract in accordance with the principle of fairness."

After the outbreak of the COVID-19 pandemic, the Supreme People's Court issued several guiding opinions regarding the pandemic, specifically the *Guiding Opinions on Several Issues Concerning the Proper Trial of Civil Cases Involving the COVID-19 Pandemic (I)* provide that:

"Cases rising from contract disputes shall be properly tried in accordance with the law. For contract disputes directly affected by the pandemic situation or the pandemic prevention and control measures, unless otherwise agreed upon by the parties, the courts shall consider comprehensively the impact of the pandemic situation on different regions, different industries and different cases when applying the law, accurately understand

the causation and the extent of the causal force between the pandemic situation or the pandemic prevention and control measures and the failure to perform the contract, and handle the cases in accordance with the following rules:

(1) If the pandemic situation or the pandemic prevention and control measures directly cause the failure to perform the contract, the provisions of *force majeure* shall apply in accordance with the law, and liability shall be exempted in part or in whole based on the extent of impact of the pandemic situation or the pandemic prevention and control measures. Where a party is liable for the failure to perform the contract or for the aggravation of the loss, it shall bear the corresponding liability in accordance with the law. For the non-performance of contractual obligations due to the pandemic situation or pandemic prevention and control measures, if the party concerned asserts that it has fulfilled notification obligations promptly, it shall bear the corresponding burden of proof.

(2) Where the pandemic situation or pandemic prevention and control measures only cause difficulties in performance of the contract, the parties may re-negotiate; if continued performance is possible, the people's court shall pragmatically strengthen mediation and actively guide the parties to continue performance. The people's court shall not support a party's request for rescission of the contract on the grounds that it is difficult to perform the contract. Where continued performance of a contract is evidently unfair to a party concerned, and the party concerned requests for change of contract performance period, performance method, price amount, etc., the people's court shall decide the case on its merits whether to support the request. If, after the contract is modified in accordance with the law, the party still claims to be exempted from liability in part or in whole, the people's court shall not support the claim. Where the purpose of a contract cannot be realized due to the pandemic situation or pandemic prevention

and control measures, the people's court shall support the party's request to rescind the contract."

The often called "exemption from liability for breach of contract due to *force majeure*" should be, more accurately, referred to as "exemption from liability for breach of contract due to failure to perform a contract as a result of *force majeure*". The "defense of *force majeure*" includes four elements. The first three elements are the three elements of a *force majeure* event *per se*, namely, "unforeseeable", "unavoidable", and "insurmountable". The fourth is the situation of "inability to perform" encountered by the breaching party. The "insurmountable" impediment, which is the third element of "*force majeure*", is not necessarily the same as the impediment of "inability to perform the contract" by the breaching party. In practice, the two often point to the same impediment. For example, the port control imposed by the government due to the pandemic is a *force majeure* event, whereas at the same time, the party cannot perform the maritime contract due to the *force majeure* event of port control. The two impediments are often regarded as the same event, that is, the pandemic cause the parties unable to perform the contract. Nevertheless, there are also situations where the two impediments under the party's *force majeure* defence are not the same. For example, the port control imposed by the government due to the pandemic is a *force majeure* event, because of which the parties are unable to purchase the products from overseas suppliers due to the control of the port, thus failing to perform the delivery obligation to the domestic downstream buyer. The port control and the reason for the party's failure to perform its sales contract with the downstream buyer is not the same event, the former being a government action while the latter being unable to obtain the products and deliver the products to the downstream buyer. There is no direct causation between the two.

As for the defense based on change of circumstances, the common point between it and

the defense based on "failure to perform the contract due to *force majeure*" is that both of them have "unforeseeable" impediments. However, the difference between them is that the contract is not impossible to perform when the circumstances change; instead, it can continue to perform, but continued performance will face great difficulties and would be manifestly unfair to the performing party. This is clearly defined in Article 533 of the *Civil Code*.

In drafting this Chapter, we analyzed CIETAC's 144 declassified arbitral awards concerning *force majeure* and change of circumstances disputes over the past five years, and took into account other publicly available judicial decisions. We summarize the following precautions in the cases where the breaching party claims exemption from liability on the grounds of the pandemic or similar circumstances.

First, the breaching party should clearly distinguish whether its defense is identified as "failure to perform the contract due to *force majeure*" or "change of circumstances".

• The major difference between them is that the former is "unable to perform the contract" and the latter is "the contract can be perform the contract, but continued performance will face great difficulties and be obviously unfair to the performing party". If the breaching party's failure to perform the contract is due to high performance costs (e.g., high cost of procuring substitute goods) rather than being completely impossible to perform, then when the arbitral tribunal applies the Chinese law to the dispute over a sales contract, the party concerned should clearly demonstrate that its defense is a change of circumstances and not a "failure to perform the contract due to *force majeure*", otherwise its claim may be difficult to be supported.

Second, the breaching party should prove that there must be a sufficient causation between the inability to perform the contract and the *force majeure* event or change of

circumstances encountered by the party to the contract.

• The breaching party's performance must be actually and adversely affected by the *force majeure* event or change of circumstances. If the breaching party claims a defense of *force majeure*, yet the actual situation is that the breach occurs after the cancellation of the control measures which affect the performance of the contract, the judge or arbitrator is more likely to hold that there is no causation between the breach and the pandemic, and will not support the defense. If the breach has occurred prior to the occurrence of the *force majeure* event or change of circumstances, there is a high probability that *force majeure* or change of circumstances invoked by the breaching party as a defense will not be accepted.

• It is necessary to distinguish commercial risk from a *force majeure* event or change of circumstances. If the breaching party, as the buyer, fails to pay the purchase price as agreed upon in the contract and claims that the reason for the non-payment is the recession of the whole industry caused by the pandemic, which leads to the buyer's business difficulties and inability to make the payment, the judge or arbitrator is more likely to deem that the operational difficulties of the buyer are commercial risks and the pandemic is not able to establish a sufficient causation, thus ultimately rejecting the buyer's defense.

• The breaching party needs to prove that the reasons for non-performance include the inability to remedy or the inability to perform despite the remedy measures actually taken. If there are remedies available in the event of a breach of contract and thus the contract can be performed, the breaching party's claim of "failure to perform the contract due to *force majeure*" has a high probability of not being accepted.

Third, if a *force majeure* event or a change of circumstances occurs, which frustrates

performance of the contract, the breaching party shall promptly notify the other party of its inability to perform.

• The laws of mainstream jurisdictions including Chinese law and the *United Nations Convention on Contracts for the International Sale of Goods* require the breaching party to notify the other party in a timely manner in the event of a *force majeure* event or change of circumstances; otherwise, the breaching party shall not raise the defense of *force majeure* or change of circumstances afterwards. Under the principle of "the party to a contract must remedy the situation in a timely manner", the contract can be remedied with the joint efforts of the parties only after the breaching party notifies, in a timely manner, the other party of the frustration of the contract. Only through adequate and timely communication can the parties agree upon the remedy measures and determine whether the remedy measures taken by the breaching party conform to the purpose of the contract. If the non-breaching party accepts the remedy measures proposed by the breaching party, then the contract may be actually remedied (e.g., delay of delivery, change of place of delivery, change of price, etc.) to avoid disputes. If the non-breaching party does not accept the remedy measures proposed by the breaching party, then the breaching party may claim that "the contract is irremediable" and, in turn, it is entitled to be exempted from liability for breach of contract on the basis of *force majeure* or change of circumstances.

Only a small number of judgments published by the Chinese courts involves cases in which the court discussed in detail the *force majeure* or change of circumstances defense, and there are even fewer cases in which courts upheld the *force majeure* or change of circumstances defense. The Chinese courts are cautious in determining whether there is a causation between *force majeure*/change of circumstances and inability to perform the contract, and adopt more stringent identification criteria. This is because that if

the parties can abuse such defenses and easily escape liability for breach of contract, it is clearly contrary to the basic principle of honoring contracts. Therefore, the parties should fully and comprehensively prove the causation in specific cases.

The explanatorynote issued by China's Legislative Affairs Commission of the National People's Congress defines the COVID-19 pandemic as a *force majeure* event. On 10 February 2020, Zang Tiewei, spokesman for the Legislative Affairs Commission, said that the pandemic as a public health emergency, is unforeseeable, unavoidable, and insurmountable.[16] In addition, the Supreme People's Court and people's courts at all levels have provided corresponding guidelines for resolving legal disputes arising from the pandemic. For example, the *Guiding Opinions on Several Issues Concerning the Lawful and Proper Trial of Civil Cases Involving the COVID-19 Pandemic (I)* (Fa Fa [2020] No.12), the *Guiding Opinions on Several Issues Concerning the Lawful and Proper Trial of Civil Cases Involving the COVID-19 Pandemic (II)* (Fa Fa [2020] No.17), and the *Guiding Opinions on Several Issues Concerning the Lawful and Proper Trial of Civil Cases Involving the COVID-19 Pandemic (III)* (Fa Fa[2020] No.20)[17] promulgated by the Supreme People's Court have provided provisions on the identification of *force majeure*, delayed performance of contracts, inability to perform contracts, anticipatory breach of contracts,etc. However, neither the legislature nor the statutory interpretation authority has elaborated on the causation between the pandemic and inability to perform contracts. Although the pandemic is a *force majeure* event under Chinese laws, if there is

16 See the National People's Congress Legislative Affairs Commission at the Press conference on 10 February 2020,http://www.npc.gov.cn/npc/c30834/202002/23100ec6c65145eda26ad6dc288ff9c9.shtml.Accessed on 19 April 2021.

17 The *Guiding Opinions on Several Issues Concerning the Lawful and Proper Trial of Civil Cases Involving the COVID-19 Pandemic (I)* were issued and came into force on 16 April 2020.The *Guiding Opinions on Several Issues Concerning the Lawful and Proper Trial of Civil Cases Involving the COVID-19 Pandemic (II)* was issued and came into force on 17 May 2020.The *Guiding Opinions on Several Issues Concerning the Lawful and Proper Trial of Civil Cases Involving the COVID-19 Pandemic (III)* was issued and came into force on 8 June 2020.

no causation between the pandemic and the inability to perform contracts, the parties concerned still cannot invoke *force majeure* to exempt or mitigate liability for breach of contract.

2. *Force majeure* and change of circumstances under CISG

The relevant provisions of *force majeure* and change of circumstances under the *United Nations Convention on Contracts for the International Sale of Goods* ("CISG") are similar to the corresponding provisions of Chinese law despite of some differences.

(1) Definition of *Force Majeure* and Change of Circumstances

Article 79(1) of CISG provides: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

CISG itself does not use the terms *force majeure* or change of circumstances to describe events that frustrate the performance of the contract, but rather the term "impediment". However, the term "impediment" *per se* is not clear as to whether it refers to "being unable to perform the contract" or "performance of the contract is impeded but can be performed". Therefore, there has been debate in the academic community on whether Article 79 of CISG includes change of circumstances in addition to *force majeure*. The prevailing view is that it should include change of circumstances.[18]

(2) *Force majeure* or change of circumstances encountered by a third party

18 Franco Ferrari, Marco Torsello, International Sales Law-CISG-in a Nutshell, West Academic, 2014, p.324.

In reality, it often happens that a breach of contract by one party is caused by the breach of contract by a third party, especially in the cases where the seller under a purchase and sales contract is just an intermediary and the dispute arises when the actual manufacturer is unable to deliver the goods. For example, a seller and a buyer enter into a sales contract to transact steel, and the seller intends to purchase the steel from a third-party steel manufacturer for resale to the buyer in order to perform the sales contract. However, can the seller claim *force majeure* and be exempted from liability if the third-party manufacturer, for some reasons, is unable to complete production of the steel products, which results in the seller being unable to deliver goods to the buyer? There is no clear provision under Chinese law regarding this issue; however, CISG describes it in detail.

Article 79(2) of CISG provides:

"If a party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph (Note: Article 79(1)); and

(b) the party whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him."

In short, the party is exempt from liability under CISG only if both the party and the third party engaged[19] thereby have satisfied the requirements of Article 79(1) of CISG, that is, they all suffer *force majeure* or a change of circumstances.

Taking the dispute over sale of steel products mentioned above as an example, if the third-party encounters control measures triggered by the pandemic, such as

19 The English text "engaged" carries a broader meaning than "employment". The official Chinese version of CISG translates "engaged" as *guyong* which literally means "employment" in Chinese.

transportation control, which results in his inability to deliver the products, he may claim exemption from liability under Article 79(1) of CISG. The question then is whether the seller (who is also the buyer for the third-party manufacturer) under the disputed contract can claim exemption from liability on the grounds that "the inability of the third-party manufacturer to deliver" is an "impediment" under Article 79(1) of CISG? The core of this is whether the seller can avoid or overcome the impediment that the third-party steel manufacturer is unable to deliver. If the purchase and sales contract expressly provides that the steel under the contract shall be manufactured and delivered by such third-party manufacturer (not by the other manufacturers), the seller will have a higher probability to be exempted. On the contrary, the buyer may claim that the seller has the opportunity to purchase steel from other manufacturer(s) in order to perform the contract.

Therefore, Chinese parties should pay particular attention to the above provisions and make full use of CISG rules to defend their rights when dealing with a case of "non-performance of the contract due to reasons attributable to a third party" under CISG.

(3) Whether CISG is applicable when the parties do not agree on the application of the CISG in the contract?

CISG entered into force in China on 1 January 1988. In practice, courts and arbitral tribunals usually apply CISG to contracts for sale of goods concluded between the Chinese party and the party from other CISG contracting states but without agreement on the governing law.

However, China is a country with multiple jurisdictions. In practice, two questions often arise as to (1) whether CISG is applicable where one party to the contract is a foreign party and the other is a party from Hong Kong, Taiwan or Macau, and (2) whether

CISG is applicable to the contracts between a Mainland China party and a Hong Kong SAR party. Hong Kong had not yet returned to China when China acceded to CISG in 1986. Chinese officials have made it clear that CISG is also applicable to Hong Kong. However, for the purchase and sales contracts between the Mainland China party and the Hong Kong party, Chinese courts always hold that CISG is not applicable to Hong Kong as "CISG can only be applied to contracts between parties whose places of business are located in different countries, while both the Mainland and Hong Kong SAR are located within China territory".[20]

Nevertheless, it is important to note that courts in other countries have held that CISG should be applied to Hong Kong, such as Arkansas Courts, the USA.[21]

On 2 March 2020, the Department of Justice of Hong Kong published the *Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region* for public comments from all walks of life,[22] in which the Department of Justice proposed that CISG be applied to Hong Kong. On how to apply CISG to Hong Kong, the Department of Justice has stated that:

A. Given that CISG is only open for accession by states, Hong Kong would not be able to accede to CISG as an independent contracting party. If CISG is to be applied to Hong Kong, Hong Kong would seek such application through a formal decision by the China Central Government under Article 153 of the *Basic Law*.

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20 For example, *Lianzhong Enterprise (Resources) Co., Ltd. v. Xiamen International Trade Group Co., Ltd.*, (2016) Zui Gao Fa Min Zai No. 373.

21 United States District Court, Eastern District of Arkansas, Western Division, *Electrocraft Arkansas, Inc. v. Super Electric Motors Ltd, et al.*, 23 December 2009, No. 4:09 CV 00318 SWW.[40] See official statistics released by the National Bureau of Statistics: https://data.stats.gov.cn/search.htm?s=GDP. Accessed 23 April 2021.

22 For details, see the website page of the Department of Justice of the Hong Kong Special Administrative Region, https://www.doj.gov.hk/en/featured/consultation_paper.html.

B. In order to give effect to CISG in Hong Kong, Hong Kong may incorporate CISG into Hong Kong local law by way of enacting a new stand-alone Ordinance.

Undoubtedly, Hong Kong, as a common law jurisdiction, may have difficulties in applying CISG which originates from civil law system, in actual cases. The Department of Justice also analyzed the advantages to implementing CISG in Hong Kong. For example, compared with Hong Kong local law, CISG is more prone to maintain the validity of contracts, and is easier to understand and comprehensive. It seems to be more in line with the expectations and practices of today's business society, at least in terms of the applicability and quality of the goods sold and remedies. Moreover, the Department of Justice also explained that CISG is very similar to Hong Kong local common law system.[23]

3. *Force majeure*/change of circumstances under common law

The statutory law in the common law system does not provide for "exemption from liability due to *force majeure*" or "exemption from liability due to change of circumstances". Under common law, *force majeure* and changes of circumstances are usually classified under the doctrine of frustration. However, the frustration of contract is not equivalent to *force majeure* / change of circumstances. The scope of the frustration of contract is broader, including cases in which the purpose of the contract is frustrated as a result of the loss of a specific subject matter of the transaction agreed to by the parties, and does not only include *force majeure*.

However, even for the failure to perform a contract caused by a *force majeure* event in the traditional sense, such as pandemics and earthquakes, the common law approach differs

23 For details, see the documents of the Department of Justice of HKSAR, https://www.doj.gov.hk/sc/featured/pdf/CISG_SC_Executive_Summary_PDF.pdf, paras 44–27.

from the civil law, especially on the issue whether the contract can be terminated as a result.

In essence, the effect of a *force majeure* event only results in that the party who is obligated to perform the obligations of the contract fails to perform, and normally, the continuing event of such an inability is equal to the duration of the *force majeure* event. In the absence of exceptional circumstances, the party concerned may continue to perform its contractual obligations after the end of the *force majeure* event. For example, if the goods cannot be delivered on the date stipulated in the contract due to cessation of production as a result of the pandemic, or if the project cannot be completed as scheduled due to the pandemic, the contract can continue to be performed after the pandemic ends. Therefore, the consequences of the *force majeure* event are essentially delayed performance, the termination of the contract will be necessary only if the delay in performance exceeds the period of time tolerable by the non-breaching party, making it impossible for the non-breaching party to achieve the contract purpose, or making it meaningless for the non-breaching party to continue waiting for the end of the *force majeure* event.

Take the example of impediment to contract performance caused by the COVID-19 pandemic, if the seller to a purchase and sales contract is unable to deliver the goods on time, which constitutes a breach of contract, under the civil law, it does not necessarily give the non-breaching party a right to rescind the contract. On the contrary, if the breaching party requests an extension of the period for performance of the contract, the judge or arbitrator is likely to uphold the breaching party's assertion that the contract, after modification, will be eventually performed rather than terminated. Paragraph 2, Article 1 of the *Guiding Opinions of the Supreme People's Court on Several Issues Concerning the Proper Trial of Civil Cases Involving COVID-19 Pandemic (II)* provides that:

"If a sales contract can be performed continuously, but the pandemic situation or pandemic prevention and control measures result in a significant increase in performance costs such as labor, raw materials and logistics, or result in significant reduction in product price, which render the continuous performance of the contract obviously unfair to one party, the party adversely affected may request for price adjustment, and the people's court shall adjust the price according to the principle of fairness based on the merits of the case. Where the pandemic situation or pandemic prevention and control measures result in the seller's failure to deliver the goods at the agreed time limit, or result in the buyer's failure to make payment at the agreed time limit, if the party concerned petitions to adjust the performance period, the people's court shall adjust the performance period according to the principle of fairness based on the merits of the case. For a contract of which the price or performance period etc., has been adjusted, if a party concerned requests the other party to bear the liability for breach of contract, the people's court shall not uphold such request."

However, if the same dispute is tried under the common law, the result may be different. This is because under common law, the legal consequences of "frustration of contract" will directly "kill" the contract; thus, both parties do not need to perform it, and there is no problem of delay in performance.[24] Because of the serious consequences of frustration of contract, and given the contractual spirit under common law that contracts need to be strictly performed, frustration of contract is difficult to establish, unless it can be proved that:

(i) There much be fundamental or extreme changes in circumstances that make strict performance no longer just and reasonable;

(ii) if the frustration of contract is established, it is to kill the contract;

24 Yang Daming, International Trade in Goods, Law Press, 2011, p.387.

(iii) once a contract is frustrated, it is automatically suspended. The two parties are not liable to each other, and there is no compensation issue involved; and

(iv) the frustration of contract does not result from the act or choice of the party who intends to rely on the doctrine of frustration to escape performance of contract; instead, it must be caused solely by external contingencies,[25] which is similar to the criteria for establishing *force majeure*.

The case of *Salam Air Saoc v. Latam Airlines Group SA*[26] is a typical case in which the British court analyzed whether the impact caused by the pandemic constitutes "frustration of contract" during the pandemic period. In this case, both parties entered into a lease agreement for commercial aircraft, agreeing that the lessee should pay rent to the lessor irrespective of any contingency whatever. However, the outbreak of pandemic has imposed restriction on the routes operated by the lessee, and several aircrafts were forced to suspend operations. In this context, the lessee claimed that the COVID-19 pandemic and anti-pandemic measures constituted "frustration of contract" because the aircrafts it leased were forced to suspend operations and thus it is unable to pay rent. However, the British Commercial Court rejected the lessee's claim on the main grounds that the normal flight of the aircrafts is not consideration for the lease or a condition to the payment of rent, and that even if the aircrafts were forced to suspend operations, the lessee still had a small number of aircrafts in operation and still had the capacity to perform the contract. From this case it can be seen that the threshold for application of the frustration of contract under common law is very high. In international commercial arbitration agreements or arbitration clauses, many parties will choose the laws of common law countries or regions such as the United Kingdom, the United States, Singapore, or Hong Kong as the governing laws. In such a case, if the

25 *Ibid*., p.388.

26 [2020] EWHC 2414 (Comm), 7 September 2020.

parties do not specifically agree on *force majeure* clauses in the contract, the final result might be termination of the contract according to the governing law of the common law jurisdiction agreed upon by the parties, rather than continued performance after modifying the contract.

One advantage of the common law, however, is that, since common law jurisdictions tend to adopt case law, questions such as whether a particular impediment constitutes *force majeure* and whether there is sufficiently causation between the impediment and the breach, can often be found in case law, which undoubtedly provides clearer guidance to both the judges/arbitrators and the parties.

For example, in *Thames Valley Power Ltd v Total Gas & Power Ltd*,[27] Total Gas & Power Ltd claimed exemption from liability for the supply of natural gas to the plaintiff due to *force majeure* on the grounds that the soaring price of oil and gas had put it in a very commercially disadvantageous position. The British Commercial Court said in the judgment that: "*The force majeure event has to have caused in Total to be unable to carry out its obligations under the GSA … The fact that it is much more expensive, even very greatly more expensive for it to do so, does not mean that it cannot do so*". It is thus clear that the British Commercial Court deems that a dramatic increase in the cost of performance due to market conditions would not result in the exemption of a party's performance obligations on the grounds of force majeure or the frustration of the contract.

In the case *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd*,[28] Tullow signed a contract with Seadrill, from whom Tullow leased oil rigs for drilling and mining for oil in Ghana's sea. However, due to a territorial sea dispute between Ghana and Cote d'Ivoire, the international arbitral tribunal heard over the dispute issued a preliminary

27 [2006] 1 Lloyd's Rep. 441.

28 [2018] EWHC 1640 (Comm).

measures order requesting Ghana to take all necessary steps to cease all oil drilling activities in the disputed sea where Tullow's drilling was to take place. Tullow, the lessee, demanded termination of the contract on the grounds that the order of the arbitral tribunal constituted a *force majeure* which rendered it impossible to use the rig. The case was brought before the British Court, which ascertained that, although the provisional measures order (and the government's drilling moratorium) were a *force majeure* event agreed upon in the contract, the lessee's failure to pay the equipment rental and failure to perform its contractual obligations, and the failure of Ghanaian Government to approve Tullow's field development project in Ghana due to a technical problem in one of the concessions, were not relevant causes of the *force majeure* event. In this case, two events together led to the inability to perform the contract claimed by the lessee, and only one event was deemed as a *force majeure* event. The situation in this case, where multiple events occurred at the same time but only some of the events were deemed as force majeure, made the analysis of causation complicated. In the case *Intertradex v Lesieur* [1978] 2 Lloyd's Reports 509, the British Court established the principle that where performance or delay in performance is excused by a *force majeure* clause, an uncontrollable event must be the sole cause of the inability of the parties to perform their contractual obligations. Accordingly, in Seadrill case, the British Court, based on the principle established in the *Intertradex* case, found that, although the drilling ban was a contractual *force majeure* event, it was not the sole cause of the inability of the lessee Tullow to perform its contractual obligations, and that the *force majeure* defence claimed by Tullow would stand only if the *force majeure* event claimed by Tullow was the sole cause of its inability to perform the contract. It is thus clear that, when a contract cannot be performed due to both *force majeure* and non-*force majeure*, the parties cannot achieve the purpose of exempting the performance of the contract under English law by simply relying on the *force majeure* clause. The *force majeure* event must be the "only effective

cause" for inability to perform the contract.

On the criteria for determining *force majeure*/change of circumstances, if the parties have specified in the contract what is *force majeure*/change of circumstances, these clauses would be used by the judges/arbitrators as the criterion for assessing the parties' situation, in order to determine whether it is an exemption of liability. Unfortunately, in some contracts, especially those under certain industry-specific transaction models, the parties do not agree on a *force majeure* clause, or deliberately do not agreed on (or prohibit from agreeing on) *force majeure* clauses due to particular transaction models. For example, in the case of a commercial aircraft financial lease contract in the aviation industry, the airline (i.e., the lessee) is often bound by "hell or high water" clause in the contract, which requires the lessee to pay rent regularly despite any risks or hardship. In fact, under English law, the parties to a contract must strictly perform their obligations under the contract even if the "hell or high water" clause is not included in the contract. The requirement for contracting parties to perform obligations is very stringent under English law. A promise, express or implied, must be fulfilled. If it is impossible to fulfil, one will be held liable for breach of contract and damages therefrom; the question of whether this is no reasonable or unreasonable does not exist here. In international commercial arbitration, if the parties to a contract choose English law as the applicable law for arbitration but fail to agree on the *force majeure* clause in the contract, they can only resort to doctrine of "frustration of contract" under English law to "kill" the contract so as to avoid liability for breach of contract. However, as noted above, the conditions under which a contract is frustrated is very stringent, mainly reflected in two aspects:

• First, one of the conditions for frustration is that a fundamental or extreme change of circumstances must occur which makes strict performance no longer fair and reasonable.

According to the doctrine of English law, the circumstances under which the basic conditions of a contract are changed are not foreseeable by the parties at the time of the contracting, nor are they the circumstance to which the parties made commitments at the time of the contracting. Continued performance under unfavorable circumstances is not what the parties intended at the time of the contracting. This may seem rigid. Under English law, a court or arbitral tribunal does not have any power to interfere with a contract reached between parties, and can only construe the disputed contract in question or assist in enforcement or provide relief for breach of the contract. A court or arbitral tribunal can be deemed *ultra vires* if it holds that it is unreasonable for one or all parties to the contract to continue to perform due to changes in objective circumstances and thus so there is no need to further perform the contract.[29] Moreover, as a matter of practice, the parties can modify the contract and enter into a new contract if the contract is indeed frustrated; alternatively, the parties to the contract may terminate the contract through negotiation if the fundamental changes in the objective circumstances defeats the purpose of making the contract in the first place or renders it meaningless.

• Second, the frustration of contract must be caused solely by unforeseen circumstances, rather than as an excuse for the parties to evade their contractual obligations. That is to say, the frustration should not be self-induced frustration.

Similar to the doctrine of contract frustration under English law, Article 533 of China's *Civil Code* also stipulates the principle of "change of circumstances", and the circumstances under which the principle applies are the same that "the basic conditions of the contract have undergone a substantial change which could not be foreseen at the time of entering the contract and are not commercial risks, and the continued performance of the contract would be manifestly unfair to one of the parties." The

29 Yang Daming, "An analysis of the court's jurisdiction over contract disputes under Anglo-American law", International Goods Sales, Law Press, 2011, p.390.

difference lies in the power of judges or arbitral tribunals — under the China's *Contract Law*, judges or arbitral tribunals have the power to determine the circumstance and to adjust the contract, in particular the obligations undertaken by the parties, or to terminate the contract; whereas under English law, judges or arbitral tribunals can only "kill" the contract and cannot modify its contents at their own discretion.

C. Recommendations for Chinese Enterprises

In the pandemic, we can see that Chinese enterprises, especially export-oriented ones, are still actively carrying out foreign trade business in accordance with China's export-oriented policy of "going global". After the pandemic, Chinese enterprises need more knowledge and experience in preventing and dealing with contract disputes caused by pandemic or other *force majeure* events. In this regard, we have the following suggestions for reference:

1. Drafting and revision of a commercial contract

As mentioned above, in the event of a dispute, it is vital that the contract includes provisions relating to the issue in dispute and the applicable law. Therefore, during the drafting and negotiation stages of a commercial contract, detailed provisions regarding *force majeure* or frustration of contract are necessary.

First, it is necessary to exhaust the list of the *force majeure* events based on the background and characteristics of the transaction and clarify the definition of each *force majeure* event in order to avoid any discrepancy in the interpretation of such wordings in the event of subsequent disputes. In the context of the COVID-19 pandemic, it is necessary to consider whether government's pandemic prevention or control measures will affect the transaction. This includes not only the impact of a series of government

measures on the delivery stage, but also on third-party suppliers (such as raw material suppliers), as it is very likely that the contracting parties need support from other links of the industry chain to fulfill their contractual obligations, and once the third-party supply is affected, it is likely to lead to a breach of contract by the contracting parties.

Second, the manner and scope of proof for a *force majeure* event shall be specified in the contract. If the parties agree in a contract that "upon the occurrence of a *force majeure* event claimed by one party, that party shall deliver to the other party a certificate issued by the local chamber of commerce certifying the existence of the event", this will greatly assist in proving whether the event exists and whether it constitutes *force majeure*, thereby reducing a dispute between the parties in this regard. During the pandemic, the China Council for the Promotion of International Trade ("CCPIT") has issued "*force majeure* certificate" many times, which has played a great role in promoting dispute resolution. However, in practice, the parties often have an inaccurate understanding of what is proved in the "*force majeure* certificate". Taking a *force majeure* certificate issued by CCPIT as example, the certificate usually only proves the existence and duration of the control measures claimed by the parties, such as transportation control and shutdown ordered by the government, and does not comment on the performance of the disputed contract. In other words, in addition to the proof provided by a third party that the *force majeure* event does exist, a party must prove the causation between its breach of contract and the *force majeure* event in order to prove that it is indeed entitled to the defense of *force majeure*. However, we have seen, in certain international arbitration cases, that individual foreign chambers of commerce issued the *force majeure* certificates to assess transactions disputed in arbitration. For example, in addition to proving the fact that the local railway transport capacity was obstructed, the *force majeure* certificate also mentioned that "the seller has applied to the railway authorities for wagons and

was rejected in a certain month and year, so the party's failure to perform the contract is caused by *force majeure* and therefore it can be exempted from liability". Such a "*Force Majeure* Certificate" is clearly overreaching because the Chamber of Commerce, as a third party, should only have the function of proving the existence of an objective fact and should not (and is not capable to) give a conclusive legal opinion on the causation between a *force majeure* event and the breach in a specific case. The actual situation in this arbitration case is that the seller is able to take remedial measures to complete the delivery according to the contract, and it obviously does not fall under the circumstances of inability to perform due to *force majeure*. Therefore, the parties should avoid using the phrasing such as "to prove the existence of *force majeure*, the *force majeure* certificate shall be the final conclusion", so as to avoid being deemed as the parties authorizing the issuer of the *force majeure* certificate to reach a final conclusion on "whether a party's breach of contract can be exempted from liability due to *force majeure*" and getting into unnecessary trouble.

In addition, a specific notice period should be stipulated in a contract for the obligation of notifying after the occurrence of *force majeure* (rather than just a "timely notice"), so that the non-breaching party is aware of the occurrence of force majeure in time and promptly remedy and stop the losses, so as to avoid the dispute afterwards about how long the notice is "timely".

The International Chamber of Commerce (ICC) issued in 2020 an updated model of *force majeure* and hardship clauses which practitioners in international trade may refer to when drafting contracts containing *force majeure* clauses.[30] ICC's model *force majeure* clauses suggest including wordings such as:

30 International Chamber of Commerce, ICC Force Majeure and Hardship Clauses, March 2020, https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf.

"'Force Majeure' means the occurrence of an event or circumstance ("Force Majeure Event") that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment ("the Affected Party") proves:

a) that such impediment is beyond its reasonable control; and

b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and

c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party."

In these model clauses, ICC also lists a number of events that can amount to *force majeure*, such as war (whether declared or not), kidnapping, invasion, acts of adversaries, large-scale military action, civil war, riot, rebellion and revolution, military mutiny and power struggle, insurrection, acts of terrorism, sabotage and piracy, currency and trade restrictions, embargos, sanctions, legal or illegal acts of government, governmental orders, expropriation, compulsory confiscation, requisition, nationalization, pestilence, pandemics, natural disasters or extreme natural events, explosions, fires, equipment destruction, transportation failure, communication failure, information system failure or energy supply failure, general labor problems such as labor boycotts, strikes, lockouts, slowdowns, the occupation of factories and premises of business, etc.

In addition to the general provisions of *force majeure* and its extensions, the model clauses also provide for non-performance of a third party, notice of breach due to *force majeure*, consequences of *force majeure*, temporary hindered performance of contract, unreal obligations, termination of contract and unjust enrichment, etc. It can be said

that the model clauses are fairly complete, strike a good balance between the differences in various legal systems, and serve as an important reference for international commercial transactions.

2. Response to *force majeure* risk

Crisis management is a necessary ability of a mature enterprise. At present, the global pandemic has not ended. Although the pandemic in China has been contained on the whole, there have been small flareups in some regions. *Force majeure* may still occur and hinder the performance of a contract after the contract are entered into and when the parties begin to perform the contract. Therefore, enterprises should improve their coping capacity after the occurrence of *force majeure* risk, including the following:

• First, when a *force majeure* event occurs, the first and most important step is to notify the other contracting parties immediately of the occurrence, current impact and possible subsequent impacts on the transactions or performance of the contract, so as to fulfill the obligation of timely notification required under the contract and law, and to buy time for both parties to modify and remedy the contract. At this point of time, the legal affairs department of the enterprise should cooperate with the commerce authorities to draft and review the contents of the notice and send it to the other party in a timely manner.

• Second, after the occurrence of a *force majeure* event, the enterprise concerned should carefully collect and preserve the relevant evidence as comprehensively as possible, including evidence of the occurrence of the *force majeure* event, evidence of the impediment to the performance of the contract, evidence of the *force majeure* notification which has been sent to the other party, etc. As discussed earlier, chambers of commerce, including CCPIT, may issue *force majeure* certificates. However, such certificates usually do not comment on the specific facts that the enterprise is unable to perform the

contract, as well as the causation between the non-performance of the contract and the *force majeure* event. Enterprises still need more and more sufficient factual evidence to prove the causation.

At the same time, enterprises should actively seek contractual remedies and discuss with the counterparty on possible remedies, striving to save the transaction, so as not to be deemed as "the contract can be actually remedied, so the defense of *force majeure* claimed by the party cannot be established" in the ensuing dispute proceedings.

III. IMPACT OF THE COVID-19 PANDEMIC ON INTERNATIONAL COMMERCIAL ARBITRATION PROCEDURES

A. New Changes in Arbitration Rules of Commercial Arbitration Institutions

1. Changes in arbitration rules of international commercial arbitration institutions

In 2020, the pandemic posed an unprecedented challenge to the traditional dispute resolution mechanism. In response to the procedural and legal issues arising from the COVID-19 pandemic, major arbitration institutions have also revised their arbitration rules accordingly. Overseas arbitration institutions especially ICC and LCIA have revised their arbitration rules in 2021 and 2020, respectively. The major revisions include online case filing procedures, evidence storage and presentation procedures, remote hearing procedures and electronic service procedures. As a matter of fact, prior to the outbreak of the COVID-19 pandemic, technologies such as Internet remote connectivity and artificial intelligence were already used in international commercial arbitration proceedings. In the face of the impact of the traffic restrictions or the

suspension of offline hearings brought by the pandemic, these new technologies have also been continuously developed, and new trends have emerged in the procedural rules of arbitration proceedings.

Taking ICC as an example, the 2017 edition of the *ICC Arbitration Rules* requires that a hard copy of all documents must be served on all parties under any circumstances. After the outbreak of the pandemic, the 2021 edition of the *ICC Arbitration Rules* clearly stipulates that service of notices and documents can be carried out by email, and only requires the parties to "send" the written pleadings (including the Notice of Arbitration, the Statement of Response to Arbitration and the Request for Emergency Arbitration) and written communication to the other parties, arbitrators, and the secretariat. Moreover, where there is no special agreement or requirement between the parties, one party only needs to complete the service by email or other means and needs not mail paper documents offline. In terms of the manner of hearing, Article 26 of the 2021 edition of the *ICC Arbitration Rules* also clearly stipulates that the arbitral tribunal may, after consultations of the parties, decide to hold hearings remotely by means of information technology such as videoconference, which explicitly grants the tribunal more discretion to determine the manner of hearing.

The *LCIA Arbitration Rules* was also amended in 2020 to adjust rules in response to the pandemic. For example, pursuant to Article 19.2 of the revised *LCIA Arbitration Rules*, arbitral tribunals are now given greater discretion to independently determine how to hold hearings, and hearings can be held remotely with participants in one or more locations via teleconference, videoconference, or the use of other communications technologies.

2. Changes in arbitration rules of domestic commercial arbitration institutions

While the pandemic is posing severe challenges to international commercial arbitration, China's commercial arbitration institutions are also actively formulating and implementing countermeasures. Domestic arbitration institutions, such as CIETAC and the Beijing Arbitration Commission/Beijing International Arbitration Center, co-signed the "Arbitration and COVID-19" joint statement (the "Joint Statement") together with 13 major international arbitration institutions and organizations including the International Center for Settlement of Investment Disputes of the World Bank, the International Center for Dispute Resolution of the American Arbitration Association, the German Arbitration Association, the Vienna International Arbitration Center, the London Court of International Arbitration, the International Court of Arbitration of the International Chamber of Commerce, and the International Federation of Commercial Arbitration Institutions, to actively participate in international cooperation in the face of the pandemic, jointly promote fair and efficient dispute resolution in international arbitration, and create a favorable international legal environment for China to stabilize foreign trade and foreign investment. The Joint Statement calls for collaboration of major international arbitration institutions to jointly address the impact of the pandemic, to advocate greater unity among various arbitration institutions in this special period, to build a platform for cooperation in pandemic prevention and control for international dispute resolution institutions, and to explore fair and efficient arbitration and hearing methods under the pandemic. The Joint Statement will promote the development and change of a diversified dispute resolution mechanism and case hearing mode for international commercial affairs in the context of normalized pandemic prevention and control.

Meanwhile, in the early stage of the pandemic outbreak in China, due to control measures that paralyzed on-site arbitration and other work, CIETAC promulgated

the *Guidelines for Actively and Steadily Advancing Arbitration Procedures During the COVID-19 Pandemic (for Trial Implementation)*. The Guidelines put forward several measures and solutions in terms of online case filing, electronic service of documents, online hearing procedures, written hearing, authentication, online mediation, arbitral awards, etc., which help CIETAC to better respond to the challenges brought by the pandemic. Specifically, parties to arbitration cases during the pandemic may submit their arbitration applications through CIETAC's online case-filing platform, and all documents served in the arbitration activities are sent by email. The arbitral tribunal may make flexible arrangements for the arbitration proceedings by sending procedural orders to the parties in accordance with the CIETAC Arbitration Rules, hear an arbitration case under either the summary procedure or the ordinary procedure in writing, and hold hearings or mediate online in accordance with the *CIETAC Rules on Video Hearing (for Trial Implementation)*. Other well-known domestic arbitration institutions, such as the Beijing Arbitration Commission and the Shenzhen Arbitration Commission, have promulgated the *Guidelines of Beijing Arbitration Commission/Beijing International Arbitration Center on Online Hearing (for Trial Implementation)* and the *Warm Reminder of Shenzhen Court of International Arbitration on Arbitration Work and Relevant Issues during the Pandemic Prevention and Control Period* respectively.

In addition, the Shenzhen Court of International Arbitration ("SCIA") is at the forefront of practice in coping with the impact of the pandemic and adopting flexible mechanisms for the calculation and collection of arbitration fees. In February 2020, SCIA issued the *Special Decision on Jointly Responding to the COVID-19 Pandemic and Reducing/Exempting Arbitration Fees*, which stipulates that:

• "for eligible domestic cases: the case acceptance fee is exempted; the case handling fee is halved, that is, the case handling fee is charged, as arbitration fees, at the rate of 50%

specified in the applicable SCIA Arbitration Rules", and

• "for eligible international cases, foreign-related cases and cases involving Hong Kong, Macao or Taiwan: the case filing fee is exempted; the arbitration fee is halved, that is, the arbitration fee is charged at the rate of 50% specified in the applicable SCIA Arbitration Rules."

Substantial reduction and exemption of arbitration fees are conducive to reducing the impact of the pandemic on arbitration procedures and the rights of the parties. In the critical moment of pandemic prevention and control, it not only ensures the orderly flow of arbitration procedures and protects the parties' arbitration rights, but also effectively reduces the cost burden of enterprises in dispute resolution, thus maintaining a stable, orderly, and fair business environment. In addition, reduction of arbitration costs also takes into account the facts that the arbitral tribunal can only hold hearings through online procedures due to pandemic prevention and control measures, that videoconference does have some inconvenience compared with traditional on-site hearings, and that the parties may worry about the confidentiality and impartiality of online arbitration. Therefore, the fee reduction and exemption measures issued by SCIA are also a means to encourage the parties to participate in online arbitration, in order to promote the progress and improvement of online arbitration activities.

B. Remote Hearings in the Zoom Era

Remote hearings, also known as online hearings, are more widely used in international commercial arbitration to cope with the impact of the pandemic following its breakout. Remote hearings are arbitration hearings conducted through the use of communications technologies to establish synchronized connection between multiple parties located in

different locations.[31] Communication technologies that can meet the needs of remote hearings include videoconference, teleconference, and remote presence. Currently, videoconference is the most commonly used method in international commercial arbitration proceedings, while the most commonly used software for videoconference is Zoom and Microsoft Teams.

1. Hearing preparation and procedural orders

Remote hearings are quite different from traditional hearings. In a traditional on-site hearing, all matters relating to the hearing will be properly arranged by the arbitration institution and the secretary of the tribunal; the parties, their attorneys and other parties participating in the arbitration are required only to appear on time to participate in the arbitration. However, a remote hearing requires simultaneous preparation by the arbitrators, the parties, attorneys, witnesses, interpreters, shorthand and other parties to restore the on-site hearing in a synchronized manner. This imposes high requirements on the quality of network connection, the confidentiality and impartiality of the arbitration, and the efficiency of the hearing.

Compared with the traditional offline hearings, online hearings place higher requirements on all parties involved in the cases, including arbitral tribunals and hearing participants. In international commercial arbitration, because the arbitration process is more party-oriented, the attorneys representing the parties play a greater role in the direction of the arbitration process, and thus need to take the lead in preparing for the online or remote trial. Generally, the parties or their attorneys need to first apply for online hearings to the arbitral tribunals. Some arbitration institutions grant the arbitral

31 Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework", in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2020, Vol. 37 Issue 4), pp.407–448.

tribunals the power to decide on the remote hearings model. For example, following the outbreak of the pandemic, ICC promulgated the *ICC Guidelines on Possible Measures to Mitigate the Impact of the COVID-19 Pandemic*,[32] which states that the arbitral tribunal may adopt the remote hearing model if it deems necessary. If a party applies for remote hearings or the arbitral tribunal decides to adopt remote hearings but the other parties disagree, such parties may raise their objections to the arbitral tribunal, and the arbitral tribunal will decide based on the merits of the case and the reasons of the parties. In fact, in complex international commercial arbitration cases or cases with a large amount of subject matter, it is likely that the parties will submit several rounds of opinions to the arbitral tribunal to argue whether to adopt the remote hearing model.

After deciding to adopt the remote hearing model, a pre-trial conference should be held on the specific arrangements of the remote hearing. The pre-trial conference can be conducted by video conference. Although scheduling of hearings through pre-trial conferences is common in international arbitrations (especially in arbitration cases in which a jurisdiction other than mainland China is the seat of arbitration), remote hearings do require more advance scheduling than on-site hearings. The purpose of the pre-trial conference is to coordinate preparations and schedules. As a general rule, the pre-trial conference includes the following:

• First, the specific hearing schedule, including the date of each hearing, the specific start and end time, the break time, etc. Since participants in remote hearings are often located in different time zones, it is necessary to schedule the hearing at a time convenient to all parties. If it is impossible to coordinate, participants in the hearing, such as interpreters, witnesses, and attorneys of the same party, can gather in the same place to participate in

32 "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic", https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/. Accessed 2 April 2021.

the trial together.

• Second, the arrangements for cross-examination of witnesses. Witnesses in international arbitration are divided into factual witnesses and expert witnesses, and attorneys for the parties will cross-examine witnesses during the hearing. At the pre-trial conference, the sequence and time of cross-examination of witnesses and the location of witnesses should be determined. Since there is a risk of network delay in online hearings, a certain amount of flexible time should be set aside for cross-examination.

• Third, the time of submission of the hearing file. The content of the hearing file usually includes all the written documents produced during the arbitration proceedings. During the hearing, especially during the cross-examination of witnesses, the hearing file can help the arbitral tribunal and attorneys to access the relevant documents and evidence more easily. With the popularization of online hearings, electronic files have gradually replaced paper files as the mainstream trend.

• Fourth, the determination of trial support staff. Online hearings often require interpreters, trial stenographers, etc., and even professional services are needed to assist in the production of electronic files. These participants are generally confirmed at the pretrial conference and will participate in the videoconference during remote hearings.

In arbitration proceedings, in order to ensure the smooth conduct of remote hearings, arbitral tribunals generally investigate the issues in dispute at the time before the hearings, and allow the parties to express their views as fully as possible in order to reduce the pressure of remote hearings. Therefore, arbitral tribunals may issue a procedural order to adjust the relevant proceedings or require the parties to present their views or submit evidence on the relevant issues.

2. Oral presentation and cross-examination of witnesses

After a remote hearing begins, the arbitral tribunal will allow attorneys on both sides to present their views in a pre-agreed time and order. The ability of attorneys to make oral presentation will be important. In a traditional live hearing, the attorneys' oral expression, body language, and written material or evidence will all be part of oral presentations and may have an influence on the arbitral tribunal. However, in a remote hearing, the arbitral tribunal will only see computer screens and even small video windows of both parties and attorneys and witnesses. Therefore, attorneys should pay attention to the following points in their oral presentations:

First, when the arbitral tribunal watches the presentation of the opposing attorney through the video window, it is less vivid than the traditional on-site session. This will place higher requirements on attorneys' oral presentation to make up for the inconvenience that arbitrators are "unable to see in person". In particular, attorneys will have difficulty making eye contact with the arbitral tribunal and will not be able to "look into the eyes of the arbitrator and state the opinions", which will undoubtedly reduce the effectiveness of such presentations. Therefore, when making oral presentations, attorneys shall pay more attention to their oral expressions, use a louder volume, and avoid reading the entire speech. In a traditional live hearing, reading the entire text will discourage the arbitrators' interest; it is especially so in a remote hearing. Separated by two screens, in the face of complex cases and a wide range of written materials, the arbitrators are more willing to listen to the attorney explaining, taut with emotion, the original facts of the matter, including legal analysis and conclusions. If the attorney just reads the manuscript word by word, he is likely unable to focus on what the arbitrators consider to be the difficult points which determine the final outcome of the case. Moreover, reading the manuscript is less convincing for the arbitrators than speaking off-script. Attorneys can

prepare a list of key points of the speeches that can be easily checked during off-script oral presentations to prevent illogical statements or digressions. Taking a step back, if attorneys have to use a manuscript, for example, to quote a document verbally from the original text, they should make sure that the document is placed on the screen where the camera used for the videoconference is located. Otherwise, if they need to look at the other screens when quoting, this may give the arbitrators a bad impression and the arbitrators may even doubt whether the attorneys have used other auxiliary tools that do not comply with confidentiality requirements. If multiple screens are filed for record with the arbitral tribunal in advance, it is okay to use them at the same time. Whether or not attorneys use a manuscript, they should look at the camera as often as possible when speaking and maintain eye contact with the arbitrators.

Second, when oral presentations are to be delivered in a remote hearing, attorneys shall try to speak at a slower pace and articulate the sentences clear. Since the network connection may be delayed, it is very likely that the arbitrators will miss the key points of what is being said if the attorneys express themselves too quickly; moreover, the arbitrators may ask questions about the content of their oral presentations, so it is best to leave a gap in their presentations so that the arbitrators can follow up and ask questions, or they can take initiative to ask if the arbitrators have any questions about their presentations.

Third, Zoom, Microsoft Teams and other videoconference software have the function of screen sharing, and remote hearings can be much more efficient if attorneys share outlines or key points of their speeches to the arbitral tribunal from the screen during their oral presentations. Making PowerPoint ("PPT") presentations and sharing is also a better approach; however, if the PPT slides contain only the key points of the speech, it is better to share the screen to present evidence. Otherwise, if attorneys need to switch

the screens to present the evidence during their oral presentations, the effectiveness of the speech will be reduced instead; in this case, it is better not to use PPT slides. It is important to note that, while attorneys may use bullet points or PPT slides during the presentations, they should submit the outline or full content of disputed issues and the statement of opinions to the arbitral tribunal as early as possible before the commencement of remote hearings, so that the arbitral tribunal can make preparation in advance. It is not advisable to show the key points of the presentation to the arbitral tribunal only during a remote hearing.

When presenting the specific evidence in the electronic file to the arbitral tribunal through the function of screen sharing, the parties should also pay special attention because the presentation of evidence in this way is quite different from traditional hearings, for example:

• Avoid inadvertent screen-sharing of materials which are unrelated to the evidence to be presented (e.g., one's own notes, other internal documents).

• When presenting evidence, one should first state which page of the case file the evidence is presented. When necessary, software tools such as highlight should be used to highlight relevant contents of the evidence so as to facilitate the reading of the arbitral tribunal.

• When presenting evidence, if one is to move on to the next page or scroll down a page, he should do so slowly and verbally explain to the arbitral tribunal, such as "I will now turn to page X", "We are still on the same page, and now I will scroll down the page", so that the arbitral tribunal can read it clearly.

• When presenting evidence, there should be no unnecessary cursor movements, so as

not to interfere with the arbitral tribunal.

• When presenting evidence, although cursor can help point out the content of a page, the parties should still say out the process of showing the evidence so that it can be accurately recorded in the transcript. For example, when the party is using the cursor to demonstrate the content of multiple places on the same page, they may say: "The second line of this page shows XXX, while the tenth line of this page shows XXX", instead of "This place shows XXX, and that place shows XXX". The reason is that while the arbitrator can follow the cursor movements to see the content of the evidence presented by the party during the hearing, the cursor movements are not able to be recorded in the transcript, and the arbitrators when reading the transcript after the hearing may have difficulty recalling exactly which part of the evidence the party was presented. If the evidence to be presented involves complex content such as circuit diagrams, there is even more necessary to clearly demonstrate the presentation process.

Fourth, for cross-examination of witnesses, attorneys should train witnesses before a hearing to help them adapted to the requirements of online hearing. For cross-examination of witnesses at a remote hearing, on the one hand, attorneys should ensure the stability of their witnesses' network connectivity and the reliability of the hearing environment; on the other hand, they should question the witnesses of the opposing party as clearly as possible, and should not speak too fast or too quietly, which may leave a negative impression on the arbitrators due to network delays.

C. Legal Framework for Remote Hearings

Although remote hearings have become the mainstream method of hearings during the pandemic, whether remote hearings, instead of on-site hearings, comply with the laws and regulations of the seat of arbitration and meet the requirements of procedural

legitimacy is still an issue that has been discussed and even debated in the industry. The legitimacy of remote hearings mainly depends on the arbitration laws and regulations of the place where the arbitration institution is located and the arbitration rules of the arbitration institution, as well as the arbitration agreement or arbitration clause reached between the parties. It seems that there is currently no country in the world whose arbitration legal norms explicitly prohibit remote hearings, especially the arbitration legal norms of the place where an arbitration institution is located and the arbitration rules of an arbitration institution. Nevertheless, there are few national arbitration laws and regulations explicitly providing that remote hearings can be regarded as a legal and effective mode of international arbitration.

1. Legality of remote hearings

Few domestic laws explicitly provide for remote hearings and their legality. Even if there are relevant provisions in domestic laws, they do not directly stipulate the legality of remote hearings. Rather, they create the possibility of remote hearings. One can draw the conclusion that remote hearings have legality, through legal interpretation in the process of applying the law.

There are, however, domestic laws that clearly stipulate the legality of remote hearings. A typical example is the *Dutch Code of Civil Procedure*, which provides in Article 1072b(4) that:

"Instead of a personal appearance of a witness, an expert or a party, the arbitral tribunal may determine that the relevant person have direct contact with the arbitral tribunal and, insofar as applicable, with others, by electronic means. The arbitral tribunal shall determine, in consultation with those concerned, which electronic means shall be used to this end and in which manner this shall occur."

Besides domestic laws, most of the arbitration rules of international commercial arbitration institutions recognize the legality of remote hearings. Article 19.2 of the *LCIA Rules* (2020) also provides that:

"…The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)…"

The arbitration rules of other arbitration institutions also contain similar clauses, and these domestic laws and arbitration rules explicitly allow remote hearings. In particular, when the pandemic outbroke, the ICC also amended its arbitration rules and published specific guidelines on measures to deal with the impact of the pandemic, including remote hearing procedures.

In the absence of such provisions on legality under domestic laws, and under the circumstance that there is no clear provisions on the legality of remote hearings in the arbitration rules, a fundamental principle of arbitration may be followed — the right of parties to participate in hearings, and the right of the arbitral tribunal to determine the proceedings.

The right of parties to participate in hearings is a fundamental principle governing arbitral activities. The question is, is it a must for the parties to participate in hearings offline and on site? Some scholars argue that remote hearings do not qualify as "hearings" under certain domestic laws because hearing should have the parties communicate face-to-face and verbally with each other throughout the entire process, exchange documents

or evidence in real time, and examine and cross-examine witnesses or evidence.[33] However, it turns out that remote hearings still meet these criteria. In general, although remote hearings can be conducted in the form of videoconference software, electronic case files and other tools to achieve oral expression, examination and cross-examination, and other procedures, the principle of case-by-case scrutiny should be followed to carefully examine whether all procedures and details satisfy the characteristics of an on-site hearing, and most importantly, whether the parties' right to participate in the hearing is fully respected.

It is worth noting that, on 23 July 2020, the Austrian Supreme Court of Justice issued a ruling on the procedural fairness of a case in which remote hearings were held at the Vienna International Arbitration Center ("VIAC").[34] It is the first case in the world where a national supreme court has addressed on the legality of remote hearings.[35] The arbitration case commenced in 2017 and, while the case was ongoing, the arbitral tribunal scheduled the date of evidentiary hearing at 10:00am CEST on 15 April 2020. Due to the outbreak of the COVID-19 pandemic, the parties discussed the possibility of remote hearings in March 2020, but the respondent rejected remote hearings and proposed to postpone the on-site hearing. However, the arbitral tribunal decided that the hearing would proceed as scheduled and by way of videoconference. The start time was changed to 3:00pm Vienna time on 15 April 2020, which was 6:00am local time, since the respondent's attorney and witnesses were located in Los Angeles, California, USA.

33 Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework", in Maxi Scherer (ed), Journal of International Arbitration, © Kluwer Law International; Kluwer Law International 2020, Vol. 37 Issue 4, pp.407–448.

34 Case No. 18 ONc 3/20s.https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf

35 Maxi Scherer and Franz Schwarz, "In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns", Kluwer Arbitration Blog, 2020/10/24,http://arbitrationblog.kluwerarbitration.com/.

Immediately after the hearing, the respondent filed a complaint with VIAC, which was rejected subsequently; the respondent then filed a lawsuit with the Austrian Supreme Court of Justice, alleging that the arbitral tribunal had failed to "properly notify it of the date of the hearing, which caused it to fail to make adequate preparations", that "the arbitral tribunal's decision to set the hearing at 3:00pm Vienna time, or 6:00am Los Angeles, prevented the parties from being treated equally", and that "remote hearings violate the arbitral tribunal's obligation to treat the parties equally, because the arbitral tribunal failed to take appropriate measures to prevent undue interference with witnesses — neither the arbitral tribunal nor the parties were able to ascertain which documents the witnesses would have access to at the hearing, whether someone else was present in the witness's room, or whether the witnesses received chat messages when they were cross-examined."

In the end, the Austrian Supreme Court of Justice rejected the respondent's application. The Supreme Court held that, given the outbreak of the pandemic, the arbitral tribunal's choice of remote hearings, rather than postponing the date of the hearing, did not breach its obligation to ensure equal opportunities for the parties to participate in the hearing. The Supreme Court recognized the important role of remote hearings during the outbreak, citing Article 6 of the *European Convention on Human Rights* ("ECHR") which states that parties have the right to obtain effective judicial remedies and to have a fair trial. Moreover, the Supreme Court of Austria held that despite the difference in time zones, online hearings were more efficient than traveling from the USA to Austria to participate in an on-site trial, and that existing Internet technologies, when used properly, can ensure that witnesses testify independently.

The significance of this decision is that the Austrian Supreme Court of Justice once again upheld the arbitral tribunal's unilateral power to decide on the proceedings, including

whether to use remote hearings for online trial. For the issue of equal treatment of the parties to arbitration, the Supreme Court adopted a broader standard — Article 6 of ECHR provides that parties have the right to obtain effective judicial remedies and to have their cases heard. Remote hearings not only ensure that the established hearing arrangements are not affected, but also protect the parties' right to full participation in the trial.

2. Consent of the parties and power of the arbitral tribunal

In general, arbitration activities are carries out on the basis of an arbitration agreement or arbitration clause between the parties. For remote hearings, it is customary for arbitral tribunals to follow the arbitration agreement between the parties, or to ask the parties whether they agree to hold a remote hearing if the arbitration agreement does not expressly provide for remote hearings. However, in practice, the situation is much more complicated.

First of all, if parties expressly agree to prohibit remote hearings and to conduct the hearing on site, can the arbitral tribunal still decide to use remote hearings in its sole discretion? Generally, in practice, if parties object to remote hearings, the arbitral tribunal often decide to postpone the hearing. However, based on the essential feature of the arbitration — contractuality — if parties have explicitly objected to remote hearings and requested on-site hearings in the arbitration agreement, the arbitral tribunal must listen to the parties, respect the arbitration agreement between the parties, and shall not arbitrarily continue to use remote hearings or emergency procedures — shall at least ask in advance and obtain the consent of the parties.

Second, contrary to the above, the parties may explicitly agree to use remote hearings. In

this case, can the arbitral tribunal refuse? In some arbitration cases, it is true that arbitral tribunals refuse to use remote hearings, and the presiding arbitrator may be reluctant to use complex technical techniques. Although in theory, arbitral tribunals should follow the agreement between the parties to hold the hearing, in practice, if the arbitral tribunal refuses to hold a remote hearing, the parties have no better choice other than replacing arbitrators. In addition to arbitrators' reluctance to adapt to complex technical requirements, they may also wish to avoid the risk that the arbitral award will be revoked or unenforceable due to technology reasons. In fact, however, the best way to avoid risk is to strictly comply with the parties' agreement to the extent permitted by the law of the seat of arbitration and the arbitration rules.

Apart from the above two scenarios, the most common scenario is where one party agrees to hold a remote hearing and the other party objects to it — can the arbitral tribunal disregard the party's objection and decide to hold a remote hearing? There are two diametrically opposed views in this regard. Still based on the contractual nature of arbitration, some scholars believe that remote hearings can only take place if both parties agree. The opposite view is that arbitral tribunals have the "absolute" power to decide whether to use remote hearings. Article 25(2) of the *ICC Arbitration Rules* which provides that "the arbitral tribunal shall hear all parties at the request of any party in person at the same time" does not prohibit remote hearings; while the *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic* published in 2020 clearly empowers the arbitral tribunal to decide whether to hold remote hearings. Nevertheless, the arbitral tribunal should examine the case and the parties' background and circumstances, especially all factors relating to the manner of the hearings, with the utmost prudence. Therefore, the parties' opinions should also be taken into account.

D. Revocation of and Refusal to Enforce Awards under Remote Hearing Procedures

Another issue relating to the legality of remote hearings is whether an arbitral award is likely to be set aside or refused for enforcement as a result of any issues raised by the use of remote hearings. Normally, remote hearings procedure is the same as offline ones, in which any award rendered can be challenged or even revoked or refused to be enforced. The domestic law of the seat of arbitration will provides for the circumstances under which an arbitral award can be set aside. For example, Article 58 of China's *Arbitration Law* provides for circumstances in which an arbitral award should be set aside, among which, the third circumstance states that "where the composition of the arbitral tribunal or the arbitral proceedings are in violation of due process."[36] It is clear that under PRC law, an arbitral award can be set aside if the arbitral proceedings are contrary to the law or the arbitral rules. At the international level, the *UNCITRAL Model Law*, which is based on the principle of "due process", is used as a main reference for circumstances in which arbitration proceedings can be revoked for violation of statutory procedures. Article 18 of the *UNCITRAL Model Law* provides that "the parties shall be treated with

36 Article 58 provides:"The parties may apply to the intermediate people's court at the location of the arbitration commission for revocation of the award if they provide evidence to prove that the award involves any of the following circumstances:
(1) there is no arbitration agreement;
(2) The matters of the award fall outside the scope of the arbitration agreement or the arbitration commission has no power to arbitrate;
(3) the composition of the arbitral tribunal or the arbitration procedure violates the legal procedure;
(4) the evidence on which the award is based is falsified;
(5) the other party has concealed evidence that is sufficient to affect the impartiality of the award; or
(6) the arbitrators have, in the arbitration of the case, demanded or accepted bribes, practiced favoritism, or perverted the law in making the award.
The people's court shall, after examination and verification by its collegial panel, revoke the award in any of the circumstances specified in the preceding paragraph.
If the people's court determines that the award is against the social and public interests, it shall rule to revoke the award."

equality and each party shall be given a full opportunity of presenting his case". Article 34 (2)(a)(iv) provides that an arbitral award can be set aside if the arbitral procedure was are inconsistent with the agreement of the parties or, in the absence of such agreement, was not in accordance with the *Model Law*. If the remote hearing procedure during the COVID-19 pandemic violate the due process principle, the relevant arbitration rules or laws and regulations, the parties may therefore apply for setting aside the award.

Although the practice of mainstream international arbitration is very familiar with remote hearings during the pandemic, from the perspective of most parties, remote hearings are unfamiliar to them. According to one survey, 78% of participants in the arbitration have never had a remote hearing before, and another 22% are not very clear if remote hearing procedure is appliable to the trial of substantive legal issues or other issues.[37] The parties' challenge to an arbitral award is usually based on two legal reasons: *first*, their right to participate in the hearing of the case is deprived or impaired; and *second*, they are not treated equally throughout the arbitral process. These further lead to two questions:

• *first*, if one party explicitly objects to the use of remote hearings but the arbitral tribunal decides to hold remote hearings, does it constitute deprivation of the party's right to participate in the hearing of the case?

• *second*, if some technical obstacles arise in the remote hearings, which cause the hearing to be partially obstructed, does it constitute unfair treatment to one of the parties?

With respect to the first question, in practice, whether remote hearings constitute disrespect of the parties' right to fully participate in the hearing will depend on the

37 Erica Stein, "Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings", in Maxi Scherer, Niuscha Bassiri, *et al*. (eds), International Arbitration and the COVID-19 Revolution, (© Kluwer Law International; Kluwer Law International 2020), pp.167–178.

specific circumstances of the case. For instance, in the case of *China National Building Material Investment Co., Ltd v. BNK International LLC*,[38] the Chinese party raised defenses with the United States District Court to challenge recognition and enforcement of the arbitral award on the grounds that the arbitration proceedings were held remotely and failed to protect the right of one of its witnesses to participate in person. The United States District Court held that although the witness could not participate in offline hearings due to health reasons, many measures including remote appearance have been taken to ensure that the witnesses could be heard. However, because the Chinese party insisted on holding a remote hearing and rejected to remote hearing, the witness' failure to attend the hearing was caused by the party itself and not by undue process.

For the second question, if a technical problem arises during the remote hearing, resulting in poor network connectivity or other problems, but the arbitral tribunal still proceeds with the hearing, it will not necessarily lead to the revocation of the arbitral award. Nevertheless, this illustrates the importance of examining connections, conducting pre-trial testing, and developing an emergency plan prior to the remote hearing. This was confirmed in the case of *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd*[39] in 2016. At the arbitral hearing in that case, due to technical problems such as network connectivity, one party's cross-examination of witnesses was interrupted, resulting in the witness giving evidence by Skype software; moreover, at the hearing, due to technical problems, the arbitral tribunal decided to exam and cross exam through use of a telephone with the loudspeaker on, and turning on the video facilities; during the cross-examination of witnesses, witnesses were unable to see and speak on relevant evidentiary material; the interpreter was not qualified and eventually had to be replaced, etc. The Australian court did not, however, set aside the award on the grounds

38 W.D. Tex. 2009, USA District Court, Western District of Texas, Austin Division.

39 [2016] FCA 1131, Federal Court of Australia.

that, despite problems with internet connectivity, witness cross-examination, etc., these problems were finally resolved in the arbitration, witness testimony were also submitted in writing to the arbitral tribunal and the interpreter was eventually replaced; therefore, the final award was not affected by these problems.

In addition to the right to attend hearings, certain domestic arbitration laws and regulations provide for the right of parties to be equally treated. Although Article V of the *New York Convention* which sets forth the grounds on which an arbitral award can be set aside does not specify the right to equal treatment, it is generally considered that such right was included within this clause. Equal treatment to the parties mainly refers to the treatment not less than that received by other parties to the arbitration. For example, if one party's attorney has a technical glitch in cross-examining the opposing party, which results in poor and unclear audio sound effect of the call, the opposing party may claim that it was not treated equally because the opposing party's attorney had no technical glitch in interrogating his own witnesses. However, in practice the so-called fairness is comparative and it cannot guarantee that the conditions for both parties to attend the hearing will be exactly the same. Otherwise, any party may even claim that it is not adapted to the local temperature of the seat of arbitration and thus is placed in an unfavorable situation compared to the opposing party. It is difficult for a party to claim that it has been unfairly treated if there is no apparent difference in treatment in the arbitration proceedings. As discussed above, in the case of *Sino Dragon Trading v. Noble Resources International*, although the Australian Court ultimately held that the remote hearing in that case did not impair the right of a party to participate in hearing, the issue of equal treatment may arise if the network technical problems in the remote hearing result in a party being more negatively affected than the other parties. Moreover, the issue of equal treatment is bound to arise if one party attends the hearing remotely

while the other party attends the hearing on site; but the reality is that a witness or expert from one party is often unable to be present and has to attend a hearing using remote technology. This is not generally considered a violation of a party's right to equal treatment unless the remote hearing renders the witness or expert unable to achieve the purpose or effect of participating in the hearing, or unable to deliver important opinions to the arbitral tribunal.

Lastly, apart from the voidability of arbitral awards discussed above and the possible obstacles to their enforcement, it seems that the pandemic does not have a substantial impact on awards entering the enforcement process, except for the courts' slowdown in the process of recognizing and enforcing arbitral awards due to the pandemic and delays in enforcement due to government control measures.

IV. CONCLUSION — PROSPECT OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE POST-PANDEMIC ERA

The COVID-19 pandemic has brought a serious negative impact on the economic development of countries around the world. Economy of many countries has entered a "retrogressive" state. This severe impact is evident in a number of industries, notably, international trade, construction, aviation, and finance. China has gradually emerged from the shadow of the COVID-19 pandemic. Except for sporadic infections in individual regions, the country has rapidly resumed production and work, maintaining a GDP growth rate of 2.3% in 2020 and 18.3% economic growth in the first quarter of 2021.[40] For China's arbitration institutions, their ability to handle international commercial arbitration cases has been greatly improved. Especially during the pandemic,

40 For details, see official statistics released by the National Bureau of Statistics, https://data.stats.gov.cn/search.htm?s=GDP. Accessed 23 April 2021.

arbitration institutions such as CIETAC, the Beijing Arbitration Commission, and the Shenzhen Arbitration Commission have quickly introduced a series of measures to ensure the smooth progress of arbitration activities under the pandemic, and established a series of standards for remote hearings.

At the level of substantive law, affected directly or indirectly by the pandemic, many enterprises around the world have breached the contract in the process of performing commercial contracts. Some enterprises hope to invoke *force majeure* or the contract frustration to defend against the liability for breach of contract. In international commercial arbitration, the arbitral tribunal will first examine the relevant issues in accordance with the terms of the contract between the parties. In the absence of a *force majeure* clause in the contract, the arbitral tribunal will further examine the consequences of the parties' acts based on the substantive law applicable to the dispute. Moreover, even if the parties have proved that the *force majeure* event itself satisfies the three requirements (ie., unforeseeable, unavoidable and insurmountable), the parties still need to prove the causation between the *force majeure* and the breach, whether they have timely notified the other party of the *force majeure* event, and whether they have attempted to make remedy before they are truly exempted from the liability for breach of contract. As the current epidemic has not yet ended and the performance of the contract is likely to be affected by the occurrence of control measures at any time in various countries, there is no doubt that this imposes a higher requirement on the professional capacity and legal quality of the parties.

In the aspect of arbitration procedure and hearing method, a series of breach of contract and disputes have brought a greater burden to the domestic and international commercial arbitration institutions. To cope with the impact of the pandemic, various commercial arbitration institutions have introduced countermeasures, while remote

hearings and other Internet information technologies have been fully applied. At the same time, remote hearings have also brought room for challenging the arbitration procedure. Questions such as whether the consent of the parties is required as a prerequisite, and how to balance the power of the arbitral tribunal and the rights of the parties, have once again become the focus of discussion. In particular, the Austrian Supreme Court of Justice made the first ruling on remote hearing procedures, which gave a deeper understanding of the procedural rights of the parties under the pandemic.

Nevertheless, it is undeniable that remote hearings are adopted by more and more arbitration institutions, and a series of norms for remote hearings are specified in their arbitration rules; remote hearings are accepted by more arbitration users, and even become the active choice of the parties. With the continuous use of technology, the limitations of current technology on the effectiveness of hearings are more deeply understood. Sociologists call this limitation "Zoom fatigue" — a sense of distance and a sense of limited expression when people use Zoom software.[41] This limitation stems from the way people process information through video channels. In videoconference, we face cameras and screens. In real life, we face people in person. These two modes of receiving information are very different, and people gradually become tired of facing the screen. In the post-pandemic era, there is a strong need to address these limitations, and the need as well as the expansion thereof will undoubtedly lead to further advances in technology and more targeted services for cross-border dispute resolution procedure, especially in international commercial arbitration activities. In the future, advances in remote hearing technology may even create a feeling of being in the same room for both the arbitral tribunal and the parties — no longer constrained by technical issues such as screen size and network latency. For complex cases involving multiple parties, the parties (and their

41 Ema Vidak-Gojkovic and Michael McIlwrath, "Chapter 11: The COVID-19 Revolution: The Future of International Arbitration Is Not Over Yet", in Maxi Scherer, Niuscha Bassiri, *et al.* (eds), International Arbitration and the COVID- 19 Revolution, (© Kluwer Law International; Kluwer Law International 2020), pp.191–202.

attorneys) may have oral statements, witness cross-examination, expert opinions, and evidence cross-examination, etc., with greater ease.

In terms of technology, it should also be noted that the use of tools such as electronic signatures, electronic service, and electronic dossiers is expanding. Along with the rapid increase in the use of remote hearings, the market for providing ancillary services for remote hearings (e.g., the market for providing remote hearing platforms, electronic dossiers, and online stenography of hearings) is also flourishing.

In terms of the arbitration model, due to the imperfect technology of remote hearings at the moment, there may be technical gaps in the trial process or the entire arbitration procedure. Therefore, it is important for the arbitral tribunal to speed up the proceedings while the technology is stable so as to avoid the risk of jeopardizing the validity of the arbitration. In the future, the arbitral tribunal may pay more attention to pre-trial conferences and focus more on determining the focus of disputes. For more complex cases, the arbitral tribunal may conduct staged hearings and prepare partial awards more frequently. Due to the inconvenience of submitting or accessing materials at remote hearings, the arbitral tribunal may seek alternative methods or use other new technologies for the submission and examination of materials. The arbitral tribunal is likely to be more organized and systematic in the examination of witnesses and issuance of expert opinions, and more frequent to use summary procedures and emergency procedures, etc.[42]

Based on the above discussion on international commercial arbitration under the pandemic situation, we can clearly find that it is impractical to seek a unified and

42 Ema Vidak-Gojkovic and Michael McIlwrath, "Chapter 11: The COVID-19 Revolution: The Future of International Arbitration Is Not Over Yet", in Maxi Scherer, Niuscha Bassiri, *et al.* (eds), International Arbitration and the COVID-19 Revolution, (© Kluwer Law International; Kluwer Law International 2020), pp.191–202.

universal method or path to generalize the impact of the COVID-19 pandemic on international commercial arbitration. Instead, we should consider the circumstances encountered in each specific case. On the one hand, we should analyze the substantive legal issues of commercial disputes arising from the pandemic; on the other hand, we should analyze how to ensure that the changes in the arbitration procedures brought about by the pandemic are justified and reasonable. Drawing on the experience of individual cases, we believe that the experience accumulated by the international arbitration community in dealing with the disputes arising from the pandemic, as well as the various measures taken to deal with the impact of the pandemic on arbitration procedures, will become an important page in the history of the continuous development and progress of international commercial arbitration.

Chapter Three

Special Observation on Financial Arbitration Cases

I. OVERVIEW OF FINANCIAL ARBITRATION CASES IN 2020-2021

A. Financial Disputes from the Perspective of Commercial Arbitration

1. Understanding and cognition of "financial arbitration cases"

Financial arbitration cases refer to cases which are financial in nature and are handled by means of arbitration. In general, the financial nature is reflected in two aspects: subject and transaction. This Chapter defines financial subjects in a broad manner, that is financial subjects include licensed financial institutions, "7 + 4" financial institutions, and private equity fund managers ("7 + 4" financial institutions and private equity fund managers are collectively referred to as "Quasi-Financial Institutions"). To be specific, "7 + 4" financial institutions refer to small loan companies, financial guarantee companies, regional equity markets, pawnshops, financial leasing companies, commercial factoring companies, local asset management companies, investment companies, farmers' specialized cooperatives, social crowdfunding institutions, and various local exchanges.

According to Paragraph 2, Article 2 of the *Financial Disputes Arbitration Rules of the China International Economic and Trade Arbitration Commission* (2015 Edition) (the "CIETAC Financial Disputes Arbitration Rules"), financial transactions refer

to "transactions arising between financial institutions *inter se*, or arising between financial institutions and other natural or legal persons in the currency, capital, foreign exchange, gold and insurance markets that relate to financing in both domestic and foreign currencies, and the assignment and sale of financial instruments and documents denominated in both domestic and foreign currencies, including but not limited to: loans; deposit certificates; guarantees; letters of credit; negotiable instruments; fund transactions and fund trusts; bonds; collection and remittance of foreign currencies; factoring; reimbursement agreements between banks; and securities and futures."

An arbitration case that falls under any of the following circumstances may be classified as a financial arbitration case: (a) where the financial subject is one of the parties to the arbitration; and (b) where the dispute arises out of the execution and performance of a financial transaction contract, such as banking, trusts, securities, funds, insurance, asset management, etc.

2. Quantitative analysis of financial arbitration cases in 2020-2021

Regarding the number and overall characteristics of financial arbitration cases, we take the China International Economic and Trade Arbitration Commission ("CIETAC") as an example in our analysis. In 2020, the total number of cases accepted by CIETAC was 3,615, of which 217 were financial arbitration cases for which arbitral awards had been rendered. Therein, 118 awards were rendered by CIETAC and 99 were by branches of CIETAC, accounting for about 6% of all cases accepted by CIETAC in the whole year.

In the aforementioned financial arbitration cases at CIETAC, the top three types of institutions in terms of the number of disputes are fund managers, fund custodians, and securities companies; and the top three types of disputes involving contracts are fund

contract disputes, bond contract disputes, and loan contract disputes. There may be three reasons for the large number of these three types of financial cases:

• First, these three types of financial services are all conventional financial services, with a relatively large business volume and a relatively large number of disputed cases.

• Second, these three types of financial services are relatively mature, and the contractual terms and conditions are relatively clear and standardized. In general, the parties generally have little differences on disputes, and it is in the interests of all parties to quickly resolve disputes through arbitration procedures, avoid unnecessary litigation, and improve the efficiency of dispute resolution.

• Third, due to the large business volume of these three types of financial services, the transmission effect is likely to be triggered once a dispute arises. As litigation settlement cannot avoid the impact on the credibility and the image of the parties after the publication of judgment documents, the parties are inclined to choose arbitration.

In terms of the amount of the subject matter in dispute, cases in which the amount of the subject matter in dispute is more than RMB100 million account for about 10% of the total financial arbitration cases; and the majority of these cases are bond contract disputes, the parties to which mainly involve banks and rural credit cooperatives (as the Claimant) and securities companies (as the Respondent). Normally, the focus of dispute in such cases is that the Claimant (a bank) and the Respondent (a securities company) carry out bond reverse repurchase business, for which it is agreed that on the bond maturity settlement date, both parties shall conduct reverse transactions, that is, the Respondent shall perform the settlement obligation upon maturity and pay the due settlement amount (i.e., repays the principal and interest for financing) to the Claimant,

and that the Claimant shall sell back the corresponding bonds to the Respondent (i.e., the respondent repurchase). It follows that however the Respondent fails to perform the repurchase obligation upon maturity. In such cases, the Master Agreement based on which the Claimant applies for arbitration is the standard agreement issued by China's National Association of Financial Market Institutional Investors. The members of the inter-bank bond market must sign the Master Agreement before entering into pledge-style repurchase transactions and/or buyout repurchase transactions in the inter-bank bond market. As stipulated in the Master Agreement, the mode of dispute settlement is arbitration at CIETAC, and the seat of arbitration is Beijing. The transaction amount in the inter-bank market is relatively large, while the amount of subject matter in other financial arbitration cases such as disputes over fund contracts and asset management contracts is relatively small, which results in bond contract disputes accounting for a relatively large proportion of cases in which the amount of the subject matter is more than RMB100 million.

B. Categorized Characteristics of Financial Arbitration Cases

1. Wide industry coverage with relatively concentrated "category"

Financial arbitration cases basically cover all licensed financial institutions and quasi financial institutions and involve a wide range of industries, including banking, trust, securities, funds, insurance, asset management, etc. Accordingly, the types of institutions with relatively frequent occurrence of disputes are more often seen in the corresponding "category" of disputes. For example, financial arbitration cases often involve fund disputes. Most of the claimants in fund cases are investors, and most of the respondents are fund managers and custodians. Since the investors are unable to recover the principal and investment income as agreed upon in the contract, arbitration proceedings are

initiated against fund managers or custodians. The focus of the disputes in such cases are:

• whether the fund manager concerned has fulfilled the obligation of managing the suitability of investors,

• whether there are false records and misleading statements in the fund manager's promotion of the fund,

• whether the fund operation complies with the terms of the contract,

• whether the fund custodian has fulfilled its due diligence obligation, and

• whether the information disclosure of the fund complies with the terms of the contract, etc.

In arbitration cases, the defenses of the respondents are similar and tend to be stereotyped. Most of the defenses are that the fund manager has managed the fund investment in accordance with the contract and does not violate the regulations or breach the contract, and there is no causation between the losses of the investors and the act of the fund manager, and the respondent should not assume joint and several liabilities.

2. A number of institutions are involved in relatively concentrated "similar cases"

Financial arbitration cases involve a large number of licensed institutions or quasi financial institutions; it often happens that the same institution is arbitrated in multiple cases at the same time. For example, the same counterparty of a pledge-style bond repurchase transaction are involved in multiple cases, or multiple investors initiate arbitration proceedings against the same PE fund manager or custodian. The possible

reasons are as follows:

(1) a single financial institution or even a single product or contract involves a large number of investors, while contracts involving the same institution usually agree on the same arbitration institution; and

(2) financial risks have a transmission effect. If large-scale defaults occur with respect to a product or contract of a financial institution, the performance capacity and credit of the institution will be affected, and the continued performance of other products or contracts of the financial institution will be adversely affected, resulting in risk transmission.

3. The amount of subject matter of a single case is scattered but the cumulative amount of all cases is relatively large

The amount of subject matter in financial arbitration cases are small and scattered, that is, the subject matter of a single case may not involve a big sum but the cumulative amount in the disputes of the same nature or the disputes against the same subject entity may be huge. Taking the most controversial fund contract disputes as an example, the amount of the subject matter of arbitration initiated by investors is approximately RMB1 to 3 million which is small compared with the amount of several hundred million or more than one billion in bond contract disputes. However, due to the large number of cases of the same type, the cumulative amount of the same subject matter will be very large if all these cases are taken into account.

To sum up, financial disputes have the following characteristics different from other types of disputes:

• First, modern finance usually relies on accelerating the flow of capital and financing to make profits and expand business channels. The time cost, capital cost, and opportunity cost in financial industry are much higher than that in other industries. Protracted and pending disputes sometimes have a greater impact on financial institutions than a failed dispute, so financial dispute resolution requires much more time and efficiency than other types of disputes.

• Second, with the development of information technology and the marketization and internationalization of financial industry, the technical and legal issues involved in financial disputes are becoming more and more complex and more professional, which places a very high requirements for the professional quality of dispute resolution personnel.

• Third, financial disputes often involve many aspects of interests, and once a dispute occurs, it will have a greater risk transmission effect. The parties are generally reluctant to disclose the disputes to the public in consideration of long-term interests and reputation, and they require higher confidentiality of financial dispute resolution.

In light of the aforesaid characteristics of financial disputes, compared with the traditional dispute resolution method such as litigation, financial arbitration is independent, speedy, professional, confidential, flexible, and economical, etc., can better reflect the autonomy of will of the parties concerned, and has a prominent advantage in resolving financial disputes. The trend of increasing number and amount of subject matter of financial arbitration cases over the years can also prove that the advantages of arbitration procedures in financial dispute resolution have been increasingly recognized by market players.

II. MAIN TYPES OF DISPUTES AND HOT AND DIFFICULT ISSUES IN FINANCIAL ARBITRATION CASES

A. Disputes Involving the "Capital Side" — Issues Concerning the Liability with Investors as Counterparties

1. Identification of the managers' performance of obligations to review investor suitability and assumption of liability

The *Administrative Measures for the Suitability of Securities and Futures Investors* (the "Administrative Measures") implemented by the China Securities Regulatory Commission ("CSRC") on 1 July 2017 clarified for the first time that fund managers shall comply with the requirements for management of investor suitability, and operators shall bear legal liability for violations of suitability obligations in the sales process. Meanwhile, the *Implementing Guidelines for Fund Fundraising Institutions on the Management of Investor Suitability (for Trial Implementation*) implemented by the Asset Management Association of China ("AMAC") on 1 July 2017 provide detailed rules for the management of investor suitability in the fund sector.

In practice, there have been many unresolved issues, such as how to determine whether a manager has performed the obligation of investor suitability review, whether a manager shall conduct a substantive review or a formal review in respect of investor suitability, etc. In this regard, the *Minutes of the Working Conference on Civil and Commercial Trials for National Courts* (the "Minutes") first clarifies that the suitability obligations refer to the obligations of the seller to understand customers and products and to sell (or provide) suitable products (or services) to suitable financial consumers when recommending and selling high-risk financial products. According to the *Minutes*, suitability obligations

are a series of obligations that the seller must perform in order to achieve the objective of "selling suitable products to suitable investors", which at a minimum include the assessment of product risk level, risk tolerance of investors, and risk warning obligations. According to the *Minutes*, the seller shall bear the burden of proof to prove whether it has performed the suitability obligations and shall provide relevant evidence that it has established risk assessment and management systems for financial products (or services), tested the risk perception, risk preference and risk tolerance of financial consumers, and informed financial consumers of the returns and major risk factors of such products (or services).

In addition, with respect to whether the manager's review of investor suitability shall be conducted in substance or in form, the *Minutes* which provides that:

"if the seller claims that it has fulfilled the obligation to inform the financial consumer on the ground that the financial consumer has handwritten such contents as 'I am clearly aware of the risk of loss of principal' and is unable to provide other relevant evidence, the people's court will not uphold such defense."

and

"if the seller can provide evidence to prove that, based on the financial consumer's previous investment experience, education level and other facts, the financial consumer's independent decision has not been affected by the breach of the suitability obligation, the people's court will support the seller's defense that the investment risk shall be borne by the financial consumer in accordance with the law."

This shows that substantive review is the mainstream judicial opinion, which is also compatible with the principles of "seller due diligence" and "*caveat emptor*".

For example, in one arbitration case, the arbitral tribunal held that, *prima facie*, the respondent has complied with the procedures of investigation on risk tolerance of investors and finds that the claimant was a qualified investor of private equity fund, and the fund subscribed by it was a stable fund product which was not beyond its risk tolerance. However, careful observation of the respondent's subsequent investments has revealed that the claimant was not a suitable investor:

• *First*, the risk-return feature of the fund in this case was described in the Fund Contract as "the fund has the feature of higher return and higher risk; the fund is mainly suitable for a prudent investor who is willing to bear certain risk and pursue higher return". However, according to the common understanding and general knowledge of the industry, the so-called "prudent investor" is not suitable to bear excessive risk and requires the safety of the principal.

• *Second*, in this case the respondent's investment decision-making and investment behavior were not stable. It invested all the fund project properties into the "Y asset management plan", and only invested in the aggressive units, which was a particularly aggressive high-risk investment. It failed to carry out effective risk prevention and control measures, thus very likely to suffer the loss of part or even total principal, which is inconsistent with the description of the so-called suitability for "prudent investors" mentioned in risk-return features of the fund. Therefore, the respondent's subsequent investments did not strictly follow the risk-return features agreed in the Fund Contract, as a result of which, the actual risk-return features of the fund in that case did not match the risk tolerance of the claimant. In fact, the respondent's selling a high-risk fund product to the investor with limited risk tolerance has violated the respondent's obligation to perform suitability review.

To sum up, the Minutes clearly states that "seller due diligence" is the premise of "*caveat emptor*". This means that the fund manager will be liable for losses incurred on the investment if it fails to perform its suitability and notification obligations during the fundraising process. In practice, once a dispute arises, the compliance of the fund manager's fundraising activities is often the focus of controversy. Investors tend to examine such activities of the fund manager under a "magnifying glass" or even "microscope", of which the compliance will be tested almost harshly. In particular, the following contents are the main aspects of the review and consideration of the fund manager's due diligence by the judiciary in the event of a dispute:

• *First*, whether the fund manager takes the initiative to examine the compliance of the distributor's fundraising process. The *Minutes* clearly states that financial consumers may either request the issuers or the sellers of the financial products to assume liability for compensation, or request the issuers and sellers of the financial products to assume joint and several liabilities. If the issuers and sellers request the People's Court to clarify their respective share of liability, the People's Court may, at the same time of ruling that the issuers and sellers shall assume joint and several liabilities to compensate the financial consumers, clarify that the issuers and sellers have the right to recover their respective share of liability for compensation from the responsible party after they have actually assumed the liability for compensation. Therefore, the fund manager will be jointly and severally liable for the violations of the distributor. At this moment, whether the manager can provide evidence to prove that it has taken the initiative to examine the compliance of the distributor's fundraising process is particularly important for determining the share of compensation to be borne by the fund manager.

• *Second*, whether the fund manager has examined the consistency of the promotional

documents, the fund contract, and the actual investment content. In practice, the inconsistency between the fund contract and the actual investment content and the contents of the promotional documents is the main reason for investors to sue the fund manager. Therefore, whether the fund manager strictly and comprehensively examined the consistency of the promotional documents, the fund contract and the actual investment content is one of the elements of the fund manager's responsibility considered in the arbitration. The scope of examination is not limited to the prospectus filed for record, the documents signed by the fund manager, the paper brochures, the project PPT, the website/APP information display page, the email/communication record, etc.

• *Third*, whether the evidence provided by the fund manager is sound. The *Minutes* emphasizes that the fund manager shall provide evidence to prove that it has duly performed all its responsibilities and obligations; otherwise, it shall bear adverse legal consequences. In view of this, the completeness of the fund manager's own archival evidence retention at the fundraising stage is usually one of the elements closely related to the completeness of its evidence.

2. Liability of the manager of asset management products

The manager's post-investment management obligations based on different types of asset management products are mainly stipulated in the contract and can be categorized as the common legal obligation of "entrusted to manage wealth for others" and the legal obligation of "due diligence".

The manager's performance of its post-investment management obligations directly affects the operation of asset management products and may directly lead to the abnormal termination of asset management products. It is an important step for the

manager of asset management products to fulfill its fiduciary obligations, and also a step where the Manager's obligations are most likely to be neglected. In practice, the investors and the manager often disagree with each other in terms of information disclosure obligations, stop-loss obligations, and the validity of credit enhancement guarantees, etc.; the performance of the above obligations may also directly affect the income distribution of asset management products.

(1) Manager's failure to disclose conflicts of interest and material information

In practice, there are still issues that the manager fails to disclose conflicts of interest or material information as agreed in the contract. For example, the manager does not disclose the net value of the product on a regular basis, does not disclose its shares of the investment of all fund assets in the asset management plan of a related party and that it concurrently serves as an investment adviser concurrently for such plan and charges investment advisory fees, etc. Typical cases are analyzed below.

(a) An arbitration case involving fund contract disputes between an institutional investor and the manager

In this case, the Claimant claimed that the Respondent failed to disclose to the Claimant that it had used the capital raised to invest in the junior tranche of the fund structured as partnership, maliciously concealed the truth after the investment, and failed to perform the information disclosure obligation. The Arbitral Tribunal held that the existence of a structured arrangement for the partnership fund in which the raised capital invested is related to the Claimant's significant rights and interests, and the Respondent should have disclosed such arrangement to the Claimant before the Claimant signed the relevant agreement on the investment in the partnership fund. The disclosure of the

structured arrangement by the Respondent to the Claimant after the investment had been materialized does not constitute the fulfillment of due diligence on information disclosure as stipulated in laws, industry normative documents and fund contract. The Respondent failed to perform such information disclosure obligation, and the investment made without the Claimant's knowledge of the structured arrangement of the partnership fund had caused damage to the Claimant's rights and interests; thus, the Respondent should bear the losses suffered by the Claimant.

(b) Business trust disputes in the second instance case involving Peng X et al.

In the case Jing 03 Min Zhong [2018] No. 13862, the Court held that the trust document agreed to notify the beneficiaries by recorded telephone call or facsimile if the early warning line was reached. CITIC Trust Corporation stated that it had engaged an investment adviser to notify the beneficiaries, while the investment adviser stated that he/she had orally notified the beneficiaries, but the Claimants denied receipt of such notice. Although some investors did add enhanced capital after the early warning line was reached, it still cannot prove that the trust company had performed its obligation of notifying all investors in the form stipulated in the contract. Therefore, even if the trust company has performed its obligation of notifying, its form of notification did not comply with the contractual provision. The trust company also failed to provide evidence that it had notified the beneficiaries before 16:30 on the date when the early warning line was reached. Therefore, the trust company's performance of its notification obligation failed to comply with the contractual provision and constituted a breach of contract. Even if the trust company had fulfilled its obligation to publish the trust unit net value on its website, it had no evidence to prove that it had sent written materials of the unit net value disclosure to the trustor and the beneficiaries every month in

accordance with the contract. These acts, though not directly link to the management of trust property, were indirect causes of the losses, and therefore the trust company shall bear all the liability for the losses caused by breach of contract and breach of trustee's obligations.

(2) Manager's failure to fulfill other post-investment management obligations

In addition to the obligation of information disclosure, the manager may also have to assume other responsibilities, such as promptly stopping losses and requiring asset owners to make additional guarantees. The manager may also face the issue of damage compensation if it fails to fulfill other post-investment management obligations. Typical cases in this regard are as follows.

(a) Manager's failure to ensure the continued effectiveness of credit enhancement measures

In a second-instance case *Northeast Securities Co., Ltd. vs. Jilin Dunhua Rural Commercial Bank Co., Ltd.* (Zui Gao Fa Min Zhong [2018] No. 363) involving a contractual dispute, the Court held that the securities company, as the asset manager, released the pledge of the disputed shares without the consent of the client, violating asset manager's good faith, prudence and due diligence and breaching the obligations to protect the safety of the entrusted assets stipulated in the asset management contract. It contradicted the basic professional ethics that should be observed by a professional manager in the capital market, constituting a breach of contract, and shall bear the corresponding liability for breach of contract. In this case, the asset manager's act caused the client to lose the right to be repaid in priority with respect to the 8 million pledged shares; thus, the asset manager shall bear the corresponding liability for compensation within the scope of

value of the shares.

(b) Manager's failure to stop loss in a timely manner

In a second-instance case *Beijing Fengda Asset Management Center (Limited Partnership) vs. Wang XX* ([2018] Jing 03 Min Zhong No. 11785) involving the dispute over the entrusted wealth management contract, the Court held that in the course of actual performance of the contract, when stock fund units reached the early warning line of RMB 0.94 and the stop loss line of RMB 0.9, the fund management company failed to give early warning in a timely manner as agreed in the contract, nor did it carry out the corresponding stop-loss operation. The fund management company's failure to perform its contractual obligations and the manager's duties directly caused the corresponding economic losses to the plaintiff.

(c) Manager's failure to diligently follow up on the status of the underlying assets

In a first-instance case *Chu XX vs. Heng Tai Securities Co., Ltd*. ([2018] No.0102 Min Chu No. 3575), the Court held that the unsuccessful listing of the target company resulted from a major change in the regulatory policies beyond the control of the defendant, and the plaintiff's losses were "inevitable" rather than "possible" losses. Under the circumstances where it could not prove that the defendant has caused losses to the client due to the defendant's violation of laws, regulations, or breaches of contract, the plaintiff's claim could not be established due to lack of factual, legal, regulatory and contractual basis.

(d) Whether there is a causation between the manager's violation of statutory duty or due diligence obligations and the investor's losses

In the second-instance case *Ganzi Rural Credit Union Co., Ltd. vs. Sichan Ke Heng Ming (Group) Co., Ltd.* ([2017] Zui Gao Fa Min Zhong No. 880) involving a contractual dispute, the Supreme People's Court ("SPC") held that the core element to determine whether the manager of assets investment, operation and management, as well as the trustee of the trust agreement in this case, should assume the corresponding civil liability is whether the manager or the trustee had breached the relevant contractual agreement between the parties or the relevant provisions of laws and regulations, and whether there is a breach of contract or negligent conduct for which the parties should be held liable for the civil damages. From the perspective of relevant provisions of laws and regulations, the *Contract Law*, the *Trust Law* and the relevant normative documents of the financial regulatory authority provide for the statutory duty and due diligence obligations of the trustee of the entrustment agreement or trust agreement; even if there is no agreement in the contract between the parties, the trustee shall assume the corresponding civil liability depending on the extent of its fault if it has breached such statutory duty or due diligence obligation and caused losses to the client due to its negligence. The Appellant did not provide evidence to prove the specific circumstances of the loss or prove the negligence of the manager or trustee in the performance of the entrustment contract or the trust contract, nor did it prove the causation between such negligence and the loss caused. Therefore, SPC found no merit in the Appellant's claim that compensation shall be made for the loss caused by the Appellee's breach of its statutory duty.

(e) Dispute over the closing time for short position

In an arbitration case administered by an arbitration commission which concerned a trust investment dispute between an investor and a trust company, the Arbitral Tribunal held that forced liquidation is a risk control measure set up by the securities

and futures market to address the high-return and high-risk attribute of leveraged trading or margin trading. The execution faced the uncertainty of the market at the time, and closing a position too early or too late will both give rise to disputes due to the reverse performance of the liquidation target. Therefore, the execution of forced liquidation shall be based on the agreement of the parties, and it is not advisable to judge the reasonableness of the timing, amount and even the liquidation price based on the performance of the market after the execution. In this case, during the existence of a trust scheme, the forced liquidation executed by the Respondent, as well as the information disclosure and liquidation and distribution obligations performed by the Respondent, complied with the provisions of the Trust Document. Therefore, the arbitration claim of the Claimant should be dismissed.

It can be seen from the above case that, similar to the determination of whether the manager has fully performed its information disclosure obligation, in determining whether the manager's performance of post-investment management responsibilities has breached the contract, the judiciary will take into account the contractual agreement together with the laws, administrative regulations and regulatory rules, and the burden of proof in respect of the causation between the losses suffered by the investor and the manager's breach of its contractual or statutory obligation is mostly borne by the investor.

To sum up, asset management contracts are the basis for the manager to perform its management responsibility. In determining whether the manager has fully performed its obligations, the judiciary often refer to both contractual agreement and the laws, administrative regulations and regulatory rules; the burden of proof in respect of the manager's due diligence and performance of obligations is mostly borne by the manager,

while the burden of proof in respect of the causation between the losses suffered by the investor and the manager's breach of its statutory obligations is mostly borne by the investor.

In determining whether the manager is liable to its partial or complete failure to perform its information disclosure obligation, the manager's liabilities that need to be borne and the proportion of liabilities, the judiciary mainly consider whether there is a causation between the manager's breach of its obligations and the losses suffered by the investor. If the manager's breach of its obligations directly leads to the losses of the investor, or increase the losses of the investor, the manager usually shall bear most or all of the liabilities. As for the calculation standard of losses, the judiciary generally deems that if there is an agreement, such agreement shall prevail.

3. Liability of the custodian of asset management products

(1) Statutory duties of the custodian

Based on the regulatory provisions on various asset management products, the general responsibilities of the custodian are:

(a) Safe custody of fund assets

The custodian shall keep the assets in the custody account safely and ensure that the escrow assets are distinguished and isolated from the inherent assets of the custodian, the manager/trustee, and from other assets entrusted to be managed by the manager/trustee and other property safekept by the custodian.

(b) Supervision over the investment operations of the manager/trustee

The custodian shall review whether the investment instructions of the manager/trustee are in line with the investment scope set forth in the contracts, and transfer the funds accordingly. The custodian may require the manager/trustee to provide investment instructions (if any) and relevant transaction documents, contracts or other valid accounting information to ensure that the custodian has sufficient materials to determine the validity of the instructions.

The review is usually *pro forma*, and is specifically to:

(a) review the *pro forma* validity of the instructions of the manager/trustee, including checking the consistency between the form of chop affixed on the instructions and the reserved seal of authorized personnel, so as to ensure the instructions are indeed given by the manager/trustee;

(b) review the *pro forma* completeness of the essential elements of instructions, including the amount of funds transferred, account information, purpose, etc., so as to ensure the executability of the instructions; and

(c) review whether the investment purpose specified in the instructions is in line with the investment scope set forth in the contracts, and retain relevant supporting materials (such as investment agreement, fee bills, etc.) to prevent misappropriation and misuse of funds by the manager/trustee.

(c) Information disclosure to investors

The custodian shall review and examine the net value of assets under custody, and prepare a custody report in the form as required by the contract; and the manager/trustee or the custodian shall disclose the information to investors.

(d) Reviewing the financial data on the assets under custody calculated by the trustee or the manager

The custodian shall verify and measure the assets, liabilities, and other accounting elements of the assets under custody, and double check the financial data on the assets under custody calculated by the trustee or the manager.

(2) Analysis of causes of the custodian's liability in lawsuits

In most of the cases involving the custodian, the investor as the plaintiff brings lawsuits against both the manager and the custodian at the same time. There are fewer cases where the custodian is the sole defendant. There are many cases where the court/arbitration rules that the custodian does not bear the corresponding liability, while fewer cases where the custodian is held partially or jointly liable. The reasons for the custodian's liability in various cases can be categorized as follows.

(a) Custodian's failure to properly perform its obligation to supervise the manager's fund assets investment operations

In this case, the Fund Custodian had relatively weak risk awareness and poor risk prevention measures and had no knowledge of the fact that the manager has failed to fully perform risk control measures and that the debtor of the asset management products was bankrupt, which was related to the losses suffered by the investors. The judiciary held that the Custodian, as a financial and securities institution approved by the State to provide comprehensive custody services for private investment funds, shall bear the corresponding social responsibility and obligation for stabilizing and purifying the financial market and preventing financial risks. If the custodian of private equity investment funds can enhance risk awareness and strengthen prevention measures, it will

not only reduce or avoid the occurrence of risks, but also meet the expectation of the public. Therefore, based on the Custodian's negligence, the judiciary believes that the Custodian shall bear supplementary compensation liability for 15% of the actual loss of the investor's fund assets.

(b) Insufficient basis for the custodian's refusal to perform it stamping obligation

The scope of duties of the custodian shall be limited to the specific provisions of the relevant laws and regulations as well as the specific provisions of the fund contract and the custodian contract. The custodian, as a party to the contract, is obliged to cooperate in completing the execution of the fund contract. In this case, the Fund Custodian, acting in the interests of the investors, managed the contracts affixed with its bank seal and requested the investors to send back the contracts that have been used, which was reasonable to some extent, but it shall not refuse to perform the obligation of affixing the seal on the ground that the investors have not returned the contract. The judiciary held that the Fund Custodian shall compensate the investors for the losses it suffered to the extent of the custody fee on the ground that there was no sufficient basis for the fund Custodian to perform its obligation of stamping.

(c) Custodian's failure to properly perform its obligation of information disclosure

In accordance with Article 96 of the *Law of the People's Republic of China on Securities Investment Funds*, Article 24 of the *Provisional Measures on Supervision and Administration of Private Investment Funds* and the relevant clauses on information disclosure in the fund contract, the instructions on transfer of fund money and the bank records of the custodian for executing the instructions are the contents of the management, application, disposal and income and expenditure of the fund money that the investors

are entitled to know. These are also the information on operation of the fund asset and information relating to the fund custody business that shall be disclosed to the investors by the manager and the custodian. In this case, the judiciary deems that the Custodian shall bear the corresponding obligation of information disclosure for the fund custody business to the investors on the ground that the Custodian has failed to properly perform the obligation of information disclosure.

(d) Custodian's breach of contract and execution of the manager's investment instructions when the conditions for the fund establishment are not satisfied

According to the contract in this case, the conditions for the establishment of the fund in question were not satisfied, so the fund Custodian was unable to perform its duties and the fund manager shall return the monies paid by the investors as agreed. However, despite that the fund custodian knew that the conditions for the establishment of the fund were far from being fulfilled, it has failed to perform its supervisory duties in accordance with the provisions of the laws, departmental rules and the contractual agreement, failed to promptly remind the fund manager of the risks of violation and notify the Fund Manager according to the law, and failed to follow up on the subsequent handling of the Fund Manager. Instead, it still implemented the investment instructions of the Fund Manager as if the fund had been established normally. Therefore, the Court held that the Custodian has breached the contract by failing to perform its statutory and contractual obligations. Considering that the main duties of the Fund Custodian included safekeeping of the fund assets, liquidation and delivery, investment supervision, information disclosure, etc., and that it did not participate in the investment operations of the fund assets, the limits of the responsibilities of the Fund Custodian should be different from those of the fund manager. While protecting the legitimate rights and

interests of investors as much as possible, the responsibilities of the Custodian should not be unduly increased. Therefore, after applying the principle of fairness in civil law and the general principles of "align rights and obligations" and "align fault and liability" to this case, and comprehensively considering the factors such as the degree of fault of the custodian and other parties, the impact of the losses, and the causation and the losses of the investors, the judiciary determined that the Custodian shall bear the supplementary compensation liability for 15% of the losses of the investors.

(e) Custodian's execution the manager's investment instructions when the asset management plan has not been filed

Where the custodian discovers that the manager's investment instructions violate the laws, administrative regulations and other relevant provisions, or violate the agreement in the Transaction Control Compliance Form, it has the right to refuse to execute such instructions and shall notify the asset manager and report to the China Securities Regulatory Commission ("CSRC"). If the asset management plan has not been filed for record, which is obviously in violation of the relevant laws and regulations, the custodian shall keep track of filing status and refuse to execute the instructions in case of no filing. In addition, the custodian's obligation to "keep the assets of the asset management plan safely" runs throughout the entire contract and should include not only the review of the manager's instructions but also the review of whether the manager has obtained the rights to "independently manage and utilize the assets of the asset management plan" and obtained the rights to issue instructions to the custodian. If the custodian fails to properly perform its obligation of supervising the funds and remits the funds under its supervision as instructed by the manager where the asset management plan has not been filed, resulting in a loss of the funds, the judiciary shall order the custodian to bear the

supplementary compensation liability for the lost funds.

(f) Custodian's failure to provide relevant evidence of prudence and diligence for investors' losses

In this case, in view of the fact that the Custodian has received the investment funds transferred from the investors but failed to provide relevant evidence to prove prudence and due diligence and performance of the Custodian's obligations, and that it also failed to explain the investment records, income distribution and redemption conditions for the funds under custody during the court hearing, the Court was not convinced that it has performed the obligations of fund report review and information disclosure to the investors in accordance with the contract or laws. Especially under the circumstances where AMAC has announced the Fund Manager's lost contact (abnormal) status and the fund product was obliged but failed to disclose monthly reports, the Custodian still failed to fulfill the obligations such as review the net asset value of the fund, supervise the investment operation and convene the investor's representative assembly, that is, it failed to fulfill all the important obligations of the fund custodian. This constitutes serious dereliction of duty or active assistance to the manager, resulting in losses of the investment funds of the investors. Therefore, the judiciary ruled that the Custodian shall bear the civil liability for damage in accordance with the law.

(3) Analysis of the factors when the judiciary considers the custodian's liability

(a) Whether the custodian has conducted necessary review of the manager's qualification

"Custody", as the name implies, is entrusted management. "Management" comes after "entrustment". Entrustment is not a unilateral act but a result of mutual selection between the entrusting party and the entrusted party. Even if the manager has the

advantageous position to a certain extent, it is necessary for the custodian to conduct proper background investigation before accepting the entrustment. Therefore, whether the custodian has specific internal review standards for review of the manager and whether the custodian has conducted full investigation and judgment on the reputation and performance ability of the manager are usually the starting point for the judiciary to determine whether the custodian has fulfilled due diligence. After accepting the entrustment, in order to effectively prevent risks and strengthen the ability to respond to risks, the custodian shall, in addition to performing the entrusted duties under the entrustment contract, continue to pay close attention to news, public opinions, and litigation-related situations of the manager.

(b) Custodian's responsibilities as agreed in the custody contract

The commentary above has sorted out the provisions and restrictions on the custodian's responsibilities in the laws, regulations, and industry self-regulatory rules. Fund custodian is mainly responsible for safekeeping, clearing and delivery, investment supervision and information disclosure of the escrow assets, and not participate in the investment operations of the escrow assets.

In this case, the judiciary deemed that the performance of the Custodian's obligations was highly subject to the agreement in the custody contract. The basis for the ruling that the Custodian shall bear the liability for compensation is also because that the Custodian has violated the specific stipulations of the custody contract involved in the case. Therefore, if the custodian's obligations in the custody contract are not clearly agreed, cannot be performed, or even violate the requirements of laws, regulations, and self-discipline norms, it will lay hidden dangers for the subsequent performance of the custodian's contractual obligations, and even adversely affect the effectiveness of the

contract, so it is very important to set the clauses of obligations of the custodian in the custody contract.

On the one hand, the boundaries of responsibilities should be clearly defined. Article 15 of the *Guidelines of the China Banking Association on Asset Custody Services of Commercial Banks* clarifies that the custodian does not bear any joint and several liability other than those required by laws and contracts. When drafting and reviewing the fund contract and custody contract, the custodian shall fully consider the content and scope of the entrusted matters and define the boundary of responsibilities from two perspectives: "must do" and "can do". On the other hand, the custodian shall specify the manner of performance, distinguish active from passive performance, distinguish the drafting obligation from review obligation, and distinguish *pro forma* examination from substantive examination.

(c) Whether the custodian has strictly abided by its obligations under the custody contract

The contractual agreement focuses on performance. On the premise of "obligation agreement does not exceed the boundary", it is also necessary to achieve "obligation performance without overstepping the rules".

The performance of a custody contract commences once it is executed, and disputes concerning the custodian's performance of its duties mainly arise during the performance of the custody contract. Although the investment failure, poor management, and misappropriation of funds of the manager/trustee are the main causes for the losses of investors, many investors will still claim before the court that the custodian has failed to fulfill its custody obligations strictly in accordance with the custody contract or that

there are flaws in the performance of its custody obligations.

In this regard, only when the custodian performs its duties strictly in accordance with the custody contract and keeps the relevant documents and materials, can it submit to the arbitral tribunal during the arbitration process the evidence sufficient to support its own point of view that it has acted, or refrained from acting, under the custody contract and as instructed by the manager/trustee, thereby reducing the compensation liability for breach of the custody contract as a result of its performance/non-performance of certain obligations.

4. Issues relating to rigid redemption (guaranteed principal and returns)

(1) Definition and background of rigid redemption

Rigid redemption, as far as asset management business is concerned, mainly refers to the act of the manager or other relevant entities to make up for the principal and returns of the investors when the asset management products invested by the investors cannot distribute investment principal and returns to the investors as agreed in the product contract based on its own operation or disposal of assets.

In fact, rigid redemption is a special existence in asset management business at this stage, and it also reflects the *status quo* of asset management business at this stage. There is a root to every cause. As far as rigid redemption is concerned, it is caused by the serious imbalance between the booming development of the emerging asset management industry and the investment confidence, investment cognition and risk resistance of market investors. In the early stage of the asset management industry development, the lack of investor information and the fierce competition of the industry have made many managers promise in various form that the principal and returns of the investors can

be recovered on time in order to develop business and use this as product selling point. In essence, it is an act of "exchange capital for customers' royalty", but it also cultivates investors' wrong perception of the industry and improper investment habits. Take the most typical trust product in asset management products as an example. Even today, one of the important reasons for investors to buy trust products is that trust companies really will make rigid redemption when the product is exposed to risks. For investors, such trust products are another fixed-income product with a much higher yield than bank deposits, treasury bonds, and other products.

From the point of view of the State and asset management product managers, the most important problem of rigid redemption is that the bearers of financial product risks are transferred from investors to managers. Considering the identity of a large number of managers who are state-owned financial institutions, the transfer and accumulation of such risks may have a significant adverse impact on the overall financial system of the country, which is also the origin of the systemic risks of financial institutions.

(2) Classification of rigid redemption and normal trading methods

(a) Classification of rigid redemption

From the perspective of literal interpretation, rigid redemption can be classified into rigid redemption in a broad sense and rigid redemption in a narrow sense. In particular, rigid redemption in a broad sense can be defined as the payment made by participants or other relevant entities throughout the whole process of asset management products, and may also include, in addition to the manager (including the manager per se or other funds or products led by the manager) in the general sense, counterparties (including the actual controller or entities having significant influence over such counterparties),

and the selling entities of the product (such as sales agency). In a narrow sense, rigid redemption is generally limited to the payment made by the manager. Rigid redemption mostly referred to in the context of financial regulation is rigid redemption in a narrow sense.

It should be particularly noted that not all rigid redemption in a broad sense are illegal; therefore the definition of a specific rigid redemption cannot be generalized, and it needs to be differentiated according to the specific subject entity and way of payment.

(b) Regular trading practices and the logic behind them

Rigid redemption in a broad sense can categorized into different trading practices according to the three main dimensions mentioned above.

First, rigid redemption by the manager of asset management products. The manager mainly refers to the management body of private asset management products, usually including trust companies, securities companies, futures companies, insurance companies and their subsidiaries specializing in asset management. Their business operations are subject to the industry regulation of the People's Bank of China ("PBC"), the China Banking and Insurance Regulatory Commission ("CBIRC"), and CSRC, as well as the self-regulation of AMAC and the Trust Association.

As the main body in the establishment, issuance and management of asset management products, the manager, as the core party of the asset management products, will also face dual pressure from both counterparties and investors. In general, the manager's rigid redemption is mainly to protect its own business reputation, so as to avoid failure to redeem certain products which results in the investors questioning its management capabilities, thus weakening the manager's competitiveness in the industry and affecting

subsequent product issuance.

At the same time, the manager's rigid redemption is also the epitome of the mismanagement of most managers in the asset management industry. In the past, some managers of most asset management products failed to fulfill the basic requirement of "seller due diligence" in compliance with laws and regulations, and often used rigid redemption to evade potential investors' complaints and supervisory authority's regulatory inspection of the manager's responsibilities in relevant products.

Common methods of the manager's rigid redemption include: the manager (or its related parties) directly uses its own funds to make redemption; the manager makes redemption through issuing other asset management products (usually subscribed for by the manager or its affiliated parties as investors) to undertake the asset management product share of the investors (buyout shares)s; the manager sets up product pools to pay for the earlier-issued products with the proceeds of later-issued products (in the form of capital pool), etc. Meanwhile, the *Guiding Opinions on Regulating Asset Management Business of Financial Institutions* (the "New Rules on Asset Management") also enumerates the identification of the manager's rigid redemption.

Second, rigid redemption at the level of counterparties. This is mainly found in asset management products that invest in non-standardized creditor's rights, or asset management products that invest in standardized assets of creditor's rights in a nested manner (for asset management products that invest in standardized products directly, as there is no direct counterparty, the rigid redemption after investment failure usually returns to the manager itself). This kind of asset management products usually invests in specific entities through creditor's rights, equity, etc., and realizes product income with investment returns.

Rigid redemption by counterparties is usually found in government-trust cooperation products. Some governments or enterprises will coordinate all parties to resolve the potential default risks of some local enterprises out of the overall consideration of the local regional economy, so as to avoid the impact of default events on financial institutions' investment confidence in the enterprises in the region and thereby increasing the difficulty of external financing for other enterprises in the region. Rigid redemption by counterparties usually involves direct or indirect payment with funds by the counterparty and its actual controller, or takeover by interested parties of the counterparty through the transfer of creditor's rights or equity held by the manager. From the perspective of asset management products, such rigid redemption usually ensures a smooth exit of asset management products.

Third, rigid redemption by the selling entities. In general, there are two main ways to sell asset management products (to raise funds): the manager sells asset management products, and a third party with sales qualifications is entrusted to sell the products. The selling entities mentioned herein are mainly sales agencies, while banks, as the entities with the most extensive client resources, also account for a large share of the agency sales volume of asset management products. The selling entities only act as the seller and do not assume responsibility of the manager and responsibility for redemption; in practice, they usually recommend products mainly to their internal clients (high-net-worth clients), and most of the investors purchase products based on their trust in the selling entities. Therefore, from the perspective of customer maintenance, selling entities usually pay more attention to the products they sell on behalf. When there is a risk of redemption for some asset management products, the selling entities will take over the products invested by their clients to ensure the realization of the clients' returns.

Rigid redemption by selling entities is usually found in cases in which selling entities use their own funds or other product funds under their management to take over the shares of asset management products held by the investors so as to achieve the exit of the investors.

(3) Financial regulator's attitude towards rigid redemption

Considering the regulatory regulations promulgated by the regulatory authorities in recent years, the message conveyed in various occasions, and the administrative penalties announced by regulatory authorities, in terms of rigid redemption in a broad sense, except for some rigid redemptions by counterparties (as the nature of rigid redemption by counterparties can be interpreted as the products *per se* resolve the risks, that is, cash flow on the asset side is recovered, and the manager or the seller does not bear any additional costs or expenses), rigid redemption in any other form and dimension is strictly prohibited by the regulatory authorities at the moment. From its nature, rigid redemption has a high possibility of being identified as violations by the regulatory authorities.

The negative attitude towards rigid redemption is also reflected in the increasing stringency and refinement of regulatory policies. For example, in terms of trust business, the *2007 Administrative Measures on Trust Companies* specifies that trust companies shall not "promise that the trust property will not suffer losses or guarantee minimum returns" when conducting trust business. In the same year, the *Administrative Measures on Assembled Funds Trust Schemes of Trust Companies* specifies that trust companies shall not "promise in any manner that the trust funds will not suffer losses or guarantee minimum returns of the trust funds in any manner" when promoting trust schemes.

Similar requirements are also reflected in the business development of securities companies. The *Regulations on Supervision and Administration of Securities Companies* in 2008 specifies that securities companies, when engaging in securities asset management business, shall not "make promises to clients that their assets principal will not suffer losses or guarantee a minimum return on their assets". The *Interim Administrative Provisions on the Operation of Private Asset Management Business of Securities and Futures Business Institutions* (CSRC Bulletin [2016] No.13), which came into force in July 2016, clearly specifies that "Securities and futures business operators and relevant sales agencies shall not make promises in any manner to investors that their assets principal will not suffer losses or guarantee a minimum return on their assets" and enumerates certain irregularities.

It can be seen from the logic of early regulations that the regulatory authorities are more inclined to urge managers and sales agencies to avoid misleading investors and to strengthen the risk awareness of investors during product promotion and sales. However, although the regulatory authorities, in principle, prohibit the manager's rigid redemption activities after the products have actually generated risks, they do not impose too many restrictions on such activities from the perspective of regulatory requirements.

The promulgation of the *New Rules on Asset Management* in 2018 clarifies and unifies the regulatory ideology, and conveys a strong regulatory stance of the Central Government on the past chaotic developments of the asset management industry. The *New Rules on Asset Management* unifies and confirms the basic principle that "financial institutions engaging in asset management business shall not promise to guarantee principal and returns. When experiencing difficulty in redemption, financial institutions shall not advance funds for payment in any form".

It can be seen that the regulatory authorities explicitly deny the rigid redemption activities developing over the past years and going against the logic of asset management business, and form the regulatory thinking of prohibiting rigid redemption arrangements in the whole process from initial sales to subsequent redemption. Strictly prohibiting rigid redemption, investigating and punishing rigid redemption activities, and urging each asset management product to operate in a compliance manner will be one of the key points that the regulatory authorities will focus on in the future.

(4) Judicial attitudes towards rigid redemption

Judicial decisions' attitudes towards rigid redemption have also been "upgraded" in recent years with the upgrading of regulatory requirements. Considering the existing judicial standards, rigid redemption arrangements such as those involving managers of asset management products are likely to be directly deemed invalid in the future.

As for the rigid redemption by the managers of asset management product, Article 92 of the *Minutes* clearly states that "the minimum guarantee or rigid redemption clause is invalid". In response to this adjudication principle, the court in the case Xiang Min Zhong [2020] No.1598 clearly affirms that a legal document executed by a trust company is invalid as it involves rigid redemption in violation of rules. In the future, the judicial approach of the judiciary is likely to continue the current adjudication standards for rigid redemption made by managers of asset management products.

It is worth noting is that, apart from the above-mentioned principle that the manager's rigid redemption is invalid, rigid redemption of other above-mentioned entities have not been explicitly denied by the judicial authorities at the present stage. From the perspective of contractual validity, although the act has potential risk of violation to

some extent, its validity has not been explicitly denied.

However, taking into account the risk of violation in most of the rigid redemption arrangements, with the entry into force of the *Civil Code*, a prudent and negative approach should be taken in the future to determine the validity of such acts. The *Civil Code* specifically points out that "civil juristic acts in violation of public order and good morals are invalid" when determining the validity of civil juristic acts. Rigid redemption, while violating regulatory provisions, is in essence contrary to the inherent logic and core spirit of the development of asset management business in China. Allowing the continuation of this abnormal pattern is not only detrimental to the improvement of the manager's internal management ability, but also not conducive to the improvement of investors' cognition of different types of financial products and honoring the spirit of contractual investment that investors shall bear the inherent risk. At the same time, it will continue to accumulate potential financial risks and may even have an impact on the entire economic system. On this basis, rigid redemption acts may potentially be found to violate public order and good morals and affect the social order, which will have a significant impact on the validity of contracts for rigid redemption signed by the subjects.

(5) Consideration factors for arbitration disputes involving rigid redemption of asset management products

In arbitration proceedings, the determination of rigid redemption is usually treated differently by referring to the division of transaction modes mentioned above.

In particular, the manager's rigid redemption, no matter how it is presented, shall be directly determined to be invalid. Nevertheless, a counterparty's rigid redemption may be

correspondingly identified as credit enhancement measures in transaction arrangements, which shall be recognized provided that such arrangements do not violate laws and administrative regulations. As for a selling entity's rigid redemption, it should be analyzed in detail based on specific arrangements.

Overall, the judgment and identification of rigid redemption of asset management products need to be made in the context of the macro-control of national financial regulation. In future judgments, the appropriateness and reasonableness of product issuance and whether the manager has, subjectively, circumvented or breached the financial regulatory requirements in any way will also be the focus of the judicial review. At present, many managers in the market are full of "adventurous spirit"; nevertheless, the judiciary should lead the managers with appropriate guidance, discourage risky "adventures", and guide them back to the right path guided by the regulation. It is the core issue that the judiciary should consider at this stage.

B. Disputes Involving the "Capital Side" – Issues Concerning the Liability of Investors as Counterparties

1. Nature and effectiveness of the investment and financing structure of financial products

(1) VAM issues

(a) The concept of VAM

The commonly-known "Bet-on Agreement" in practice, also known as Valuation Adjustment Mechanism ("VAM") Agreement, refers to an agreement designed by the investor and the fund-raising party at the time of entering into the equity financing

agreement, agreeing to adjust the valuation of the target company in the future, including equity repurchase and monetary compensation etc., in order to solve the uncertainty of the future development of the target company, information asymmetry and agency cost of both parties to the transaction,

(b) Validity of VAM

In current judicial practice, there are generally two types of VAM:

(a) VAM between the investor and the shareholder or actual controller of the target company. This VAM shall be deemed valid, and the actual performance shall be supported if there is no other invalid reason; and

(b) VAM between the investor and the target company. This VAM goes through the process from invalidity to validity.

Stage One - invalid VAM with the company

SPCheld in the *Haifu* Case (Min Ti Zi [2012] No. 11) that in private financing and investment activities, the fund-raising party and the investor must abide by the provisions of the *Company Law* and *Contract Law* when setting up a valuation adjustment mechanism (that is, the investors and the fund-raising party adjust investment conditions or compensate investors based on the future business performance of the enterprise). If the compensation clause between the investor and the target company enables the investor to obtain relatively fixed profits, such profits will deviate from the business performance of the target company and will directly or indirectly damage the interests of the target company and its creditors, and therefore shall be deemed invalid. However, the commitment of the shareholders of the target company to compensate the investors shall

be valid as it does not violate the prohibitive provisions of laws and regulations. In the event that the compensation conditions agreed in the contract are established, according to the principle of party autonomy and good faith, the investee shall keep its promise and the investor shall receive the agreed compensation.

Stage Two - VAM with the company is invalid, but the company can assume the guarantee responsibility

SPC held in the Han Lin Case (ZuiGao Fa Min Zai [2016] No. 128) that:

Firstly, the relevant agreements among the Investor, the Target Company and the shareholders of the Target Company clearly stated that "Han Lin Company has passed the resolutions of the board of shareholders … All Parties have performed their internal procedures … The authorized representatives of all Parties have been duly authorized thereby". Hanlin Company has affixed its seal and its legal representative has signed, and Hanlin Company did not submit any evidence to the contrary to prove that the Company has not passed the resolution of the board of shareholders on the guarantees. Therefore, it is deemed that the Investor has performed the obligation of reasonable care and *pro forma* examination of the Target Company's provision of guarantees and going through resolution of the board of shareholders.

Secondly, the legislative purpose of Article 16 of the *Company Law* is to prevent majority shareholders of a company from abusing their controlling power to provide guarantees for their personal debts out of personal needs, thereby damaging the rights and interests of the company and minority shareholders. In this case, the Investor's investment funds were entirely used for the operation and development of the Company, not for guaranteeing personal debts. All the shareholders of the target company benefited, did

not harm the rights and interests of the company and its minority shareholders, and did not violate the legislative purpose of Article 16 of the *Company Law*. Therefore, the target company should bear the guarantee responsibility.

Lastly, SPC reiterated the legislative purpose of Article 16 of the *Company Law*. In the case that the investment funds of the investor are all used for the operation and development of the company, and the guarantee procedure is flawless or the guarantee counterparty fulfils its *pro forma* examination obligation, the agreement of the target company to undertake joint and several guarantee liability for the shareholders' VAM obligation is valid.

Stage Three - Valid VAM with the Company

The current rules of validity in judicial practice are as follows:

(a) the VAM agreement shall be valid in principle;[1]

(b) where theinvestor requests the target company to repurchase the shares, such request shall comply with the mandatory provisions of Article 35 of the *Company Law* that "shareholders are prohibited from unlawful capital withdrawal" or the mandatory provisions of Article 142 of the *Company Law* on share repurchase, and the procedures for capital reduction shall be completed; and

(c) where the investor requests the target company to assume the obligation of monetary compensation, such request shall comply with the mandatory provisions of Article 35 of the *Company Law* that "shareholders are prohibited from unlawful capital withdrawal"

1 Article 5 of the *Minutes* provides that in the absence of any statutory invalid causes for the VAM agreement between the investor and the target company, the people's court shall not uphold such claim of the target company that the VAM agreement is invalid solely on the ground that there is an agreement on share repurchase or monetary compensation.

and the mandatory provisions of Article 166 of the *Company Law* on profit distribution. If the target company has distributable profits, such profits shall be distributed to its shareholders; in case that there are no distributable profits for the time being or the profits are insufficient to fully pay off the debts, the shareholders may file a separate lawsuit if there are any profits in the future.

(c) Case analysis (Zui Gao Fa Min Shen [2020] No.2957 heard by SPC)

Basic Facts

Yinhaitong Investment Center ("YHT") entered into VAM agreement with Xinjiang Xilong Corporation (XL), agreeing that if XL failed to be listed in the stock market one year later, XL shall buy back YHT's shares in XL. Meanwhile, YHT and Kuitun Company, a wholly-owned subsidiary of XL, agreed that if XL was not able to buy back the shares, Kuitunshall buy back the shares, and YHT provided guarantees therefor. Afterwards, YHT paid the investment amount of RMB9 million to XL, but XL has never publicly issued shares and been listed.

YHT sued in the court, claiming that XL shall pay the price for share repurchase; and that Kuitun shall bear joint and several liability for payment of share repurchase.

SPC's ruling

SPC held that:

XL and YHT entered into a Capital and Share Increase Agreement to raise RMB9 million from YHT by way of capital increase, and jointly signed the Supplementary Agreement with Kuitun agreed on equity repurchase and guarantee, the contents of which are valid.

VAM agreement between YHT as the investor and XL as the target company failed through, YHT requested XL to buy back its shares. This arrangement shall not violate the mandatory provision of the *Company Law* which prohibits "unlawful capital withdrawal by shareholders". XL is a company limited by shares, and its shares buy-back falls under the circumstance of decrease in the company registered capital; therefore, a resolution on such matter shall be passed at the shareholders' meeting and capital reduction procedures shall be completed in accordance with the laws. Now, XL has not completed the aforesaid procedures, so it is not improper for the original ruling to reject the claim of YHT.

Regarding YHT's claim against Kuitun, YHT sought for performance of obligation under the guarantee contract, which is of subordinate nature, i.e., the prerequisite for fulfilling the obligations of the guarantee contract is that the obligations of the main contract have been fulfilled. In this case, the capital reduction procedures of XL have not been completed and the obligations under the master contract of share repurchase have not been fulfilled, so the guarantee obligation of XL has not been fulfilled.

Comment on the case

The juridical thinking behind the ruling of the Court is that after the promulgation of the *Minutes*, the court will consider VAM between shareholders and the company from the following perspectives:

• First, the validity of the VAM contract will be examined. The contract shall be deemed valid if there is no statutory circumstance rendering the contract invalid.

• Second, under the premise that the contract is valid, if the target company is required to buy back the shares, it shall complete the capital reduction procedures in accordance

with the relevant provisions; otherwise, the court will not uphold its claim for share repurchase.

• Third, even if the guarantee is set, the shareholders have no right to directly request the party who provides the guarantee to assume the liability under the guarantee contract, because the obligation under the guarantee contract is subordinate to the mater contract and the prerequisite for the performance of the obligation under the guarantee contract is the fulfillment of the obligation under the master contract.

(2) Disguise debt as equity

(a) Concept of "disguise debt as equity"

"Disguise debt as equity" is not a legal concept, but a transaction arrangement in the process of investment. It is an investment method whereby an investor accepts the transfer of the equity of the investee company in the name of equity investment. The investment return is not linked to the business performance of the investee company. The investee company does not distribute the investor's invest return based on the investee company's investment return or loss; instead, it promises to return the investor's principal and a certain yield, regularly pays the fixed return to the investor as agreed, and redeems the equity or repays the principal and interest upon satisfaction of certain conditions. It is equity investment in name, but debt investment in disguise.

(b) Validity of "disguise debt as equity"

"Disguise debt as equity" should be identified on the basis of the internal relationship of the equity transferor and transferee. "Disguise debt as equity" does not have a uniform transaction model. In practice, it should be comprehensively identified based on the

investment purpose of the parties, their actual rights and obligations etc. An investor whose purpose is to acquire the equity of the target company and who enjoys the right to participate in the operation and management of the target company should be deemed as equity investment. The investor is a shareholder of the target company and may, under certain circumstances, constitute unlawful capital withdrawal. Conversely, an investor whose purpose is not to acquire the equity of the target company but to obtain fixed income and who does not enjoy the right to participate in the operation and management of the target company should be deemed as debt investment, in which case the investor is a creditor of the target company or a creditor of the shareholder with repurchase obligations. If the transferee of the equity does not participate in the operation and management of the investee company, the transferee's equity is withdrawn or repurchased upon maturity, or the investment income agreed upon by the parties is fixed income, the above circumstances should be deemed as "disguise debt as equity". In the case Zui Gao Fa Min Zhong [2017] No. 907, the People's Court held that, based on the specific clauses of the *Transfer of Equity Benefit Rights and Repurchase Agreement* and the actual performance of the Agreement, AX Company had no real intention to purchase the underlying equity benefit rights and to bear the corresponding risks. AX Company only indirectly obtained the proceeds generated from the operation, management, disposal, and transfer of the underlying equity of Tian Yue Company and did not participate in the operation and management of the underlying equity that could generate proceeds. According to the specific provisions of the *Transfer of Equity Benefit Rights and Repurchase Agreement* and given the facts of the case, the main contractual purpose of Tian Yue Company was to raise funds from AX Company, while the main contractual purpose of AX Company was to collect relatively fixed proceeds from Tian Yue Company. Therefore, the Court of First Instance's finding that the real purpose of the transaction between the two parties was to finance money in the name of share price

through selling and then repurchasing had factual and legal standing. As the *Transfer of Equity Benefit Rights and Repurchase Agreement* in this case was not a nominate contract provided in the Contract Law, the judgment of first instance applied the law correctly in accordance with the nature of the agreement and with reference to the most similar loan contract in the *Specific Provisions of the Contract Law*.

As to the validity of "Disguise debt as equity", the intention of both parties to the transaction for equity transfer is false, and the true intention of both parties is for the creditor's right. According to Paragraph 1 of Article 146 of the Civil Code which provides that "the civil juristic acts by persons of civil conduct and counterparties under false manifestation of intent are null and void", the equity transfer based on the false manifestation of intent shall be invalid. According to Paragraph 2 of Article 146 which provides that "the validity of a civil juristic act concealed by making a false manifestation of intent shall be dealt with in accordance with the relevant provisions of the law", the true manifestation of intent concealed by both parties under the equity transfer is a lending act, which should be dealt with pursuant to the relevant provisions on lending, and the equity transferor shall bear the obligation of repurchase. Where an investor acquires the equity of the target company by way of capital increase, and the target company directly pays the price for equity repurchase to the investor, it does not constitute unlawful capital withdrawal.

It is worth noting that, Paragraph 3 of Article 68 of the *Interpretation of the Supreme People's Court on the Application of the Civil Code of the People's Republic of China Concerning the Security System* (the "Interpretation of the Security System") provides that:

"Where a debtor and a creditor agree thatthe debtor will transfer the property to the creditor, and that the debtor or a third party designated by it will repurchase the property

after a certain period of time at the principal plus the premium, and that the property will be owned by the creditor if the debtor fails to perform the repurchase obligation when due,the people's court shall handle such case with reference to the provisions of Paragraph 2."

While Paragraph 2 of this Article provides that:

"Where a debtor or a third party and a creditor agree that the property will be *pro forma* transferred to the creditor and that the property will be owned by the creditor if the debtor fails to perform the due debt, the people's court shall hold such agreement invalid, but it does not affect the effect of the manifestation of intent of the parties regarding the provision of security. After the parties have completed the public announcement of changes in property rights, if the debtor fails to perform its due debts and the creditor claims ownership of the property, the people's court shall not uphold such claim; if the creditor claims for priority repayment of the discounted value of the property or the proceeds from the auction or sale of the property with reference to the provisions of the *Civil Code* on real rights for security, the people's court shall uphold; if the debtor claimsfor return of the property after performing the debt, or for repayment of the debt with discounted value of the property or the proceeds from the auction or sale of the property, the people's court shall uphold".

It can be determined according to the above provisions that the transfer of the equity in the nature of debt is aguarantee measure of the equity transferor, thus the transferee of such equity may be repaid in priority with the proceeds from the auction or sale of the equity.

(C) Case Analysis (Zui Gao Fa Min Zhong [2019] No. 1532)

Basic facts

On 19 November 2013, Guotong Inc. (GT) and Bingoucheng Company ("BGC") entered into a Letter of Intent, agreeing that BGC, due to business development needs, intended to seek capital from GT for its project located in Hu Airport, Wuchang District, Wuhan City, Hubei Province, and that GT would issue a trust scheme and invest the trust funds in this project. BGC's capital need is RMB 500 million for a period of two years. To obtain such funds, BGC agreed to bear a cost of funds which was no less than 16% of the total funds.

In 2013, GT, BGC, Shangshanzhigao Corporation ("SSZG") and Dingchuang Inc. ("DCH") signed a *Capital Increase Agreement*, pursuant to which GT would use 51% of its total trust funds under Dongxing No. 9 trust scheme, totaling RMB 112.5825 million, to increase the capital of BGC. During the period when GT held the shares in BGC, GT would at least receive the full amount of equity return on time and was entitled to apply for full or partial capital reduction. BGC, SSZG and DCH shall unconditionally assist GT in handling the capital reduction matters and pay the capital reduction amount in full to GT.

In 2015, GT, BGC, SSZG and DCH entered into an *Equity Investment Agreement*, under which GT would use RMB 1.5 million in Phase 4 trust scheme to purchase SSZG's equity in BGC, which was equivalent to 1.22% of BGC's registered capital. Upon receipt of the equity transfer sum, SSZG shall forthwith use the equity transfer sum to pay the financial advisory fee under the *Supplementary Agreement to the Financial Advisory Agreement* to GT on behalf of BGC. SSZG and DCH unanimously promised that, during the period in which GT held the underlying equity interest of BGC, in addition to the income from equity interests that GT was entitled to under the *Capital Increase*

Agreement, the underlying equity held by GT would receive equity income additionally.

Later, GT petitioned to the court, claiming, inter alia, that BGC should repay the principal of the trust funds in full.

Court's opinions

SPC held that, in respect of the nature of RMB112.5825 million involved in this case, BGC claimed in its appeal that this sum should be the price for capital increase rather than a loan. The Court held that BGC's claim could not be established because: Although the sum was paid according to the *Capital Increase Agreement and the Supplementary Agreement to the Capital Increase Agreement*, the nature of the payment could not be determined solely based on the name of the agreement; instead, it should be determined comprehensively based on the true intention of the parties reflected in the terms of the contract, the true purpose for signing the contract, the performance of the contract, etc.

First, according to the provisions of Clauses 7.1, 7.2, and 7.3 of the *Capital Increase Agreement*, in this case, GT signed the above agreement to receive relatively fixed capital gains through financing funds to BGC, which is different from the act of increasing capital and purchasing shares for the purpose of obtaining contingent long-term equity gains in the general sense. BGC claimed that, in accordance with Article 5 of the *Supplementary Agreement to the Capital Increase Agreement*, GTwasalso be entitled to the profits on its investment in addition to fixed profits. However, Article 5 of the *Supplementary Agreement to the Capital Increase Agreement* provides that "the provisions of the *Equity Investment Agreement* shall prevail", while the Equity Investment Agreement only involvedthe sum of RMB1.5 million under the Phase 4 trust scheme,

and RMB112.5825 million involved was the sum under the Phases 1 to 3 trust scheme, which is not the same payment. Therefore, in accordance with Article 5 of the *Supplementary Agreement to the Capital Increase Agreement*, it is insufficient to determine that the purpose of GT 's remittance of RMB 112.5825 million involved to BGC is to obtain equity dividends rather than fixed returns.

Second, although GT has been registered with the administration for industry and commerce as a shareholder of BGC, BGC has not provided evidence to prove that GT has actually participated in the subsequent operation and management of BGC. Furthermore, in accordance with Articles 10.3.4, 10.3.5 and 10.3.10 of the *Capital Increase Agreement*, GT shall have the right to transfer itsequity interests to external party, to apply for capital decrease, to dispose of the projects concerned, etc. in the event that BGC breaches the contract. Therefore, BGC's claim that there is no equity exit mechanism agreed in the *Capital Increase Agreement* and the *Supplementary Agreement to the Capital Increase Agreement* is inconsistent with facts; and BGC's claim that the sum involved in this caseis not a loan also lacks sufficient basis, therefore, so the Court did support it. At the same time, it should be noted that since this case is an internal dispute among the parties to the agreement, so relevant rights and obligations shall be confirmed according to the agreement. However, the internal agreement hadno external effectbefore GT completed its equity exit without going through legal procedures; if a *bona fide* third party suffers damage to its interests due to its trust in the shareholding structure and industrial and commercial registration information disclosed by BGC, he can seek remedy by filing a separate court case. The court didnot uphold BGC's claim that the judgment of the first instance was incorrect on the grounds that an external relationship may be involved.

Thirdly, with respect to the nature of the money involved in this case, BGC not only recognized in the *Debt Confirmation Agreement* that "GT enjoys a creditor's right of at least RMB 114.0825 million from BGC in accordance with the *Capital Increase Agreement*", but also recognized in the court hearing of the case (E 01 Min Chu [2016] No. 5905) that "RMB 112.5825 million, the subject matter in a dispute over the capital and share increase, plus RMB 1.5 million, have been remitted to the Company. At present, all the subject matter in dispute over the capital and share increase are repaid to GT" and "confirm that it is debt in nature but shares in disguise." In this case, BGC claimed that the above sum was the price for capital increase rather than a loan, which is inconsistent with the provisions of the above agreements and the statements made in other case. As BGC failed to produce evidence to prove that the *Debt Confirmation Agreement* was invalid, as a party to the Agreement, it shall be bound by such Agreement.

Comment on the case

It can be seen from this case that the judicial judgment did not determine the nature of the disputed amount based on the name of the contract, but rather based on the true intentions of the parties to the transaction. Although the disputed sum appeared to be an equity investment sum, it is not regarded as an equity investment, but as a loan, after comprehensively considering the true intentions for the conclusion of the contract and the performance of contract.

2. Determination of the validity of new credit enhancement measures

(1) Concept of new credit enhancement measures

In recent years, in addition to the statutory guarantee, other types of credit enhancement measures have emerged in financing transactions. Take the trust industry as an

example, innovative credit enhancement measures have emerged one after another. This is due to the regulatory requirements for trust products. According to Article 8 of the *Administrative Measures on Assembled Funds Trust Schemes of Trust Companies*, in promoting a trust scheme, a trust company shall not:

"(1) guarantee, in any manner, that the trust funds will suffer no loss, or guarantee, in any manner, a minimum return on the trust funds …,"

and Article 11 provides thatthe subscription risks statement shall at least include the following contents:

"(1) The trust scheme does not guarantee principal return or minimum profit, and it carries certain investment risks, and is suitable for qualified investors who are more capable of identifying, assessing, and tolerating risks."

Article 34 of the *Administrative Measures on Trust Companies* stipulates that no trust company may commit any of the following acts when engaging in trust business:

"(1) seek improper gains by taking advantage of its position as trustee;

(b) misappropriate the trust property for non-trust purposes; and

(c) promise that the trust property will not suffer any loss, or guarantee a minimum return."

All the above-mentioned regulatory provisions strictly require trust companies not to guarantee return of minimum profit or capital. Under this circumstance, trust products have innovated a variety of new credit enhancement measures to control risks without violating the regulatory provisions.

From the perspective of decreasing functionality, credit enhancement measures can be classified into three types:

(a) Statutory guarantee,

(b) Non-statutory guarantee, such as alienation guarantee, which is also known as atypical guarantee; and

(c) Third-party commitment and other measures with relatively weak guarantee purposes and functions.

New credit enhancement measures generally refer to the third type of measures with relatively weak guarantee purposes and functions. The new credit enhancement measures mainly include subordination, repurchase, make up for shortfall, and liquidity facilities, etc.

(a) Subordination

Establishing a subordinated structure is to allocate beneficiary rights by the trust company according to different risk preferences of investors; the returns are allocated with different priorities to the junior and senior tranches, so that investors with different risk preferences and affordability can obtain benefits by investing in different tranches of beneficial rights and bear different levels of risks. The trust units of junior tranches function as protective layers of the more senior tranches, so the trust structure is a credit enhancement for the beneficiaries of senior tranches.

In judicial practice, there is a view that there is a loan relationship between the junior and senior tranches of beneficiaries. In the case (Zui Gao Fa Min Zhong [2017] No. 604), SPC specifically discussed the nature of legal relationship between the specific

beneficiary Xu X and a general beneficiary or the trust company, that is, the relationship between a specific beneficiary (junior tranche) and a general beneficiary (senior tranche). As a specific beneficiary, Xu X's obligations were to return the principal and pay the proceeds to the general beneficiaries when the trust matures, and to assume the risks of price changes of the shares purchased under the trust scheme. Xu X's rights were to enjoy the remaining property benefits after paying the trust scheme fees, trust taxes, principal of the general beneficiary, and expected proceeds. Article 196 of the *Contract Law* stipulates that "a loan contract is a contract whereby the borrower borrows a loan from the lender and repays the loan with interest when it becomes due", so the legal relationship between a specific beneficiary and a general beneficiary in the trust scheme shall be deemed a loan contract according to law.

Article 21 of the *New Rules on Asset Management* issued by PBC and other authorities in 2018provides that "… classified asset management products shall not, directly or indirectly, provide guarantee of principal and returns to subscribers of senior tranche…". The *New Rules on Asset Management* prohibits the arrangementof guaranteed principal and returns for senior tranche in the subordination structure. The *Minutes* is sued by SPC in 2019 stipulates the liability of the beneficiary of junior tranche. It is provided in Article 90 of the *Minutes* that:

"Where trust documents and related contracts classify beneficiaries into different classes, such as senior tranches and junior tranches, and agree that senior tranches use their assets to subscribe for shares of the trust plan and that at the maturity of the trust, junior tranches are obliged to make up the difference between the proceeds obtained by the senior tranches from the trust assets and the investment principal and the agreed proceeds, if the senior tranches request the junior tranches to assume the liability as

agreed, the people's court will support such request according to law. The agreement in the trust documents regarding the rights and obligations of different tranches of beneficiaries shall not affect the determination of a fiduciary legal relationship between the beneficiaries and the trustee."

It can be seen that although the guarantee of principal and returns and rigid redemption arrangement for beneficiaries of senior tranches are prohibited in structured products, beneficiaries of junior tranches can assume the obligation to make up the difference for the beneficiaries of senior tranches.

(b) Buy-back or repurchase

Buy-back or repurchase means that the trust company issues trust schemes, raises funds to purchase the right to earnings of specific assets such as equity interest, creditor's right, real estate etc., held by the fund-raising party; and the fund-raising party or its affiliates or a third party undertakes to repurchase such specific assets or the right to earnings of specific assets at an agreed price ("initial asset transfer price + premium") after a specified period of time, and the trust schemes recover the funds and distribute the earnings.

(c) Make up the shortfall

"Make up the shortfall" generally refers to a transaction arrangement whereby the fund-raising party or a third party it designated assumes the obligation to make up the shortfall, when the trust, asset management products, and fund products are insufficient to pay off the expected earnings or principal on the redemption date agreed in the transaction documents, which are repayable in the current period. "Make up the shortfall" mainly includes making up the difference in equity protection provided for financial transaction arrangements, and making up the difference based on the

established debtor-creditor relationship, mainly in the form of agreements or unilateral issuance of letters of commitment or confirmation.

(d) Liquidity facilities

Liquidity facilities usually refer to a special arrangement whereby a liquidity support institution is obliged to pay certain sum to the investor of senior tranches when such investor is not fully paid, so as to ensure that the returns of senior tranches are more stable and safer. Also, in asset-backed securities, liquidity support means that the liquidity support institution assumes the obligation to make temporary short-term advances when the cash flow of the underlying asset is at risk.

(2) Validity of new credit enhancement measures

In response to the aforementioned credit enhancement measures, Article 91 of the *Minutes* stipulates that:

"Where the parties, other than those to the trust contract, provide similar commitment documentsas credit enhancement measures, such as a third party making up the shortfall, performing repurchase obligations on maturity on behalf of the parties, and liquidity facilities etc., and the contents thereof comply with the provisions of the law on guarantees, the people's court shall hold that a guarantee contract relationship has been established between the parties. If the contents thereof do not comply with the provisions of the law on guarantees, the corresponding relationship of rights and obligations shall be determined in accordance with the specific contents of the commitment documents, and the corresponding civil liability shall be determined in accordance with the facts of the case."

The *Minutes* classifies credit enhancement measures into two types:

• if the agreement between the parties is in line with the provisions of the law on guarantees, it shall be deemed to constitute a legal relationship of the guarantee contract; and

• if the agreement between the parties is not in compliance with the provisions of the guarantee, the relationship of rights and obligations shall be determined according to the specific provisions of the credit enhancement documents.

SPC in its *Understanding and Application of the Minutes of the Working Conference for Civil and Commercial Trials for National Courts* states that the *Minutes* classifies credit enhancement measures into two types: guarantee and undertaking existing debt. The independent contractual relationship is to maintain the openness of the normative content of this article. There is still room for discussion as to whether an independent contractual relationship has been established between a third party and a creditor, except for guarantee and undertaking existing debt.

With respect to whether a credit enhancement measure is to provide guarantee or undertake existing debt, the *Understanding and Application of the Minutes of the Working Conference for Civil and Commercial Trials for National Courts* provides the following perspectives:

First, follow the principle of canons of construction. To determine whether a third party's promise to perform debt obligations is provide guarantee or undertake existing debt, one should first start from the words and sentences used in the commitment letter issued by the third party or in the agreement signed by the parties. If the commitment letter or agreement explicitly uses the words "guarantee" or "undertake existing debt",

it should, in principle, be identified according to the wording, unless there are special circumstances sufficient to support a deviation from the literal meaning, that is, the literal meaning takes precedence.

Second, determine whether the content of the debt that the third party is willing to undertake is identical with the original debt. Whether the content of the debt that the third party is willing to undertake is a subordinate debt or a debt identical with the original debt is an important criterion to distinguish guarantee from solidary debtor. This distinction can be seen in two ways: on the one hand, in terms of the sum of the debt, the guarantor often agrees to undertake the shortfall that the principal debtor cannot perform, while the agreed sum for undertaking existing debt is often the same amount as the existing debt and has nothing to do with the subsequent performance of the principal debtor. On the other hand, the scope of the guarantee usually includes liquidated damages, damages, and the cost of realizing the creditor's right, while for undertaking existing debt, the solidary debtor assumes liability to the extent of the original debt at the time of joining and is not liable for the breach of contract of the original debtor. Therefore, in individual cases, to determine whether the third party's conduct is to undertake the existing debt or provide guarantee, it is most important to explore the true manifestation of the third party, so as to determine whether the debt it intends to undertake is independent or subordinate debt.

Lastly, determine the true intention of the parties in respect of the order of the obligation to be performed. In practice, if the relevant credit enhancement documents define that the premise for the third party to perform the debt is that the debtor "cannot", "is unable to", or "does not" have "no property" to perform its debt on due, this is a clear order of performance which conforms to the definition of general guarantee in Article

17 of the *Security Law* and shall be deemed as general guarantee rather than undertaking existing debt. It should be noted that there is a difference between the provision of "the debtor is unable to perform its debt" in Article 17 of the *Security Law* and the provision of "the debtor fails to perform its debt" in Article 6 of that law, which is determined by the supplement of guarantee. Even for an agreement on joint and several liability, the debtor's non-performance of debt still may be set as a prerequisite for liability. Therefore, when the credit enhancement document agrees that the debtor's failure to perform its obligations at maturity is the prerequisite for the credit enhancement organization to perform its obligations, the agreement alone cannot determine whether a guarantee is constituted. Of course, if the third party's performance of the debt is not premised on the debtor's non-performance, but directly indicates that the third party performs on behalf of the debtor, it can be directly recognized as undertaking existing debt."

If the credit enhancement measures are consistent with the guarantee contract, it is necessary to review whether the guarantee has relevant resolution documents and authorization. If no resolution documents are available or the resolution documents are illegal, an *ultra vires* guarantee is constituted, and an examination on whether the creditor acts in good faith shall be conducted in accordance with Articles 17 and 18 of the *Minutes*. In the event thatthe creditor does not act in good faith, the guarantee is still valid if it falls under the exception specified in Article 19 of the *Minutes* under which no resolution by authorities is required. If the credit enhancement document isdeemed as undertaking existing debt, the above rules on contract of guarantee shall still apply to determine the validity.

(3) A Typical Case

Basic facts

On 16 August 2017, Xinjiang Guanghui ("GH"), as the trustor, and Zhonghai Trust, as the Trustee, signed a Trust Contract in question, which stipulated that:

"The face value of each trust unit is RMB1, and the Trust Scheme consists of preferential trust units and general trust units. 'Preferential beneficial rights' refer to the type of beneficial rights that can obtain trust benefits in priority over general beneficial rights. Preferential trust units are only issued to specific qualified investors who meet the criteria for trustor. 'General beneficial rights' refer to the type of beneficial rights that are entitled to trust benefits only after the highest trust benefits under all preferential beneficial rights have been distributed in full. General trust units are only issued to GH. The Beneficiary and the Trustor under this Trust scheme are the same person. 'Investment adviser' refers to a specialized agency engaged and entrusted by the trustee as an agent of all trustors (other than the Trustee of this Trust Scheme) to provides services for the investment operation of the trust scheme in accordance with the provisions of the *Investment Advisory Contract*; in this Trust Scheme, the investment adviser is Shanghai Huishitong Investment Management Co., Ltd. ("HSHT"). 'Trust assets' refer to the total of the trust funds, the property obtained from the management, utilization and disposal of the trust funds by the Trustee, and the profit and loss thereof. The expected duration of the Trust Scheme is two years, commencing from the date of establishment of the Trust Scheme. All trustors shall subscribe for trust units and participate in the trust scheme and authorize the investment adviser to send an investment proposal to the Trustee on behalf of all trustors (the investment proposal received by the Trustee shall have the legal effect as client's instruction between all trustors and the Trustee). The investment scope of this Trust Scheme shall be limited to domestic treasury bonds, local government bonds, central bank bills, …enterprise bonds and corporate bonds…. 'This Trust' refers to a management trust scheme. There shall be 360,000,000 Trust Units (subject to the

actual amount raised), of which the ratio of the number of preferential trust units to the number of general trust units shall not exceed 5:1. If the duration of the Trust Scheme expires or any circumstance for termination as provided for in the contract occurs, and the trust assets cannot be realized in time due to objective reasons such as suspension of trading of securities, the term of the Trust Scheme shall be extended until the realization of all trust property. The preferential trust units under the Trust Scheme are issued to the Trustee. 'Trust documents' means the trust contract, the prospectus of trust scheme, and the declarations of subscription risks, collectively. Prospectus of trust scheme, the declarations of subscription risks, and the Investment Advisory Contract are integral parts of this Contract and shall have the same legal effect as this Contract."

GH argued that the above clauses regarding the senior/subordinated structure and making up shortfall were invalid and filed a lawsuit with the Shanghai Financial Court.

Court's opinion

The Shanghai Financial Court held that:

Firstly, the *Opinions on Further Strengthening Risk Supervision and Administration of Trust Companies* issued by the General Office of CBRC is a departmental normative document, in which the provisions on the allocation ratio of investment funds between beneficiaries of senior tranches and junior tranches state comprehensively that:

"Trust companies shall be urged to reasonably control the leverage ratio of structured stock investment trust products. In principle, the allocation ratio of investment funds between beneficiaries of senior tranches and junior tranchesshall not exceed 1: 1, up to 2: 1, and the leverage ratio of junior tranches shall not be increased in any disguised form."

It can be seen that the provisions on leverage ratio of trust investment in the normative document are applicable to stock investment trust products, while the underlying investment object of the Trust Scheme in dispute is corporate bonds and thus falls under the scope of fixed-income investment trust products and does not fall under the applicable scope of the above provisions. Therefore, invoking the above provisions to assert that the Trust Contract has violated public order and good morals lacks legal basis and is thus not supported by the Court.

Secondly, the Trust Contract did not stipulate that the conclusion of a contract by the trustor shall be subject to the resolution of internal authorities in accordance with the articles of association of the company. Nevertheless, the provision on making up shortfall in dispute is a promise made by the plaintiff, as beneficiary of junior tranche, to senior tranche to make up the difference in investment income. This is a commitment made by the debtor to the creditor that it will fully perform its obligations under the Contract, rather than a guarantee promise made by the guarantor for another party to perform its obligations under the master contract. Therefore, it is not a guarantee and Article 16 of the *Company Law of the People's Republic of China*, which stipulates that a company intending to invest in other enterprises or to provide guarantee for others shall be subject to the resolution of its board of directors or shareholders or the resolution of the shareholders' meeting according to the articles of association of the company, shall not apply. Whether the resolution of the board of directors in question violates the articles of association of the plaintiff does not affect the validity of the civil juristic acts of the legal representative of the plaintiff signing the Trust Contract and affixing the official seal on behalf of the plaintiff. Therefore, the plaintiff's claim that the resolution of the board of directors is invalid and therefore the Trust Contract and its making-up-shortfall clause is invalid lacked legal basis, and thus is rejected by the Court.

Thirdly, the Trust Contract classifies the beneficiaries into priority beneficiaries and general beneficiaries, and stipulates that the priority beneficiaries subscribe for trust scheme units with their assets and that upon the maturity of the trust term, the general beneficiaries are obligated to make up the difference between the proceeds obtained by the priority beneficiaries from the trust property and their investment principal and the agreed proceeds. This is a disposal of civil rights and obligations between the parties concerned in accordance with the law, which does not harm public order, and shall be deemed valid. The Trust Contract stipulates that the investment ratio of the priority beneficiaries to the general beneficiaries shall be 5: 1, that the annualized rate of return for the junior tranches shall be 8%, that the excess proceeds shall be obtained by the Investment Adviser, and that the declarations of subscription risk for the priority beneficiaries stated that the annualized rate of return for the priority beneficiaries shall be 5.6%. The Court holds that the annualized rate of return of the preferred beneficiaries is not significantly higher than its investment sum and multiples and is still within a fair and reasonable scope. Given the fact that the Trust Scheme in dispute is a transaction management trust, that the Investment Adviser is selected by the trustors and that the investment decisions are made by the Investment Adviser, the allocation of the excess proceeds is a matter to be self-arranged by the investment adviser and the trustors and not at the discretion of the Trustee. Therefore, the Court holds that the making-up-shortfall clause in dispute does not violate the principle of fairness and the principle of public order and good morals and should be deemed valid.

Comment on the case

It can be seen from the judgment of this case that the people's court holds that the subordination structure for trust products with fixed income is not subject to the

restriction of leverage ratio and should be deemed valid. As for the determination of making up shortfall, the people's court holds that the agreement on making up shortfall should be deemed valid if it does not fall under any statutory circumstance which renders a contract invalid. Furthermore, the court holds that the undertaking of making up shortfall does not constitute an external guarantee and should be deemed as a separate contractual obligation, which does not require a resolution of the competent authority of the company. Even in the absence of a resolution, there is still an obligation of making up shortfall.

3. Issues relating to "Channel Services"

(1) Concept of "Channel Services"

Article 93 of the *Minutes* stipulates that:

"Where the parties agree in the trust documents that the trustor shall independently decide the matters such as the establishment of the trust, the target of use for the trust assets, the management, use and disposal of the trust assets, andshall assume the risk management responsibility and bear the corresponding risk losses, and that the trustee only provides necessary assistance or services for the matters and does not take the initiative to manage the trust assets, it shall be deemed as channel services."

It can be seen from the definition of channel services provided in the *Minutes* that criteria for identifying channel services are follows:

(a) the trustor shall independently determine the flow of funds and the method of disposal;

(b) the trustor shall bear the corresponding risks, including risk management

responsibility and risk losses, on its own; and

(c) the Trusteedoes not take the initiative to manage the channel services but only provides assistance or services for necessary matters.

Those that simultaneously meet the abovecriteriacan be recognizedas channel services.

(2) Effectiveness of "Channel Services"

(a) Validity during the transition period

Article 93 of the Minutes stipulates that, while Article 22 of the *Guiding Opinionsof PBC, CBIRC, CSRC and the State Administration of Foreign Exchange on Regulating the Asset Management Services of Financial Institutions* (the "Opinions") provides that "financial institutions shall not provide channel services for the asset management products of other financial institutions to circumvent regulatory requirements such as investment scope and leverage constraints", Article 29 of the *Opinions* clearly sets the end of the transition period as the end of Year 2020 in accordance with the principle of "separating the old from the new" to ensure a smooth transition. During the transition period, for channel services which cover up risks through trust channels, circumvent regulatory requirements on capital investment, asset classification, provision and accrual, and capital occupation, or falsely remove on-balance-sheet assets from the balance sheet through trust channels, if there are no other invalid reasons, one party requests to confirm invalidity on the grounds that the purpose of the trust violates the law or regulations, the people's court shall not support it. The relationship of rights and obligations between the trustor and the trustee shall be determined in accordance with the agreement of the trust documents.

(b) Validityafter the transition period

No formal regulatory documents have been issued yet regarding the validity of the channel services after the transition period. The viewpoint of the *Understanding and Application of the Minutes of the Work Conference for Civil and Commercial Trials for National Courts* can be referred to, which provides that:

"From the perspective of necessity, channel services carried out in violation of regulatory policies shall be deemed invalid in accordance with the law on the grounds of violation of public order. However, from the perspective of orderly defusing financial risks and preventing operational risks arising from the process of risk disposal, the validity shall be determined in a matter-of-fact manner according to the pace and schedule of regulatory work. After the transition period, channel services shall be deemed invalid on the ground that channel services will hide financial risks, which is not conducive to regulation and public interests."

Therefore, SPC tends to deemchannel services invalid after the transition period.

In short, in accordance with the relevant provisions of the *New Rules on Asset Management*, the *Minutes* distinguishes the validity of the "channel services" by "separating the new from the old". The following is a brief table:

Time	Circumstances	Effectiveness
During the Transition Period[2]	No ground for violation of laws or regulations	Effective
	Despite thatthere are acts such as using trust channels to cover up risks, circumventing regulatory regulations on capital investment, asset classification, provision and accrual and capital occupation, or falsely removing on-balance sheet assets from the balance sheet through trust channels, there is no other invalid ground.	Effective
	Statutory grounds for invalidity of contracts	Ineffective
After the Transition Period	Currently, there are no clear normative documents, and SPC tends todeem channel services invalid.	

(c) Analysis of an arbitration case involving "Channel Services" (Trust Scheme C23 case)

Basic facts

Claimant's arbitration claims, facts and grounds: The Claimant is the trustor of the Trust Scheme C23 and the Respondent is the Trustee. On 2 August 2017, the promotional materials sent to the Claimant by the Respondent disclosed that the trustor of Type B2 (junior tranches) of the Trust Scheme C23 and the obligor for making up the difference

2 The *New Rules on Asset Management* provides that the transitional period shall expire after the end of 2020. However, PBC, in conjunction with the National Development and Reform Commission, the Ministry of Finance, CBIRC, CSRC, the SAFE and other relevant authorities, issued a *Notice on Optimizing Arrangements under the New Rules on Asset Management during Transition Period to Guide the Smooth Transformation of Asset Management Business* on 31 July 2020 stating that: "In order to steadily promote the implementation of the New Rules on Asset Management and the standardized transformation of the asset management business, upon the approval of the State Council, PBC, CBIRC, CSRC, SAFE and other authorities decided upon a prudent study to extend the transitional period to the end of 2021." http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/4066284/index.html.

is D, with an introduction of D's personal and family asset status, and provided the proof of D's housing property rights and financial assets certification materials. Based on the truston the promotional materials provided by the Respondent for the Trust Scheme C23, and given that D, as a trustor of Type B2, provided the obligation of making up shortfall, the Claimant and the Respondent signed the Trust Contract. As agreed in the Trust Contract, the Respondent acts as the Trustee to manage the Trust Scheme C23with a term of one year and a scale of RMB202.5 million, among which, F Ltd., Co.("F"), as a Type A trustor, shall subscribe for trust scheme funds of RMB135 million with a benchmark rate of return of 7% per year; the Claimant, as a trustor of Type B1, shall subscribe for trust scheme funds of RMB27 million with a benchmark rate of return of 11% per year; and D, as a trustor of Type B2, shall subscribe for trust scheme funds of RMB40.5 million. On the same day, the Claimant signed the Making-up-shortfall Contract with D, a trustor of Type B2. The Contract provides that if, at the time of termination of the Trust Scheme C23 (including early termination), the Claimant's actual proceeds obtained under thetrust scheme are insufficient to cover the principal of Type B1 trust funds and proceeds generated therefrom, D shall make up the difference to the Claimant. On 11 September 2017, the Claimant remitted the subscription funds of RMB27 million to the bank account designated by the Respondent. After that, the Trust Scheme C23 suffered a total loss. The Claimant assertedthat the Respondent has made false statements and provided false materials (such asinformation on D's capital account, securities account, and house ownership) during the promotion of the Trust Scheme C23, concealed the risk coefficient of Trust Scheme C23, and induced the Claimant to make a wrong subscription decision. Therefore, the Claimant submitted the case toarbitration and requested the Respondent to assume compensation liabilities.

The Respondent argued that it had fulfilled its suitability obligations, risk warning

obligations, and information disclosure obligations in the Trust Scheme in this case. As the Trust Scheme falls into the nature of transaction management trust business, the Respondent is not obligated to substantively examine the materials provided by the Trustor of the Trust Scheme. On the contrary, the Claimant, as a qualified investor and a specialized investment agency, is obligated to conduct due diligence on Trustor of Type B2 and bear investment risks in accordance with the Trust Contract. Under the Making-up-shortfall Contract entered into between the Claimant and D who is the Trustor of Type B2, the rights and obligations thereof shall be limited to both parties thereto and is irrelevant to the Respondent. The Claimant's failure to seek remedy against D under the Making-up-shortfall Contract had nothing to do with the Respondent and the Respondent shall not be held liable for compensation.

Tribunal's opinions

The Tribunal held that the focus of dispute between the parties on this issue is whether the Trust Scheme in this case is a transaction management trust or an active management trust, which implies that the trustee of the transaction management trust only provides "channel" services and is not obligated to conduct due diligence on Trust Scheme materials. Article 9.1 of the Trust Contract in this case stipulated that "This Trust is a self-benefit trust and the Trustor and the Beneficiary are the same person." Article 10.1 provided that:

"This Trust Scheme is a transaction management trust scheme for the purposes designated by all the Trustors. The property of the Trust Scheme shall be managed and used by the Trustee in accordance with laws and the trust scheme documents. To be specific, the Trustee, the party to give instructions as authorized by the Trustor, the Custodian Bank and the Securities Broker shall jointly operate and perform their

respective duties according to the relevant contracts and agreements under the Trust Scheme."

It is clearly provided in thesecontract terms that the type of the Trust Scheme in this case is a transaction management trust scheme.

Furthermore, according to the *Understanding and Application of the Minutes of the Work Conference for Civil and Commercial Trials for National Courts*, transaction management trust business is a passive channel business that assumes responsibility for transaction management. The main featuresof a transaction management trust include:

(a) Due diligence prior to the establishment of the trust shall be the sole responsibility of the trustor or a third party it designated. Trust company shall have the rights to conduct independent due diligence on the legality and compliance of the trust scheme.

(b) The establishment of the trust, the utilization and disposal of the trust assets and other matters shall be determined by the trustor at its own discretion or shall be clearly stipulated in the trust document in advance.

(c) Trust company shall only perform the management duties that must be performed by the trust company or in the name of the trust company in accordance with the law, including matters such as account management, liquidation and distribution, and provision or issuance of necessary documents to assist the trustor in the management of the trust property.

(d) Upon the termination of the trust, the trust assets in the actual existing state shall be transferred to the owner of the trust assets rights, or the trust assets shall be disposed of according to the instructions of the trustor.

In light of the agreed content in the legal documents of the Trust Scheme and the actual performance in this case, the Trust Scheme basically conforms to the above features of the transaction management trust.

As the Trust Scheme in this case is a transaction management trust, in the legal relationship based on the Trust Contract in this case, the assets supporting materials of Trustor D of Type B2 do not fall within the scope of statutory information disclosure obligations of the Trust Scheme C23, nor do they fall within the scope of information disclosure obligations stipulated in the Trust Contract in this case. Although there are inconsistencies in D's financial information, the Claimant's request for the Respondent to bear the liability for damages on the grounds that the Respondent has made false statements and provided false promotion materials to it is not tenable, so the arbitral tribunal does not support the Claimant's arbitration request.

Therefore, the arbitral tribunal dismissed all claims of the Claimant.

Comment on the case

There are two focuses of dispute in this case:

• Is the Trust Scheme in this case a transaction management trust (i.e.,"channel service")?

• if it is a transaction management trust, what are the scope of obligations of the Trustee?

Regarding the criteria for determine the transaction management trust, the arbitral tribunal exams from two perspectives:

• From a *pro forma* perspective, the Trust Contract stipulatesthat "this Trust Scheme is a transaction management trust scheme with the purposes designated by all trustors".

• In substance, this Trust Scheme was in line with the featuresof transaction management trusts indicated in the *Understanding and Application of the Minutes of the Working Meeting on Civil and Commercial Trials for National Courts*.

Therefore, the arbitral tribunal held that the Trust Scheme in this case is a transaction management trust.

As for the scope of obligations of the Trustee, the arbitral tribunal holds that the scope of obligations of the Trustee should be determined in accordance with the Trust Contract. In the legal relationship based on the establishment of the Trust Contract in this case, the assets supporting materials of trustor D of type B2 do not fall within the scope of statutory information disclosure obligations of the Trust Scheme C23, nor do they fall within the scope of information disclosure obligations stipulated in the Trust Contract in this case. Despite that D's financial information and data are inconsistent, the arbitral tribunal holds that the Trustee is not liable for compensation to the Trustor.

Therefore, the arbitral tribunal dismissed all arbitration claims of the Trustor.

(d) Analysis of a judicial case involving "channel services" (Sino-Australian Trustcase)

Basic Facts

The Plaintiff, Wu Man ("WM"), as the investor, invested in a fund project through Shanghai Yin Xun ("YX"). YX, as the Trustor, signed a Trust Agreement with the Trustee, Sino-Australian Trust ("SA Trust"), to deliver the funds raised from the project to SA Trust. Then SA Trust, as the lender, signed a Loan Agreement to lend the funds to Zhejiang Lianzhong Company ("ZLZ"), the actual user of the funds. Later, due to the criminal offence of the actual controller of YX and ZLZ, WM's funds could not be

recovered.

WM filed a lawsuit with the People's Court of Pudong New Area, Shanghai ("Pudong Court"), claiming that SA Trust shall compensate WM the sum of RMB 1 million as well as the corresponding interest calculated at the PBOC's loan interest rate for the same period from 3 August 2013 to the date of actual payment.

The Pudong Court ruled in the first instance that SA Trust shall, within ten days from the effective date of the ruling, bear the supplementary compensation liability to the extent of RMB 200,000 for the unsuccessful recovery by WM through the illegal property recovery procedure according to the Criminal Judgment (Hu 01 Xing Chu [2017] No. 50).

Later, both WM and SA Trust appealed. The Shanghai Financial Court dismissed the appeal and upheld the original judgment.

Court's opinions

The Shanghai Financial Court held that the Trust Company in this case had breached two minimum obligations:

• First, the trustor's funds were raised illegally and fraudulentlyfrom the public, but the Trust Company neither took necessary preventive and control measures nor issued corresponding warnings to public investors, thus violating the principle of prudent management.

• Second, this case involved trust channel services. According to the Trust Contract in question, SA Trust did not conduct substantive due diligence and review on the borrower and the project for use of trust funds, andonly provided transaction management

services. SA Trust did not have the obligation to conduct due diligence on the project during the operation of the disputed trust product. However, SA Trust issued the apparently false Project Risk Inspection Report, which was used by criminals to deceive investors, and thus SA Trust violated the obligation of reasonable care.

In conclusion, SA Trust violated the principle of prudent management in its single-fund trust business, which to some extent damaged the interests of WM. Therefore, SA Trust should assume the liability for compensation.

Comment on the case

First, with respect to the identification and validity of channel services, the Shanghai Financial Court, following the guidelines of the *Minutes*, held that the Trust Contract entered into by SA Trust was a channel service carried out in 2013, and the Contract was valid according to the principle of "separating the old from the new".

Second, the obligations of SA Trust shall be determined according to the terms of the trust documents. In this case, SA Trust, as the Trustee, only had the obligation to disburse and collect the loans as instructed. It did not have active management responsibilities, nor did it bear the risks of the loans. In fact, afterSA Trust issued the funds to ZLZ according to the instructions of the single trust Trustor, it was also unable to supervise the subsequent flow and use of such funds. Therefore, WM's claim that SA Trust's lack of supervision over the trust property led to the transfer of the money by criminals lacked factual basis, which was thus rejected by this Court.

Third, in this case, the reason why the court ruled that SA Trust shall be liable for compensation was not because SA Trust has breached the terms of the Trust Contract, nor was it because of the validity of the channel service *per se*, but because SA Trust

has failed to fulfill its obligations to the minimum extent, i.e., the principle of prudent operation and the obligation of reasonable care. If a trust company breaches its obligations and causes actual losses to investors, it shall be held liable for the losses.

III. DEVELOPMENT OF FINANCIAL ARBITRATION CONCEPT

A. Evolution and Development of the Concept of Adjudicationin Financial Arbitration Cases

With the continuous development of China's market economy and the continuous enrichment of the supply of financial products and financial services, the participants in the financial market are also constantly evolving and changing. Against the backdrop that financial transactions have become a common way of life, the relationship between the parties to financial transactions has undergone subtle changes. Some scholars have put forwardthat the complexity and specialization of the financial and commercial transaction objects have made financial consumers an increasingly large and independent group. The trading relationship between them and financial institutions in commercial transactions is unequal and asymmetrical, and the financial legal relationship is being reconstructed[3]. Therefore, this Section attempts to explore the development of adjudication concept of financial arbitrationfrom the perspective of financial consumers.

1. Evolution of adjudication thinking in financial arbitration

Based on theobservation of judicial practice of financial arbitration in recent years, it is discovered that the development of adjudication concept of financial disputes involving

3 Ding Dong, "The Logic of Financial Adjudication— The Organizational Building and Future Direction of Financial Adjudication Specialization in China", PhD dissertation, East China University of Political Science and Law, 2019, p.5.

financial consumers can be roughly divided into the following stages.

(1) "Freedom of contract and caveat emptor" under the basic principle of "pacta sunt servanda"

Althoughthe term "financial consumer" has been used a lot in recent years, in fact, the early judicial practice has not paid much attention to financial consumers. Under the long-held basic position of "*pacta sunt servanda*" in civil and commercial laws, most courts and arbitration institutionsadhered to the adjudicative thinking of "freedom of contract and *caveat emptor*", and it is difficult for financial consumers to seek judicial reliefthrough arbitration or litigation. This is mainly due to the featuresof financial transactions.

On the one hand, financial transactions are contractual transactions in nature. Whether they are traditional financial services such as financial loans and securities, or new financial services such as sales of financial products and private equity funds, the relevant financial transactions need to be completed through contractual arrangement of rights and obligations and allocation of responsibilities and risks. Taking a financial loan contract as an example, agreements reached by and between the lender and the borrower on the establishment and validityof the contract, loan amount, repayment term, security measures and liability for breach of contract are all carried outunder the legal framework of the contract, while the legal interpretation of acts under a financial loan contract is also subject to the general principles of contract laws and regulations. Therefore, a contract actually becomes the main carrier for both parties to the financial transaction to agree on rights and obligations and to allocate responsibilities and risks, and naturally becomes the main basis for arbitration institutionsto resolve disputes.

On the other hand, financial transactions are also commercial risk transactions accompanied by various risks such as market risk, credit risk, and operational risk. The natural risk characteristics of financial markets determine that financial transactions are different from normal commercial transactions. In modern financial markets, financial transactions are more of a business judgment, choice, and decision-making process for financial consumers. Financial consumers conduct financial transactions based on factors such as the information they possess and the purpose of the transactions they wish to achieve, which are restricted by the sufficiencyof the information they possess and the comprehensive cognition and use of the information. At the same time, there is bound to be a risk of misjudgment. If financial consumers make an error of judgment and suffers losses due to theirown reasons, they should bear the corresponding loss by themselves.

In short, since financial consumers conduct financial transactions with financial institutions[4] of their own will, based on the logic that voluntary transactions are fair and financial consumers should be responsible for their own actions, in the early days, arbitration institutions often held a non-supportive view for financial arbitration claims filed by financial consumers.

(2) "Financial consumers protection" under the choice of freedom of contract and justice of contract

However, along with the deepening of the reform of China's financial market, financial disputes caused by financial institutions misleading financial consumers to buy financial products and financial services have emerged in endlessly. In financial transactions, simply adhering to the principle of *caveat emptor* canno longer effectively protect the legitimate rights and interests of financial consumers and will affect the further

4 Unless otherwise specified, financial institutions hereinafter refer to issuers and sellers of financial products and providers of financial services etc. in general.

development of the financial market.

Therefore, in the Eighth Working Conference on Civil and Commercial Trials for National Courts held in December 2015, the attendees proposed to "correctly handle the relationship between freedom of contract and justice of contract". Information asymmetry in the financial market, coupled with investors' own knowledge and ability limitations, makes it difficult for investors to truly understand the risks and benefits thereof when purchasing investment financial products or accepting relevant services, and the investors mainly rely on the promotion and explanation of product sellers and service providers. Under normal circumstances, the contracting capacity of the two parties to the transaction is unequal. Therefore, it is necessary to determine the "suitability" obligations of sellers in accordance with the law to ensure that financial consumers can make independent decisions based on a full understanding of the investment target and its risks, and achieve the contractual justice. This proposal has won the support of adjudicating bodies including courts and arbitration institutions. Since then, the concept of adjudication in cases involving financial consumers has gradually changed. Arbitration institutions no longer emphasize the principle of "*caveat emptor*" when adjudicating financial disputes. Instead, they have begun to stress the protection in favor of financial consumers and require financial institutions to assume certain "suitability" obligations. In arbitration practice, the adjudication thinking under the principle of preferential protection of financial consumers is mainly reflected in the following aspects:

First, the principle of preferential protection requires the protection of financial consumers' right to know. Financial consumers have the right to obtain the relevant necessary knowledge and information when purchasing financial products or receiving financial services, while financial institutions are also obliged to fully disclose the relevant

information in light of the actual conditions of financial consumers at the time of selling the relevant products or providing the relevant services. The obligation to inform and explain should be a combination of objective standards that can be understood by ordinary people and subjective standards that can be understood by financial consumers. The obligation to inform and explain is the key for financial consumers to truly understand the returns and risks of financial products and financial services, and the core for financial institutions to perform the "suitability" obligations.

In addition, the principle of preferential protection requires toredistribution the burden of proof in favor of financial consumers. Financial consumers are naturally weaker than financial institutions in terms of the ability of burden of proof, and especially the lack of some professional knowledge or experience leads them rely on sufficient explanations given byfinancial institutions. Under thiscircumstance, it is particularly important to endow financial institutions with the obligation to disclose information and make explanation to financial consumers. Under the principle of preferential protection, financial consumers only need to bear the burden of proof for the facts relating to their purchase of products or acceptance of services, while financial institutions shall bear the burden of proof for whether they have performed the obligation of notification and explanation. If financial institutions fail to perform these obligations in the transactions or have flaws in their performance, they shall be liable for the losses caused to financial consumers by non-performance or defective performance. For example, in a private equity fund contract dispute, the fundraiser is obliged to keep relevant information and materials such as the risk disclosure statement and investor risk tolerance questionnaire, to prove that it has performed the suitability obligation, and shall therefore bear the burden of proof as to whether it has performed the corresponding obligation of notification and explanation.

All in all, in the financial market, both parties to the transaction have a high degree of asymmetry in the grasp of commodity transaction information, and the great difference in the powers of the two parties makes it difficult for financial consumers to trade on an arm's length basis with financial institutions. This requires the law to extend a helping hand to give protection in favor of financial consumers that they are entitled to, so as torectify the information asymmetry between financial consumers and financial institutions and maintain the balance of power of financial consumers and financial institutions in the collection, mastering, identification and understanding of information.[5]

(3) The "principle of suitability" under the tighteningof financial regulation

On 27 April 2018, PBC, CBIRC, CSRCand SAFE jointly issued the *New Rules on Asset Management*, according to which financial institutions issuing and selling asset management products should adhere to the business philosophy of "understanding the products" and "understanding thecustomers", and strengthen the investor suitability management; in addition, financial institutions should convey the philosophy of "seller due diligence and *caveat emptor*" to investors, and break the rigid redemption. Subsequently on 28 September 2018, CBIRC issued the *Measures for the Supervision and Administration of Wealth Management Business of Commercial Banks* which serves as a supporting implementation rulesfor the *New Rules on Asset Management*. The promulgation of the *New Rules on Asset Management* indicates that China has entered a new stage of development of the suitability obligation system. It is also due to the gradual strengthening of "investor suitability management" by the regulatory authorities, which has directly influenced the transformationof judicial adjudication philosophy.

5 Li Pei, "Research on the Financial Consumer Protection System", Ph.D. dissertation, Fudan University, 2011, p.31.

On 8November 2019, SPC promulgated the *Minutes*, which states that, in the trial of civil and commercial cases arising from the sale of various high-risk rating financial products or the provision of services tofinancial consumers to participate in high-risk rating investment activities, the principle of "seller due diligence and *caveat emptor*" must be adhered to, and whether financial consumers fully understand the nature and risks of relevant financial products and investment activities and make independent decisions on such basis shall form the basic facts of thecase that shouldbe ascertained, so as to protect the legitimate rights and interests of financial consumers in accordance with the law, regulate the operation of financial institutions, and promote the formation of an open, fair, and impartial market environment and order.

The above-mentioned changes in financial regulatory policies and changes in judicial adjudication concept are the result of the fact that regulatory authorities and adjudicative agencies have to applythe stricter principle of "suitability obligation" to regulate financial institutions in the context that the obligation of notification and explanation previously imposed on financial institutions is still insufficient to protect the rights and interests of financial consumers.

"Suitability" is anexotic term that requires financial institutions to sell the suitable products to the suitable clients. Suitability obligation, originated in the USA securities law, is an effective tool to balance the unequal status of buyers and sellers and information asymmetry in financial markets. In recent years, it has been highly valued by financial regulatory authorities in various countries.[6] Suitability obligation requires that financial institutions must, in the process of promoting and selling high-risk financial products to financial consumers and providing financial consumers with services for

6 "Understanding and Application of the 'Minutes of the Working Conference on Civil and Commercial Trials for National Courts'", compiled by the Second Civil Division of the Supreme People's Court, People's Court Press, December 2019, p.410.

their participation in high-risk investment activities, fulfill the obligation of understand customers, understand products, and providing suitable products to suitable financial consumers.

The purpose of imposing suitability obligation on financial institutions is to ensure that financial consumers can make independent decisions based on a full understanding of the nature and risks of relevant financial products or servicesand bear the benefits and risks arising therefrom, so as to achieve a certain balance of interests between the *caveat emptor* and the protection of financial consumers. However, it should be noted that financial consumers shall not be protected in an unrestrained manner. On the one hand, it is necessary to comprehensively consider the financial trading capabilities of financial consumers *per se* and distinguish the protection of financial consumers from professional investors. At the same time, it is also necessary to implement differentiated protection for different financial consumers based on the characteristics of different financial industries, so as to ensure that various transaction entities in the financial market can trade under a relatively fair condition. On the other hand, if financial consumers deliberately provide false information or refuse to listen to the advice of financial institutions, resulting in their improper purchase of products or acceptance of services, the financial institutions shall also be exempted from corresponding liability. For example, if there is evidence proving that an investor, after being notified that it is not suitable to purchase relevant products, voluntarily requests to purchase products with risk levels higher than its risk tolerance, and that after the fundraiser confirms that such investor is not an investor with the lowest risk tolerance category and issues a special written risk warning statingthat the product risk is higher than its tolerance, if the investor still insists on purchasing such products, the fundraiser may be exempted from liability.

2. Development of the adjudication concept in financial arbitration

From the early concept of "freedom of contract and *caveat emptor*", to the later concept of protection in favor of financial consumers, and subsequently the concept of "seller due diligence and *caveat emptor*" in the new era, the concept of financial arbitration in adjudicating financial disputes involving financial consumers is undergoing some changes, which may become a trend in the future development of the adjudication concept of financial arbitration.

(1) Changes from pro formaequality to substantive equality of subject entities

The development of the financial market is inseparable from the active participation of financial consumers. The protection of financial consumers' legitimate rights and interests is also an inevitable requirement for deepening financial reform and promoting the healthy development of financial markets. However, the resolution of disputes between financial institutions and financial consumers under the modern financial system applyingthe principle of *pro forma* equality characterized by freedom of contract and autonomy of will cannot achieve fairness and justice in financial transactions. Since the factors such as the disparity in the status of both parties to financial transactions, and the disparity in economic strength and the ability to access information have caused the *de facto* unequal status of financial institutions and financial consumers, it is necessary to correct such "imbalance" in order to realize equal status and balance interests between financial institutions and financial consumers.[7] Therefore, it is necessary to adhere to the principle of equal legal status, equal right protection, and equal development opportunities for all types of market players, and to avoid the one-sided emphasis on *pro forma* equality whileignoring the egal protection of substantive equal rights of different social groups. In respect of the rights of financial consumers, it is necessary to have an in-

7 Liu Bo Han, "On the Building, Remodeling and Expansion of the Financial Jurisprudence System — A Research Based on the Perspective of Domain Jurisprudence", published in "Economic Law Series" (Total No. 34) with Chen Yunliang as the editor-in-chief, pp.178–185, [Beijing] Social Science Literature Press, 2019.

depth understanding of the development background and value orientation of relevant laws and regulations and to improve the efficiency and fairness of resource allocation. The party with dominance should shoulder certain social responsibilities to maintain the substantive equality in transactions and realize equality in the real sense.

(2) Protection of financial transactions fromthe early stage to the whole process of financial transactions

If a financial institution is regarded as having fulfilled its obligation once it fulfills the obligation of notification and explanation prior to a transaction and fully discloses the product information, then fulfilling the obligation of suitability requires the financial institution to be more proactive and professional, which imposes higher requirements on the financial institution. Taking private fund contract disputes as an example, before promoting a product to an investor, the fundraiser or its entrusted sales agency shall use questionnaires or other methods to perform the procedures for determination of specified target customers, evaluate the ability of the investors to identify and bear risks, promote the product to the matching investors, and ensure that the content of the promotional materials is true, complete, and accurate. In case of inconsistency with the main content of the fund contract, a special explanation shall be given to the investors to ensure that the investors can make independent decision based on a full understanding of the nature and risks of the relevant product and bear the returns and risks arising therefrom. After a fund contract is signed, the manager shall take the initiative to disclose information according to the type, content, frequency, and method agreed upon in the contract, and ensure the authenticity, accuracy and completeness of the information disclosed. Otherwise, the manager shall be deemed to have violated the contract and failed to fulfill its obligations such as dedication to his duties, acting in good faith, and being prudent and diligent. In addition, the manager shall make investment strictly according to the

agreed investment target or investment scope and shall compensate the investors for the loss if there is any evidence proving that the manager makes investment beyond the scope.

(3) The adjudication concept of financial arbitration is increasingly influenced by financial regulatory policies

In recent years, due to China's continuous reform of the financial system, the financial regulatory system has undergone some adaptability changes. Regulations such as the *Measures for the Suitability Management of Securities and Futures Investors* promulgated by CSRC on 12 December 2016, the *New Rules on Asset Management* jointly promulgated by PBC and other authorities on 27 April 2018, the *Measures for the Supervision and Administration of the Wealth Management Business of Commercial Banks*, the supporting implementing rules for the *New Rules on Asset Management* promulgated by CBIRC on 28 September 2018, and *Securities Law of the People's Republic of China* revised on 28 December 2019, stipulate the suitability obligations of financial institutions at the legislative level. China has successively promulgated and implemented a number of financial laws and regulations. The above provisions reflect that in recent years, China has gradually shifted from the original "*por forma* compliance" which merely meets certain regulatory requirements to the "substantive compliance" which aims at the protection of financial consumers.

At the adjudication level, the adjudication philosophy of financial arbitration has also been adjusted to reflect the judicial approach that financial adjudication effectively responds to financial regulation that financial adjudication coordinates and connects financial regulation, which leads to the change in adjudication philosophy from the early stage of "freedom of contract" to "seller due diligence and *caveat emptor*" in the new era.

However, we should also note that the coordination of financial adjudication and financial regulation does not necessarily mean that financial adjudication must have the same approach in the terms of the determination of the validity of a financial and commercial transaction and the formulation of law, nor does it mean that financial adjudication mixes up with financial regulation. The "coordination and connection" between financial adjudication and financial regulation should be based on the understanding and respect of the functional distinction and functional limits of financial adjudication and financial regulation and follow the "legal logic" of the adjudication. Otherwise, the excessive reinforcement of the role of financial adjudication as "follow the regulation" may deviate from the essential characteristics of judicial power and confuse the difference in the responsibilities of financial adjudication and financial regulation.

3. Summary

As a convenient and effective method for dispute resolution, financial arbitration plays a very important role in resolving legal disputes between financial institutions and financial consumers. In particular, financial arbitration is characterized by equality, rapidity, confidentiality, and authority, which can help financial consumers who are relatively vulnerable to reduce relief costs and risks, and thus is of greater significance in protecting them. Looking into the future, financial arbitration will play a more active role in preventing and mitigating financial risks, maintaining financial security and stability, and practicing social governance, and will provide the financial industry with arbitration services of higher quality and better in line with international standards.

B. Impact of Financial Arbitration Cases on Industry Practice and Rules and Establishment thereof

The arbitration process of financial arbitration cases is also the process of defining the

rights and obligations of the parties to a financial legal relationship. For a single financial institution, the outcome of a financial arbitration case can often, in turn, affect its front-end business processes; nevertheless, for the entire financial industry, the outcome of several financial arbitration cases of the same type may also affect or establish industry practices and rules, reflecting the integration of law and commercial matters. Taking a common dispute over asset management contracts as an example, this Section attempts to exam the impact of financial arbitration cases on industry practices and rules and establishment thereof, from the perspective of the obligations that financial institutions may assume.

1. Dynamic dimension: the initial formation of a batch of obligations of financial institutions

In asset management business, the rights and obligations between financial institutions and investors are mainly defined by asset management contracts. Therefore, the obligations assumed by financial institutions in the asset management business are mainly reflected in the period from the establishment and validity of asset management contracts to the termination of asset management contracts. However, when examining the composition of financial institutions' obligations from the perspective of dynamic development, it is found that the arbitration outcomes for the disputes arising from asset management contract continue to confirm that the obligations of financial institutions have been extended to before and after the contract, and that the obligations assumed by financial institutions to investors take on a dynamic character according to the progress of asset management business, and that a batch of obligations is formed and composed of pre-contractual obligations, contractual obligations, and post-contractual obligations, thus constituting comprehensive protection for investors.

(1) Pre-contractual obligations of financial institutions

In the process of promoting asset management products, as no specific asset management contract has been entered into between the investor and the financial institution, so no contractual relationship has been established between the investor and the financial institution, and the financial institution does not assume contractual obligations. However, the financial institution still has to perform pre-contractual obligations in accordance with legal provisions and regulatory requirements, the most typical of which is suitability obligations. Suitability obligations require financial institutions to sell (or provide) the suitable products (or services) to suitable investors. Due to the fact that "the structure of financial products become increasingly complex, risks are increasingly concealed, and financial institutions are becoming larger and larger, there is a serious asymmetry in information, capital, and status between financial consumers, as buyers, and financial institutions, as sellers".[8] Therefore, the legitimacy of financial institutions' pre-contractual obligations lies in "balancing the unequal status of buyers and sellers in financial markets and information asymmetry".[9]

(2) Contractual obligations of financial institutions

The nature of an asset management contract is a contractual arrangement of rights and obligations of the parties in the business of "wealth management on behalf of others". Therefore, it follows the principle of autonomy of will. What contractual obligations a financial institution will assume is mainly determined on the basis of independent negotiation between the investor and the financial institution. Although the regulatory authority standardizes the contents of an asset management contract by formulating

8 Huang Hui, "Investor Suitability Obligation of Financial Institutions: Empirical Research and Improvement Suggestions", Law Comments, Issue 2, 2021, p.132.

9 Wang Rui, "An Empirical Analysis of the Judicial Application to Financial Institutions' Suitability Obligations", Law Application • Judicial Cases, Issue 20, 2017, p.68.

guideline for asset management contracts, it still cannot fundamentally change that an asset management contract is the product of consensus between the investor and the financial institution. Due to the fact that the interaction between the investor and the financial institution occurs intensively in the process of contract performance, the contractual obligations of the financial institution constitute a major part of its batch of obligations. The typical contractual obligations of a financial institution include making investment within the agreed investment scope, disclosing information to the investors according to the agreed time and method, and cooperating with the investors in redeeming the investment shares according to the agreed time and method, etc.

(3) Post-contractual obligations of financial institutions

The termination of an asset management contract does not mean that the financial institution no longer assumes any obligations to the investor. In fact, based on the agreement of the asset management contract, the relevant regulatory provisions, or the principle of good faith, the financial institution may still have to perform certain post-contractual obligations. For example, based on the right of the investor to supervise the manager and the custodian to perform the obligations of investment management and custody, it may derive an obligation of the manager and the custodian to provide annual reports, net value reports, investment details reports and liquidation reports on the investment etc., at the request of the investor, after the asset management contract is terminated. If the manager and the custodian fail to perform the obligation, they may bear adverse legal consequences in the arbitration.

2. Static dimension: traceable determination of obligations of financial institutions

In asset management business, financial institutions assume a wide range of obligations to the investors from the time before the contract takes effect to the time after

the contract is terminated. The focus of disputes in arbitration arising out of asset management business often concerns whether the financial institutions assume, or effectively perform, one or more of its batch of obligations. Arbitration, as a process of identifying and resolving disputes, has gradually made the determination of the obligations of financial institutions traceable.

(1) Respect for contractual agreements

Compared with litigation, arbitration is more inclusive to the parties' autonomy of will. For disputes arising out of an asset management contract, the arbitral tribunal often focuses on the agreement of the asset management contract. If the asset management contract contains a clear and explicit agreement on whether or how the financial institution shall assume or perform an obligation, then in principle, the agreement between the investor and the financial institution should be respected. However, if the capital management contract is unclear and ambiguous as to whether a financial institution shall assume a certain obligation or how to perform a certain obligation, it is necessary to use various canons of construction to interpret contract and clarify the scope of the financial institution's obligations. In addition, asset management contract is usually the standard contract text provided by the manager. Therefore, on the basis of respecting the contract agreement, it is also necessary to consider the application of special rules of standard clauses in asset management contract disputes in order to protect the interests of investors as recipients of standard clauses.

(2) Compliance with the regulatory rules

Asset management, as a kind of business that is strictly regulated, is subject to special regulatory rules in addition to the autonomy of will of investors and financial institutions.Such regulatory rules often do not allow the parties to exclude through

autonomy of will, showing the characteristics of mandatory regulations. For example, the *Guiding Opinions on Regulating Asset Management Business of Financial Institutions* is uniformly appliable to various types of asset management businessesand prohibits financial institutions from making commitments of "rigid redemption" and "guaranteed principal and return". Therefore, even if similar clausesare agreed upon by investors and financial institutions in the contract, it is difficult to obtain legal effect. Meanwhile, financial institutions may also face compliance risks. This shows that the autonomy of will of investors and financial institutions in asset management business is not without boundary, and not all asset management contract stipulations can be legally recognized. The determination on the scope of obligations of financial institutions should also be based on relevant regulatory rules.

(3) Identification of advocated rules

Advocated rules are legal norms that promote and induce the parties to adopt specific conduct models.[10] Although the advocatedrules define the rules for the parties to a contract, they are only of advocacy natureand therefore are not adjudication standards that can be applied by judiciary.They only advocate and induce the parties to adopt specific conduct models in order to maximize their own interests. They are like a sign on a steep mountain road, aiming to remind passers-by to pay attention to their own safety.[11] Among the many rulesthat regulate asset management business, in addition to discretionary rules that the parties may exclude by agreement and mandatory rules that cannot be excluded by agreement, there are also advocatedrules formulated by the legislature to better protect the interests of investors or to regulate asset management business. The regulatory authorities often encourage financial institutions to follow

10 Wang Yi, "On Advocated Rules-Analysis against the Background of Contract Law", Tsinghua Law, Issue 1, 2007, p.66.

11 *Ibid*, p.73.

such advocatedrules. However, in the absence of relevant agreements in the asset management contract, it is inappropriate to determine that a financial institution is in breach of obligations on the grounds that ithas failed to follow the advocatedrules. For example, Articles 30 and 31 of the *Administrative Measures on Fundraising Activities of Private Investment Funds* provide that fundraisers shall pay return visits to investors upon expiration of the investment cooling-off period. But it also provides that "the Asset Management Association of China encourages fundraisers to implement a return visit system in accordance with Articles 30 and 31 of these *Measures*, and the time of formal implementation will be notified separately after relevant implementation effects are evaluated." Therefore, before AMAC formally adopts the return visit system, it is advisable to take the return visit as the business rules advocated by AMAC.

(4) Measuring prudence

Due to the highly complex and professional nature of asset management business, investors and financial institutions often enter into an asset management contract to reasonably define the rights and obligations of each party. At the same time, there are many regulatory rules formulated by regulatory authorities to regulate asset management business. However, no agreement or provision can exhaust complex transaction scenarios in reality, and the inherent ambiguity of language makes it more difficult to determine the obligations of financial institutions. Therefore, for matters that are not covered by the agreement of the parties and the regulatory provisions, the examination of whether a financial institution has exercised reasonable diligence and prudence is often the benchmark for adjudication. For example, it is often agreed in the asset management contract that the custodian is only obliged to *pro forma* review the investment transfer instructions of the manager, yet how to determine that the custodian has fulfilled the obligation of formal review sometimes needs to resort to general prudential standards.

In an arbitration case involving the manager's investment beyond the agreed scope, the arbitral tribunal held that the custodian could have found out the Manager's investment exceeding the agreed scope if it has carefully reviewed all the legal documents of the transaction, but the custodian failed to do so, thus it was deemed to have failed to fulfill its supervisory duty to the manager. In this case, the arbitral tribunal determined the scope of obligations of financial institutions based on the degree of prudence.

3. Internal dimension: attribution of liability for an employee's misconduct has become increasingly clear

Financial institutions, as a legal entity, need to complete the entire asset management business process from fundraising, investment, management, and exit through the work of individual employees. During this process, a dispute may arise as to whether financial institutions shall assume liability for their employees' violation of regulations. A typical dispute in this regard is the issue of attribution of liability where the employees of financial institutions promise guaranteed principal in violation of regulations, when promoting asset management products to investors.

One possible answer is to distinguish whether the investors have reasonable trust on the promise of guaranteed principal made by the employees of financial institutions in violation of regulations, which is often closely linked to the fulfilment of suitability obligations by financial institutions. "Regardless of whether it is the fiduciary duty under the common law system or the principle of good faith in civil law system, both emphasize that the rule of investor suitability obligations originates from the relationship of trust between financial institutions and investors".[12] Specifically, if a financial institution fails to fulfill its suitability obligations, resulting in the purchase of asset

12 He Ying & Ruan Shaokai, "On the Investor's Suitability Obligation of Financial Product Sellers", Financial Law, Issue 1, 2021, p.137.

management products by unqualified investors who lack professional knowledge and investment experience, then the investors are more likely to trust the illegal promise of guaranteed principal made by the employees of financial institutions, and the financial institutions is more likely to be held liable for their employees' illegal promise. If the financial institution has fulfilled its suitability obligations or, despite of the failure to fulfill its suitability obligations a qualified investor is not affected in its independent investment activities, then the investor knows or should have known that guaranteed principal in asset management business has been explicitly prohibited by the regulatory authorities and should not reasonably rely on the illegal promise of the financial institution's employee, so it is less likely that the financial institution will assume liability for their employees' violation.

In practice, the attribution of liability arising from employees' irregularities may run through all aspects of fundraising, investment management, and exit in asset management business. The process of arbitration institutions' adjudication of relevant disputes is actually a process of unifying the application of laws, and the result of arbitration makes the attribution of liability for employees' misconduct more and more clear.

4. External dimension: tendency of convergence in the sharing of liability between the manager and the custodian

To ensure the safety of investors' funds in asset management business, the custodian in addition to the manager is often appointed to perform supervision duties on the manager's investment. Therefore, in a dispute arising from asset management business, the investor tends to claim against both the manager and the custodian as respondents and request them to bear joint and several liability for its losses. However, in practice, it

is less likely that joint acts of the manager and the custodian cause losses to the investors. Therefore, there are fewer cases in which arbitration institutions uphold the claimant's claim against the manager and the custodian for joint and several liability for its losses. More disputes are often on how to share the liability when the manager and the custodian are at fault respectively.

Recent adjudication trends show a convergence in the sharing of liability between the manager and the custodian. That is, the manager often assumes the main compensation liability while the custodian assumes no liability or assumes secondary compensation liability. When the manager assumes secondary compensation liability, sometimes the manager and the custodian assume proportionate liability, and sometimes the custodian assumes supplementary liability to the extent that the manager fails to assume.

5. Summary

The impact of financial arbitration cases on industry practice and rules and establishment thereof is manifested in the initial formation of a batch of obligations for financial institutions in a dynamic dimension, the traces to adjudicate the obligations of financial institutions in the static dimension, the gradually clear attribution of liability for employees' misconduct in the internal dimension, and the tendency of convergence of the sharing of liability between the manager and the custodian in the external dimension. In view of the speedy, convenient, and private nature of arbitration, arbitration has become a dispute resolution method favored by financial institutions, and the outcome of arbitration will further confirm and shape the common practice and rules of the financial industry.

Chapter Four

Researchon Hot Issues of Arbitrators' Conflicts of Interest and Grounds for Recusals

Song Lianbin & Chen Xijia[1]

In order to understand the practice and development of conflicts of interest and recusal of arbitrators in the field of international commercial arbitration before and after 2020, this Chapter has conducted a retrospective study of the cases, rules and regulations in recent years both at home and abroad, especially from 2018 to 2020, in an attempt to reconstruct the latest landscape in this field and identify and analyze the problems. It is important to note that this Chapter does not represent the position of any organization, but only screens information for people and institutions from all walks of life who are interested in the development of arbitration, in order to facilitate in-depth discussion of related issues and improve the arbitrator system.

I. ARBITRATORS' CONFLICTS OF INTEREST IN COMMERCIAL ARBITRATION

A. Commentary on Arbitration Laws, Arbitration Rules, and the Code of Conduct for Arbitrators

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Arbitrator's impartiality and independence is the cornerstone of the arbitration system. It is widely accepted in international practice that the same obligations of independence and impartiality should apply, regardless of whether the arbitrator is appointed by the parties or by the appointing authority, and regardless of the sole arbitrator or the presiding arbitrator. Subject to the obligations of independence and impartiality of arbitrators, a person with a conflict of interests in a specific case cannot serve as an arbitrator in that case, and if arbitration proceedings have already been commenced, that person shall refuse to continue to act as an arbitrator in that case. As to what kind of situation constitutes a conflict of interest and may even give rise to arbitrator recusal, the laws and practice in various countries are different.

1. International dimension

To resolve the different views on conflicts of interest in international arbitrations under the various law systems, the International Bar Association ("IBA") first presented the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the "Guidelines on Conflicts of Interest") in 2004, drawing on the best international practice.Later, with reference to the laws and practice of some countries, a revised version[2] was issued in 2014, which has now been widely recognized and applied in the international arbitration community and has high reference value.

The *Guidelines on Conflicts of Interest* are divided into two parts. The first part set forth the General Standards and IBA's explanatory notes for reference. The second part lists and categorizes the situation of actual application of the General Standard in three Application Lists, namely, the Red List, the Orange List, and the Green List, according on the severity of the situation, in order to enhance clarity and consistency in specific

2 Unless otherwise specified, the contents of the 2014 editionshall prevail in respect of the contents of this Chapter and the *Guidelines on Conflicts of Interest* below.

applications and to avoid unnecessary applications for arbitrator recusal. The *Guidelines on Conflicts of Interest* specifically points out that the Application Lists are "non-exhaustive" and detail specific situations and cannot cover every situation that may arise in practice. In all cases, the General Standards should still prevail.[3]

Following the General Standard 2of the *Guidelines on Conflicts of Interest*, the so-called conflicts of interest include the following situations: *first*, an arbitrator should refuse to accept an appointment if he/she has any doubt as to his/her ability to be impartial or independent, or should refuse to continue to act as arbitrator if the arbitration proceedings have been commenced.[4] *Second*, if from the point of view of "a reasonable third person" who is aware of the facts and circumstances,a situation gives rise to justifiable doubts as to the arbitrator's impartiality or independence,it will also be considered as a conflict of interest unless the arbitrator is expressly or impliedly accepted by the parties.[5]

As to what constitutes "justifiable doubtsas tothe arbitrator's impartiality or independence", such doubtsare justified if a "reasonable third person" considers that the arbitrator, in rendering his/her decision, is likely to be influenced by factors beyond the merits of the case as presented by the parties.[6] Therefore, the standard for the "justifiable doubts" test is objective. Moreover, in any of the circumstances described in the non-waivable Red List, justifiable doubts as to the arbitrator's impartiality or independence are established and cannot be waived by the consent of the parties.

On the basis of the obligations of independency and impartiality, the arbitrator is obliged to disclose any circumstances which are "likely" to give rise to justifiable doubts as to his/

3 Practical Application, Section 1,the *Guidelines on Conflicts of Interest*.

4 General Standard 2(a), the *Guidelines on Conflicts of Interest*.

5 General Standard 2(b), the *Guidelines on Conflicts of Interest*.

6 General Standard 2(c), the *Guidelines on Conflicts of Interest*.

her impartiality.[7] The arbitrator's duty of disclosure is not only good arbitration practice but also a legal obligation. The arbitrator's duty of disclosure is expressly provided for in the *UNCITRAL Model Law on International Commercial Arbitration*[8] (the "Model Law") as well as in the laws of many countries.

(a) *Scope of disclosure obligation*

Rather than applying the objective standard in determining whether an arbitrator has conflicts of interest, the *Guidelines on Conflicts of Interest* adopts a subjective standard when determining whether an arbitrator has a duty of disclosure, that is, "if facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence",[9] the arbitrator should disclose.

Furthermore, in accordance with Article 12 of the *Model Law*, an arbitrator's duty to disclose is to disclose any circumstances that are "likely" to give rise to justifiable doubts as to his/her impartiality (Article 12(1) of the *Model Law*). "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he/she does not possess qualifications agreed to by the parties" (Article 12(2) of the *Model Law*). Article 12(1) adds the word "likely", which covers a wider scope than Article 12(2). As a result, most of the international opinions believe that the situations giving rise to the arbitrator's disclosure obligation cover a wider scope than the situations giving rise to the application for arbitrator recusal.

The Red List, Orange List and Green List in Part II of the *Guidelines on Conflicts of Interest* provide clear and specific guidelines and are highly practical. The situations set out in the Red List refer to the existence of an objective and significant conflict of

7 Article 12(1) of the *Model Law*.

8 *Ibid*.

9 General Standard 3(a), the Guidelines on Conflicts of Interest.

interest in the eyes of a reasonable third person having knowledge of the relevant facts and circumstances. The Red List can further be divided into two parts: Non-waivable Red List and Waivable Red List. The "Non-waivable Red List" includes a variety of situations based on the overriding principle that "*Nemo judex in causa sua*". Thus, acceptance of such situation by the parties does not cure the conflict of interest. In the "Waivable Red List", due to the seriousness of the conflict of interest, only when the party is aware of the conflict of interest and nevertheless clearly expresses his/her willingness to has the candidate act as arbitrator should it be deemed that the conflict of interest has been waived by the party.

Comparatively speaking, the situations set out in the Orange List refer to the fact that from a party's point of view, likely to cast doubt as to the impartiality or independence of the candidate acting as arbitrator. Therefore, the arbitrator candidate is obliged to disclose such situations. However, if the parties do not object in time after the candidate's disclosure, it can be presumed that the parties have accepted the candidate.

The Green List means that, from an objective point of view, there are no apparent and real conflicts of interest. As such, the arbitrator candidate has no duty to disclose the situations set out in the Green List.

(b) *Purpose of disclosure*

As noted above, the scope of arbitrator's duty to disclose extends beyond the grounds for application for recusal of arbitrator; therefore, the arbitrator disclosure does not imply the existence of a conflict of interest. The arbitrator who has made the disclosure considers himself/herself to be impartial and independent, despite the disclosed fact; otherwise, he/she would have refused to accept the appointment or resigned.[10] The purpose of the

10 General Standard 3(c), the *Guidelines on Conflicts of Interest*.

disclosure is therefore to give the parties an opportunity to judge whether they agree with the arbitrator's assessment (that he/she is still impartial and independent).[11]

(c) *Ongoing obligationsto disclose*

An arbitrator is obliged to maintain independence and impartiality throughout the arbitration process. Similarly, regarding the timing of the arbitrator's disclosure duty, the arbitrator is obliged to disclose not only at the time when a party or an arbitration institution is inquiring if he/she can act as arbitrator in a specific arbitration case. Upon accepting the appointment and designation, the arbitrator is obliged to disclose in an ongoing basis throughout the arbitration proceedings after appointment or designation.[12]

It was argued that an arbitrator's duty of disclosure should be relatively mitigated in the later stage of the arbitration proceedings to ensure the proper ending of the procedure.[13] However, the *Guidelines on Conflicts of Interest* takesa different approach. *General Standard 3(e) of the Guidelines on Conflicts of Interest* states that:

"When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into accountwhether the arbitration is at the beginning or at a later stage."

Explanation(e) to General Standard 3 further specifies that:

"In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal."

11 Explanation(c)to General Standard 3, the *Guidelines on Conflicts of Interest*.

12 The last sentence of Explanation(a) to General Standard 3, the *Guidelines on Conflicts of Interest*.

13 General Standard 3(b), the *Guidelines on Conflicts of Interest*.

In view of the practice that an increasing number of arbitrator candidates have made advance declarations or waivers for possible conflicts of interest arising from the facts or circumstances that are likely to occur in the future, the *Guidelines on Conflicts of Interest* specifically points out that such advance declarations or waivers will not discharge the arbitrator's ongoing disclosure obligations. The validity and effect of advance declarations or waivers must be assessed on case-by-case basis according to the specific content of advance declarations or waivers, the specific circumstances to occur, and the laws applicable, etc.[14]

(d) *Legal effect of arbitrators' failure to fulfill their disclosure obligations*

An arbitrator's failure to disclose certain facts and circumstances which in the eyes of the parties might cast doubt on the arbitrator's impartiality or independence does not necessarily imply that the arbitrator has a conflict of interest, nor does it constitute a reason to recuse arbitrator.[15] Nevertheless, it should be noted that the Supreme Court of the United Kingdom ("UK Supreme Court") in *Halliburton* case (discussed below) held that the failure to disclose relevant matters is a factor that an impartial and informed observer should consider when assessing whether there is a prejudice.[16]

2. Domestic dimension

The *Arbitration Law of the People's Republic of China* promulgated in 2017 (the "Arbitration Law") does not specify the circumstances of conflicts of interest and disclosure issues for arbitrators;it only sets forth in Article 34 the circumstances in which an arbitrator must recuse himself/herself from a case, namely:

14 Explanation (b) to General Standard 3, the *Guidelines on Conflicts of Interest*.

15 Practical Application 4, the *Guidelines on Conflicts of Interest*. The last sentence of Explanation (c) to General Standard 3, the *Guidelines on Conflicts of Interest*.

16 *Halliburton* Case, UK Supreme Court Judgment,paras. 117–118.

(a) The arbitrator is a party to the case, or is a close relative of any party to the case or the agent thereof;

(b) The arbitrator has a stake in the outcome of the case;

(c) The arbitrator has any other relationship with any party to the case or the agent thereof that may affect the impartiality of the arbitration; and

(d) The arbitrator privately meets with any party to the case or the agent thereof, or has improperly accepted treats or gifts from any party to the case or the agent thereof.

The arbitration rules and the code of conduct for arbitrators of mainstream Chinese institutions address the issue of conflicts of interest involving arbitrators. For example, Article 32 of the *Arbitration Rules of the China International Economic and Trade Arbitration Commission* (the "CIETAC Arbitration Rules") promulgated in 2015 provide that where a party has justifiable doubts as to the independence and impartiality of an arbitrator, it may request in writing for recusal of the arbitrator by stating the reasons for its challenge and adducing the evidence. Similarly, the circumstances of recusal are far fewer than the scope of disclosure. As another example, Article 9 of the *CIETAC Code of Conduct for Arbitrators* in 2021 provides that the arbitrators shall ensure time for the hearing and collegiate discussions, shall not arbitrarily affect the hearing of a case due to other matters, and shall report to the arbitral institution in advance under special circumstances. This means that although professional ethics require arbitrators to be present on time, incompliance with this requirement is hardly a justified ground for arbitrator recusal. Undoubtedly, this does not mean that arbitrators can deal with professional ethics at will. In a reputation-based industry like arbitration, an arbitrator with a bad reputation is more likely to be eliminated.[17]

17 See Song Lianbin& Yan Jiexiong, "Application for Setting Aside an Arbitration Award: Current Situation —

B. Overview of Domestic Practice on Conflicts of Interest and Arbitrators Recusal

To demonstrate the real and general picture of arbitrator' conflicts of interest in domestic practice, the cases referred to in this Chapter are not only derived from internal data of the China International Economic and Trade Arbitration Commission ("CIETAC"), but also from the "non-litigation case" database. Statistics show that over the past three years, CIETAC has accepted 71 applications for recusal and made no written decision thereon; all courts in China have accepted 989 cases involving conflicts of interest of arbitrators, among which six cases were nullified or rejected for enforcement. More specifically, in 2020, the courts have accepted 211 cases involving conflicts of interest of arbitrators, and none of arbitration awards in these cases was nullified or rejected for enforcement. In 2019, the courts have accepted 370 cases involving conflicts of interest of arbitrators, among which arbitration awards in six cases were nullified or rejected for enforcement. In 2018, the courts have accepted 408 cases involving conflicts of interest of arbitrators, and no arbitration award was nullified or rejected for enforcement. Upon multiple verification, especially the separate sampling of databases of China Judgments Online and PKULaw, the above data can basically reflect the real situation of cases involving conflicts of interest of arbitrators in judicial practice. It should be noted that due to the time constraint and the difficulty and workload of accessing the data, this Chapter does not contain relevant international statistics.

It can be seen from the above data that there is a relatively low proportion of cases in which arbitrators are challenged or the validity of an arbitral award is nullified on the grounds of conflicts of interest. This situation is not due to lack of diligence by arbitral institutions or courts, as everyone in the industry knows that, in practice, generally

Problems — Suggestions", Law Review, Issue 6, 2013, pp. 100–110.

the arbitrators will not accept an appointment if they believe there are circumstances justifying their recusal, and will not risk having the arbitration committee decide their recusal at a later stage. Moreover, the arbitrator who has been challenged by a party will often voluntarily recuse himself/herself from the arbitration, even if he/she knows that the grounds for recusal are untenable, so as to avoid unnecessary disturbances or impediments to the progress of the arbitration process. Very few of them will opt to leave it to be decided by the arbitral institution or determined by a court after the award is rendered, leading to the challenges to the award. So, the above data show that China has preliminarily established a high-quality arbitration team and that arbitration is steadily rising to become a publicly recognized form of dispute resolution. On the other hand, it also demonstrates the support and trust of Chinese courts in the arbitration. The following text classifies and sorts out the cases collected, and analyzes the important cases and key issues.

II. ANALYSIS OF TYPICAL CASES OF ARBITRATOR' CONFLICTS OF INTEREST

At the international level, this Chapter only analyzes several recent cases with significant international impact. There are, however, plenty of domestic practice involving cases of conflicts of interest of arbitrators. The cases collected this time can roughly be divided into four types: violation of arbitration laws and regulations, violation of arbitration rules, violation of code of conduct for arbitrators, and other types of cases. The analysis of typical cases is of great significance for clarifying the boundary of conflicts of interest of arbitrators.

A. International Classic Cases

1. *Sun Yang* case

On 22 December 2020, the Swiss Federal Supreme Court ("SFSC") overturned the punishment of 8-year ban imposed by the Court of Arbitration for Sport ("CAS")[18] on Chinese eliteswimmer Sun Yangon the grounds of the overly aggressive remarks made by Franco Frattini, the Presiding Arbitrator of the tribunal in the case.[19] It is revealed that after the expiration of the time limit for applying for setting aside the CAS Award, Sun Yang found an article alleging that the Presiding Arbitrator had made overly aggressive remarks about China and canine rights on his personal public Twitter account before and during the arbitration, and thus he applied to SFSC for annulment of the CAS Award, claiming that the Presiding Arbitrator was biased. SFSC held that on the issue of whether the application is made beyond the time limit, the parties' duty to investigate for the impartiality and independence of an arbitrator is limited and they cannot be expected to spend much time examining whether the arbitrator has made inappropriate remarks on various social networks, and given that the CAS and the World Anti-Doping Agency ("WADA") were unable to prove that Sun Yang has become aware of these remarks at the time of exercising his rights, so Sun Yang's application was not time barred. On the substantive matters, SFSC held that the arbitrator has freedom of expression and most of the Presiding Arbitrator's extremely aggressive remarks had nothing to do with Sun Yang and were therefore irrelevant to the case. However, the Court also held that the Arbitrator used the term "yellow face" in his overly aggressive remarks about canine rights in China during the arbitration of this case, which was singular and involved racism, so it could give rise to (Sun Yang's) justifiable doubts as to his impartiality; therefore, SFSC remanded the Award back to CAS for review and removed the Presiding Arbitrator. In

18 On 28 February 2020, the tribunal ruled that Sun Yang had violated Article 2.5 of the *FINA Doping Control Rules* and was banned from competition for eight years; and on 22 June 2021, a newly constituted tribunal re-arbitrated the case and imposed a ban of four years and three months (51 months).

19 For the specifics of his remarks, see the citation of SFSC in the 5th major paragraph of the judgment in this case, Federal Tribunal decision 4A-318/2020, 22 December 2020, https://www.swissarbitrationdecisions.com/atf-4a-318-2020.Accessed 11 July 2021.

its written judgment, SFSC expressly invoked General Standard 2(c)[20] of the *Guidelines on Conflicts of Interest*, holding that, in the point of view of a reasonable third person, the Presiding Arbitrator's Twitter postings could give rise to justifiable doubts as to his impartiality, sufficient to create an appearance of bias. SFSC held that while arbitrators may advocate their convictions in social media (such as when it comes to the promotion of animal rights), they should express their opinion in a restrained manner, regardless of whether they are performing the function of arbitrator at the time of their expression.

The *Sun Yang* case is certainly not a typical case of international commercial arbitration, but since SFSC is the competent court with jurisdiction for setting aside the CAS Award, and the basis of its examination has no difference from that of an international commercial arbitration award, so the discussion of arbitrator's conduct in this case is also of warning significance to arbitrators in international commercial arbitration in general and not just in the field of sports arbitration.

2. *Halliburton* case

The judgment of the UK Supreme Court in the case *Halliburton Company v Chubb Bermuda Insurance Ltd* ("Halliburton case")[21] has received widespread attention. In this case Kenneth Rokison QC acted as arbitrator and subsequent to his appointment he had accepted the appointment as arbitrator in two other references concerning the same oil spill incident, for which he failed to disclose in this case. After Halliburton was aware of Rokison's acting as arbitrator in those two cases, it applied to the UK Court of First Instance for removing Rokson. Both the Court of First Instance and the Court of Appeal rejected its application. Halliburton then appealed to the Supreme Court. The UK

20 *Ibid*., paras 7.4.

21 *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)*,[2020] UKSC 48, 27 November 2020.

Supreme Court held that Rokison "was under a legal duty to disclose his appointment"[22] in the two references yet he failed to comply with his duty of disclosure; however, considering all the relevant circumstances in this case, the Court was "not persuaded that the fair-minded and informed observer would infer from the oversight that there was a real possibility of bias on Mr Rokison's part".[23] The appeal was therefore dismissed. It can be seen from this case that the test applied by the UK Supreme Court in determining whether an arbitrator has a conflict of interest are also objective one.

Furthermore, the UK Supreme Court discussed the relationship between the disclosure and confidentiality obligations of arbitrators in this case, holding that the legal obligations of arbitrators' disclosure do not override the privacy and confidentiality obligations of arbitrators under English law. If the arbitrator is obliged to keep confidential the information that need to be disclosed, he/she can make a disclosure only upon consent of the parties who have the obligation of confidentiality. Such consent may be express or may be inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field.[24] The disclosure obligation is a matter that would likely to give rise to reasonable doubts as to an arbitrator's impartiality,[25] and a failure to make disclosure of the other references may then be a factor in the latter exercise that an impartial and informed observer should consider in assessing whether there is a bias.[26]

B. Domestic Practice

1. Violation of arbitration regulations

22 *Ibid.*, paras. 145.
23 *Ibid.*, paras. 149–150.
24 *Ibid.*, paras. 88–104.
25 *Ibid.*, paras 107–116.
26 *Ibid.*, paras 117–118.

(a) *Arbitrator accepted bribe from a partyor attorney*

In order to transfer assets andresistthe statutory claim of banks, A and B maliciously colluded to fabricate the false facts that the two parties concluded a house lease contract in 2012. Sole arbitrator C, having received prior consultation of the parties and being aware of the false arbitration involved in the property lease dispute, still accepted falsified evidence, and issued the Arbitral Award premised on the false statements of the parties. Afterwards, the Sole Arbitrator C received a favor of RMB53,000 from A.[27]

It is not difficult to see that the Sole Arbitrator C, whose conduct constitutes a conflict of interest, should not have accepted the appointment, or at least should have fully disclosed at the time of his acceptance of the appointment and obtained the consent of both parties, otherwise he must recuse himself from the arbitration. The award rendered by an arbitrator who should have recused himself/herself from the arbitration but does not do so shall be revoked or rejected to be enforced (contingent upon the relief sought by the parties). It should be noted that, on top of civil liability, the Sole Arbitrator C may also be subject to criminal liability. Although the Sole Arbitrator C is not an employee of an arbitration institution, nor is he an employee providing public services in a public institution, his conduct conforms to the general features of the crime of "acceptance of bribe by a non-state functionary". However, according to Paragraph 1, Article 11 of the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in Handling Criminal Cases of Corruption and Bribery*, the minimum threshold of the bribe in a criminal case of "acceptance of bribes by a non-state functionary" is RMB 60,000. Therefore, although the Sole Arbitrator C accepted the bribe, as the amount of money accepted did not reach the threshold for the crime of "acceptance of bride", he shall be held criminally liable for another crime of

27 Criminal Judgment (2018) Yun 01 Xing Zhong No. 703,Kunming Intermediate People's Court.

"arbitration by perverting the law". This rare case shows that an arbitrator who conceals the truth or fails to make disclosure or recuse himself, or even accepts a bribe from the parties, may be suspected of committing a crime if the circumstances are serious.

(b) *Arbitrator met a party or attorney in private*

In this case, A submitted the dispute with B over a construction project contract to the Beijing Arbitration Commission ("BAC") for arbitration. During the hearing of the case, Arbitrator C privately accepted A's invitation to dinner and discussed the case with A's attorney. After the Award was rendered, A requested to set aside the Award on the ground that Arbitrator C, chosen by it, met it privately. B raised no objection to C's independence and impartiality.[28]

Unlike the previous case, the Arbitrator's conduct in this case did not constitute a conflict of interest. *First*, the application for recusal is premised mainly on Article 34(4) of the *Arbitration Law* which provides that arbitrators shall not accept dinner from the party in private. However, this matter is only a *prima facie* evidence of a lack of independence and impartiality of the arbitrator; if compelling proof to the contrary can be provided, for example, both parties believe that C does not have substantive prejudice, then this Article is certainly not applicable. *Secondly*, another basis for challenge is to consider the reaction of the parties towards the ascertained fact that C accepted the dinner in private. A did not apply for recusal throughout the arbitration proceedings, from which it may be deemed that A have waived its right to challenge C's independence and impartiality. And B, after knowing C has accepted the dinner in private, still accepted C's independence and impartiality. *Lastly*, since the essential attribute of arbitration is contractual, when determining the independence and impartiality of arbitrators, the common subjective will of the parties should be given priority. Only when it is impossible to determine

28 (2020) Jing 04 Min Te No. 715, Fourth Beijing Intermediate People's Court.

the intersection of the manifestations of will of the parties can the inference be made according to the understanding of the "informed and rational third party" in the context of reconstruction.[29] Since both parties believed that C's conduct did not constitute substantive prejudice, therefore the validity of the award cannot be denied.

(c) *Attorney and the arbitrator were both qualified as arbitrator in the same arbitral institution*

In this case, A had a dispute with B over a loan contract, and the parties submitted the dispute to the Yichang Arbitration Commission for arbitration. B's attorney C is an arbitrator registered with the Yichang Arbitration Commission. After the Award was handed down, A argued that according to Article 7(5) of the *Measures for the Punishment of Violation of Law by Lawyers and Law Firms* (the "Measures") issued in 2010, C and the members of the Arbitral Tribunal are both arbitrators with the same arbitral institution and thus their relationship as colleagues may affect the impartiality of the Arbitral Tribunal. The Court ruled in favor of A and set aside the Arbitral Award.[30]

To determine whether the Court has a correct adjudication logic, it is necessary to examine whether the Court has set the correct basis for judgment. *First*, the Court must identify a proper legal basis in order to set aside the Arbitral Award. In this case, the most likely cause for setting aside the Award is "violation of legal procedures" under Article 58(3) of the *Arbitration Law*. *Second*, the Court needed to produce a legal interpretation of the legal basis for judgment. As stated above, the Supreme People's Court interpretsin Article 20 of the *Interpretation* the "violation of legal procedures"and clarifies that it only

29 Ye Jinqiang, "The Monist Model of Contract Interpretation Theory", Legal and Social Development, 2013, Issue 2, pp.101–111. Dong Guangyang, "A Study of the Rules of Contract Interpretation in U.S. Law", published in International Business Law Series (Vol. 13), Law Press, 2014, pp.303–318.

30 Civil Ruling (2017) E05 Min Te No. 1, Yichang Intermediate People's Court.

includes the violation of the arbitration procedure or rules provided for in the *Arbitration Law* that may affect the accuracy of the award. *Lastly*, the Court needed to apply the law correctly. Obviously, the *Measures* are departmental rules formulated by the Ministry of Justice, which are neither provisions of the *Arbitration Law* nor an interpretation of the *Arbitration Law*. Therefore, the *Measures* cannot serve as a basis for setting aside an arbitral award. From another perspective, it is improper to reply onArticle 7(5) of the *Measures* as a basis for setting aside an arbitral award. If one party maliciously engages a qualified arbitrator to act as its attorney, then all the other registered arbitrators with the same arbitration institution will need to recuse themselves and the arbitration process will not be able to proceed at all. Meanwhile, as an arbitration agreement has preclusive effect, the courts are also unable to deal with the disputes under the arbitration agreement, resulting in an embarrassing situation where a party acting in good faith has no access to any remedy.[31]

2. Violation of the arbitration rules

(a) *No disclosure statement received by the parties*

In this case, A submitted the dispute with B over a construction contract to the Liupanshui Arbitration Commission for arbitration. Pursuant to Article 20 of the *Liupanshui Arbitration Commission Rules*, the arbitral institution shall forward the disclosure statement signed by the arbitrators to the parties, but this step was not completed in this case. The parties had no objection to the independence and impartiality of the arbitrators in the arbitral proceedings. However, after an award was rendered, A requested to set aside the Arbitration Award on the grounds that the

31 Lin Yang, "On the Investigative Approach to Arbitration Agreements", published in Journal of Chongqing University (Social Science Edition), Issue 2, 2019, pp.145–155.

arbitrators' disclosure of information was seriously flawed.[32]

Although such conduct constitutes a minor violation of the arbitration rules, it does not necessarily mean that the arbitrators lack the independence and impartiality, let alone lead to the setting aside of the award. *First*, unlike recusal, disclosure is professional ethics in nature, and the scope of matters to be disclosed are often broader than the reasons for recusal. If an arbitrator refuses to disclose or fails to disclose information in a timely manner, it can only be said that the arbitrator is suspected of violating the professional ethics, but it does not necessarily mean that the arbitrator needs to recuse himself.[33] *Second*, the Arbitral Institution mailed the names of the members of the Arbitral Tribunal to both parties 10 days before the hearing, which has fully protected A's statutory right to apply for recusal. *Lastly*, when the Arbitral Tribunal asked each party during the hearing if they would apply for recusal, both A and B expressly stated that they would not do so. This means that both parties have recognized the independence and impartiality of the Arbitral Tribunal and waived their right to challenge and thus are not allowed to renege.

(b) *Insufficient disclosure by arbitrator*

In this case, A had a dispute with B over an equity contract and then submitted the dispute to CIETAC for arbitration in August 2017. As the parties could not reach an agreement on the composition of the arbitral tribunal, CIETAC appointed C as the presiding arbitrator. From June 2008 to December 2014, C served as general counsel, vice president, vice chairman and general manager of a Chinese Group Company. In 2012, the Beijing office of Beijing D Law Firm represented a China X Group Company in a case, while B's attorney was from Guangzhou office of Beijing D Law Firm. In

32 Civil Ruling (2020) Qian 02 Min Te No.18,Liupanshui Intermediate People's Court.

33 Xu Sanqiao, "Exploring the Disclosure and Recusal of Arbitrators", Commercial Arbitration and Mediation, Issue 3, 2020, pp.16–32.

November 2017, C did not address any of the above circumstances in his disclosure statement, nor did the parties apply for recusal within the stipulated time limit. After the Award was rendered, A asserted that the Award should be set aside as the Presiding Arbitrator C had failed to make full disclosure pursuant to Article 31.1 of the *CIETAC Arbitration Rules*. The Court approved A's assertion.[34]

As stated above, disclosure falls within the scope of professional ethics for arbitrators, and insufficient disclosure is not a basis for setting aside an award. In this case, to determine whether the Court's decision is correct, it is also necessary to determine whether the matter to be disclosed constitutes a reason for recusal based on the specific circumstances of the case. *Firstly*, it has been nearly three years since the Presiding Arbitrator C resigned from his former employer and five years since Beijing Law Firm D represented China X Group Company. Such a long period of time has not only separated the business contacts between C and his former employer, but also diluted the interest connection between C and Beijing D Law Firm. *Second*, Beijing D Law Firm is one of the largest law firms in China. The relationship between a branch office and its head office is a franchise relationship, not a relationship between the founder and the one being established, and branch offices are operated fully independently from each other. Even if it can be proven that China X Group Company did have business with Beijing office of Beijing D Law Firm, it does not mean that China X Group Company has a close interest connection with other branches of the Beijing D Law Firm. *Third*, China X Group Company is a key and large state-own enterprise handling numerous businesses. Although C was a former senior executive of China X Group Company, he was not necessarily involved in every specific business. Without proving that C was the person who directly handled the case, it is difficult to prove his direct contact with the Beijing office of Beijing D Law

34 Civil Ruling (2018) Yue 03 Min Te No. 601, Shenzhen Intermediate People's Court.

Firm Office in 2012. *Fourth*, A's failure to raise an objection in a timely manner during the arbitration has constituted a waiver and thus cannot challenge the validity of the Award on the ground that the Arbitrator had a conflict of interest.

(c) *Attorney and arbitrator work for the same law firm*

In this case, A had a dispute with B over a sale contract for a commodity house and then submitted the dispute to the Shaoyang Arbitration Commission for arbitration. Article 38 of the *Arbitration Rules of Shaoyang Arbitration Commission* provides that where an arbitrator works for the same company as the agent, the arbitrator shall recuse himself from the arbitration. However, in the composition of the tribunal, A appointed C as the arbitrator, and C and B were represented by the attorneys from the same Hunan D Law Firm. None of the parties has challenged the arbitrator within the time limit. After the Arbitration Award was rendered, A requested to set aside the Award on the grounds that the attorneys and the Arbitrator work for the same law firm which has violated the *Arbitration Rules*. The court upheld A's request.[35]

It is reasonable to some extent that the *Shaoyang Arbitration Commission Arbitration Rules* stipulates "the attorney and arbitrator work for the same company" as a reason for recusal. However, in determining whether an arbitrator has a conflict of interest with the attorney, the size of the employer and other circumstances should also be taken into consideration. Upon investigation, there is only 18 attorneys in Hunan D Law Firm. The probability that C and B's attorney are familiar with each other is extremely high. In the absence of evidence to the contrary, it can be considered that there is a strong connection of interest between the two persons. From this perspective, it is reasonable for the Court to hold that C should recuse himself from the case. It should also be noted

35 Civil Ruling (2019) Xiang 05 Min Te No. 15, Shaoyang Intermediate People's Court.

that A, who chose and knows C very well, did not ask C to recuse himself within the time limit, which may have constituted a waiver. The Court allowed A to argue about this after rendering the Award, which seems to encourage dishonest arbitration.

3. Violation of the *Code of Conduct for Arbitrators*

(a) *Arbitrator accepted multiple appointments in connected cases*

In this case, A had a dispute with B over a sale contract of chrome ore and submitted the dispute to BAC for arbitration. Both parties selected arbitrators C, D, and E to form an Arbitration Tribunal, and no one applied for arbitrator recusal within the specified time limit. Meanwhile, in another ongoing connected case, the same could be said about the composition of the arbitration tribunal. After the Award was issued, A petitioned the Court not to enforce the Award on the grounds that the composition of the Arbitration Tribunal in this case has violated Article 5.9 of the *BAC Code of Conduct for Arbitrators*, that is, one of the parties has appointed the presiding arbitrator in another case in the last two years. The Court upheld A's claim.[36]

Article 1 of the *BAC Code of Conduct for Arbitrators* provides that these rules are part of thecode of professional ethics for arbitrators, not part of the arbitration rules, and are not intended to constitute a standard of mandatory compliance by arbitrators. This means that, in order to invoke Article 5(9) of the *BAC Code of Conduct for Arbitrators* for refusal to enforce an arbitral award, it is necessary to prove substantial bias on the part of the arbitrator in the specific circumstances of the case. *First*, A appointed C as arbitrator multiple times in the lasttwo years, and C repeatedly received arbitrator remuneration for such appointment, which may give rise to doubtsabout the arbitrator's bias. Nevertheless,

36 Enforcement Ruling (2019) Jin 06 Zhi Yi No.11,Shuozhou Intermediate People's Court.

even following this line of reasoning, if C acts as arbitrator in alatter casein whichDis also chosen by B as one member of arbitration tribunal, it seems to suggest that the Arbitration Tribunal is at least *pro forma* unbiased.

It seems that the Arbitration Tribunal will not be *prima facie* biased towards any party just because the arbitrators receive remuneration. The presiding arbitrator and the sole arbitrator are jointly appointed by both parties, and it seems *prima facie* that they will not favor one of parties because of the act of receiving remuneration. So, only if A had previously appointed C to act as the presiding arbitrator in the latter case then the balance between the tribunal would probably be broken, yet this situation did not occur in this case. *Secondly*, the *CIETAC Provisions on Inspection of Conduct of Arbitrators* also provides for this situation but excludes cases of the same type and connected cases. The reasons behind are that there is a substantial overlap of facts between connected cases where the parties have the same arbitration claims, so the appointment of the same arbitrator is conducive to efficient adjudication and accurate application of the law. *Lastly*, if a party did not raise an objection during the arbitration proceedings in a timely manner, it has constituted a waiver and the party cannot challenge the independence and impartiality of the arbitrator on this ground.

(b) *Arbitrator issued an expert opinion in a separate case for the attorney'slaw firm*

A submitted the dispute with B over an equity transfer agreement to CIETAC for arbitration in 2019. Upon learning of CIETAC's appointment of X as presiding arbitrator, B engaged a lawyer from W Law Firm to act as its attorney. Noting this fact, A requested for the recusal of the Presiding Arbitrator X under Article 6.1 of the *CIETAC Provisions on Inspection of Conduct of Arbitrators* on the ground that the arbitrator has business connection with the attorney's law firm within the last two years. The factual

basis was that, in July 2016, W Law Firm appointed 13 law experts, including the Presiding Arbitrator X, to provide expert opinions on the validity of the board resolution and the persons acting in concert in an equity dispute case involving H Company.[37]

In accordance with the *CIETAC Provisions on Inspection of Conduct of Arbitrators*, if an arbitrator has business dealings with the agent's employer within the last two years, it is a disclosure matter within the scope of the arbitrator's ethics. To determine whether such a situation constitutes a ground for recusal, the factors such as the period of time, the person handling the case, and whether it is relevant to the case, etc., should be taken into consideration. *First*, if an arbitrator often gets paid for issuing expert opinions for a particular law firm and is financially dependent on that firm, this can prove that the arbitrator is likely to be biased toward that firm's lawyers. In this case, however, the Presiding Arbitrator X only occasionally issued expert opinions for W Law Firm. The last time there was connection was three years ago, and such a long period of time has diluted the connection of interest between him and W Law Firm. *Second*, if the lawyer who is recently responsible for contacting the Arbitrator to render expert opinions is the person who acts as attorney for the other party in this case, it can also prove that there may be a close connection between the Arbitrator and the attorney of that party. In this case, however, there is no evidence that the Presiding Arbitrator X knew the attorney from W Law Firm, therefore it is highly unlikely that there is tunneling between the two. *Lastly*, if the case in which the arbitrator renders an expert opinion is a case of relevance to the present case, it not only can imply a connection of interest, but also may suggest that the arbitrator may already have a preconceived bias. However, this case is completely unrelated to H Company's equity dispute case, which in turn proves that the Arbitrator needs not recuse himself from the present case.

37 CIETAC's decision on the non-recusal of arbitrator X in a framework agreement dispute.

(c) *Type of cases not included in the publicized announced expertise of arbitrators*

A and B submitted their dispute over a private equity fund contract to CIETAC for arbitration. As both parties could not agree on the composition of the Arbitral Tribunal, CIETAC appointed X as presiding arbitrator. In this case, B claimed that according to the information published on CIETAC website, the Presiding Arbitrator X is mainly engaged in insurance legal matters and has no experience in handling private equity fund legal matters. B applied to withdraw X relying on Article 4.5 of the *CIETAC Provisions on Inspection of Conduct of Arbitrators* which provides that "an arbitrator who is unfamiliar with the specialized field involved in a case and is not competent to hear the case" shall not accept the appointment.[38]

The *CIETAC Provisions on Inspection of Conduct of Arbitrators* regards the circumstance that "the arbitrator is unfamiliar with the specialized field involved in a case" as a ground for recusal, which is a provision on professional ethics. This circumstance cannot prove the lack of independence and impartiality in arbitrators. However, it does not mean that it is reasonable for arbitrators to be completely unfamiliar with the relevant field. If the nature of a case falls in the financial field and the presiding arbitrator or sole arbitrator is neither an economic expert nor a legal expert, but a well-known construction cost engineer, it is doubtful whether the tribunal will be able to apply the law correctly. In this case, however, the Presiding Arbitrator X is accomplished in both the financial and legal fields and clearly does not have to recuse himself from this case. Moreover, the expertise of the arbitrators displayed on CIETAC website is only of description nature and shows only part of an arbitrator's expertise and is not sufficient to cover the entire range of experience and expertise of the Presiding Arbitrator X.

38 CIETAC's decision on the non-recusal of Presiding Arbitrator X in the arbitration of a fund contract dispute.

4. Other circumstances

(a) *Arbitrator and aparty's attorney both participated in an academic seminar*

A had a dispute with B over a cooperative land development agreement and then submitted the dispute to CIETAC for arbitration. In the composition of the tribunal, CIETAC appointed C as the presiding arbitrator, for which neither party raised objection within the specified time limit. After the rendering of the Award, A petitioned the Court to set aside the Award on the ground that the Arbitrator was materially biased. A's submission was premised on that the Presiding Arbitrator C and B's attorney jointly participated in an academic seminar on the *Civil Code* and thus they could have become familiar.[39]

Joint participation in an academic event is not a matter expressly prohibited by arbitration regulations, arbitration rules, and the code of conduct for arbitrators, and in general is not a reasonable basis to challenge the impartiality and independence of an arbitrator. Undoubtedly, this does not mean that arbitrators may use academic activities as a cover for tunneling. If the arbitrator and one of the attorneys in a case jointly publish papers in academic activities, it can prove that there is a relatively close connection between the two. In this case, however, the Presiding Arbitrator C and B's attorney both accepted the invitation from the conference organizer and attended, as guest or as audience, the academic seminar. It shall be deemed as a normal public social event and the two might have come across by chance. If there is no evidence to prove any unreasonable private communication between the attendees, it is impossible to determine that such joint participation has exceeded the reasonable scope of social interaction and that such joint participation constitutes the situation subject to recusal.

39 Civil Ruling (2019) Jing 04 Min Te No. 356, Fourth Beijing Intermediate People's Court.

(b) *Alumni relationship between the members of arbitration tribunal*

A had a dispute with B over a procurement cooperation agreement and submitted the dispute to CIETAC for arbitration. In the composition of the tribunal, A appointed C as the arbitrator, B appointed D as the arbitrator, and CIETAC appointed E as the presiding arbitrator. A then filed a written request for recusal of the Presiding Arbitrator E on the grounds that D and the Presiding Arbitrator E were alumni of a same law school and graduated in the same year and that there may be close schoolmate relationships between them. This means that if D is grateful for being appointed by B, B may influence the Presiding Arbitrator E and there could be bias.[40]

Arbitration practitioners with a strong legal education from well-known law schools are more competitive in the market and often handle more cases. As a result, it is not uncommon that the members of the arbitration tribunal, arbitrators and agents in a same case are alumni. However, alumni relationships do not necessarily constitute a conflict of interest. Forcibly imposing high standards of disclosure obligations on arbitrators and requiring arbitrators to disclose all possible alumni relationships is completely beyond the arbitrator's ability. In the absence of exceptional circumstances, the arbitrators do not have to disclose alumni relationships of the same or different grades, as most of them may not know each other at all. Only when their relationship is narrowed to the scope of classmates (or other special circumstances) may it be within the reasonable scope of disclosure. However, disclosure is only a matter of morality and ethics, and without other direct evidence it cannot prove that an arbitrator will be biased.

(c) *Teacher–student relationship between an arbitrator and a party's attorney*

40 CIETAC's decision on the non-recusal of Presiding Arbitrator X in an arbitration case.

A had a dispute with B over a sales contract and then submitted the dispute to BAC for arbitration. B appointed Professor C of a University in Beijing to act as arbitrator, and B's attorney was graduated from that University. Having noticed this fact, A requested for the recusal of C on the ground of the existence of a faculty-student relationship.[41]

University professors with high reputation in their field of expertise are ideal candidates for arbitrators, which resulting in the commonly seen faculty-student relationships in the field of arbitration.[42] In general, a student has only one teacher in a certain module, while a teacher may be teaching a large audience at the time of giving lessons or lecturing. Requiring an arbitrator to disclose such broad faculty–student relationship when he/she accepts an appointment would sometimes be too much of an imposition, as the teacher may not have an impression of most of the students present in class or in lectures. Even if the teacher can remember his/her students, that does not mean that he/she will be biased just because of their relationship; after all, the teacher will have to maintain his/her fair image in the eyes of the students. Undoubtedly, some special faculty-student relationships may indicate close connection. For example, if a party or an attorney appoints the faculty advisor of his/her dissertation as arbitrator, it is likely to be a circumstance of recusal.

III. CONCLUSION: ISSUES AND SUGGESTIONS

As a contemporary international merchant law, arbitration is the "universallanguage" through which merchant societies resolve disputes.[43] While retaining the characteristics

41 CIETAC's decision on the non-recusal of Presiding Arbitrator X in an arbitration case.

42 Wang Hongsong, "Opportunities and Challenges Facing Arbitration in China", Beijing Arbitration, 2008, No. 1, China Legal Publishing House, Edition 2008, pp.1–18.

43 McCarthy-Linden, "The Origin of Arbitration and Its Meaning", translated by Zhou Yuan & Wu Ka, in Annual Journal of Private International Law and Comparative Law in China (Vol. 16), Law Press, Edition 2013, pp.348–359.

of arbitration in China, China should attach importance to the trend of unification of arbitration. Although the relevant laws and regulations have remained unchanged since the *Arbitration Law of the People's Republic of China* took effect in 1995, driven by mainstream arbitration institutions, China's conflicts of interest of arbitrators and recusal system has undergone tremendous changes, getting more in line with mainstream international practice.If the arbitrator system remains vague in its core, its uncertainties and potential risks (such as perverted arbitration and false arbitration in criminal law) may make international arbitrators reluctant or even refuse to arbitrate in China. This will not only raise the threshold for foreign parties to arbitrate in China, but also reduce the opportunities for Chinese arbitrators to connectwith international arbitration practice.It is not conducive to enhancing the reputation of Chinese arbitration, nor conducive to mainland arbitrators' learning and accumulating advanced international experience. To avoid these consequences, it is necessary to face up to the issues regarding the conflicts of interest and arbitrator recusalsand continuously optimize and integrate the relevant systems.[44]

A. Establishing a Grading Mechanism for Arbitrators'Conflicts of Interest

To clarify the boundaries of arbitrators' conduct to the greatest extent, China can incorporate the concepts laid down in the *IBA Guidelines on Conflicts of Interest (2014)* and establish a grading mechanism for arbitrators' conflicts of interest. Here, the highest grade is the mandatory provisions in the law applicable to arbitral proceedings. Therein, the statutory obligation of recusal not only constitutes a ground for recusal but also serves as a basis for setting aside or refusing to enforce an arbitral award. However, the non-mandatory obligation of disclosure falls within the scope of arbitrators' professional

44 Song Lianbin, "A Preliminary Study on the Reform of the Arbitrator System in China", Annual Journal of Private International Law and Comparative Law in China (Vol. 4), Law Press, Edition 2001, pp.575–604.

ethics and does not have a negative effect on the arbitral award. The intermediate grade is the arbitration rules or agreements recognized by the parties, the arbitral agencies, and the arbitrators. It should be noted that the part of the agreed obligation of recusal that does not overlap with the statutory obligation of recusal should not be the conclusive basis for eliminating the validity of an arbitral award. The lowest grade is the code of conduct for arbitrators. Such code is neither legal provisions nor contractual agreement, but merely professional ethical requirements. But this does not mean that ethical requirements are unimportant. Arbitrators' strict compliance with professional ethics is an important safeguard to eliminate the gray area of arbitration, increase the confidence of the public in choosing arbitration, and enhance the appeal of arbitration. At present, the arbitrators' professional ethics in China is still in its infancy, but the trend towards adopting the international best practice represented by the *IBA Guidelines on Conflicts of Interest* is also evident.

B. Clarifying the Consequences of the Party's Waiver

The principle of good faith is not only a basic principle in the field of substantive law, but also applies to the field of procedural law. Paragraph 3, Article 14 of the *Provisions of the Supreme People's Court on Several Issues concerning the Handling by People's Courts of Cases of Enforcement of Arbitration Awards* provides that a party who knows or ought to know that the law applicable to the arbitration proceedings or the arbitration rules have not been complied with yet fails to raise an objection in a timely manner is deemed to have waived the right to raise an objection, and cannot apply to nullify the validity of an arbitral award on the ground of violation of statutory procedures after the award is made. Undoubtedly, the scope of parties' waiver is not boundless, as arbitrators cannot be both athletes and referees. The *IBA Guidelines on Conflicts of Interest* provides that the party's

waiver in the following circumstance is not valid:

"1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is aparty in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom."

C. Strengthening Arbitrator Training

The quality of arbitration depends on the arbitrator. Nowadays, arbitration is increasingly standardized, and arbitrators not only need to have the lofty prestige like the village elders in the eyes of the villagers in the oldagricultural society, but also need the professional background, legal knowledge, and practical experience in a modern open society. This means that professional training is a mustbefore one can become a good arbitrator and avoid possible conflicts of interest. However, there is still no unified model answer as to how to determine the manner, method, intensity, and standard of training. In general, a qualified candidate co-arbitrator should be familiar with arbitration law and basic arbitration theory, familiar with arbitration rules and the code of conduct for arbitrators, able to conduct arbitration proceedings independently, and able to write qualified awards based on mock cases. On top of that, to be qualified as a presiding

or sole arbitrator, one should have sufficient experience in hearing many cases, strictly observe professional ethics for arbitrators,and ensure the legal enforceability of awards. At present, although some arbitration institutions also conduct arbitrator training, the quality of the training is a mixture of good and bad. From the perspective of efficiency, standardization, and flexibility, etc., there is still much room for improvement in the future arbitrator training.

Chapter Five

Overview of the Judicial Review of Foreign-Related Commercial Arbitration by Chinese Courts in 2020

In this Chapter, the Fourth Civil Tribunal of the Supreme People's Court, based on the data submitted by various High People's Courts as well as the rulings on arbitration-related judicial review made available on https://wenshu.court.gov.cn/ and other internet channels (as at 16 July 2021), makes a retrospective analysis of the judicial review cases of international commercial arbitration in the past year and gives comments on the legal issues involved.

In 2020, courts nationwide accepted 341 judicial review cases of arbitration with foreign elements and relating Hong Kong, Macao, and Taiwan. Therein, there were 102 foreign-related cases, 194 cases involving Hong Kong, 19 cases involving Macau, and 26 cases involving Taiwan, accounting for 2.2% of all newly accepted cases involving judicial review of arbitration.

I. LEGAL ISSUES CONCERNING APPLICATIONS FOR DETERMINING THE VALIDITY OF ARBITRATION AGREEMENTS INVOLVING FOREIGN COUNTRIES, HONG KONG, MACAO, OR TAIWAN

A. Circumstances under Which the Name of an Arbitration Institution Is Inaccurate

In the case *Yintai Yingying Kindergarten, Futian District, Shenzhen v. Liang Jingyi, Shenzhen Simei Education Management Co., Ltd. & Huang Hong*,[1] the Claimant challenged the validity of the Arbitration Agreement in this caseon the grounds that the parties failed to agree on a specific arbitration institution and thus it was unable to identify the sole arbitration institution according to the relevant clauses. The Court held that this case was an application for determining the validity of a Hong Kong arbitration agreement and the parties to the case did notagree in the contract the applicable law for the validity of the Arbitration Agreement noragree on theseat of arbitration, so *lex fori*, i.e., the law of mainland China, shall be applied to assess the validity of the Arbitration Agreement. At the time when the Project Investment Contract in this case stipulated in its Article 3.3 and Article 6.1 that "may referred to an arbitration institution in Shenzhen", there was only one arbitration institution in Shenzhen, namely, Shenzhen Court of International Arbitration ("SCIA"). According to Article 3 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China* which provides that "if the name of the arbitration institution as agreed in an arbitration agreement is inaccurate but the specific arbitration institution can be determined, that arbitration institution shall be deemed to have been selected";thus, the Arbitration Agreement was deemed valid.

In the case *Beijing Guide Science Tech Co., Ltd. v. Hong Kong MK Project Services Ltd*[2] which concerned the application for determination of the validity of an arbitration agreement, all of the three contracts executed by the parties contained an arbitration clause that disputes "shall be finally settled througharbitration in accordance with the provisions of the International Economic and Trade Arbitration Commission".

1 Civil Ruling Yue 03 Min Te [2020] No. 832, Shenzhen Intermediate People's Court, GuangdongProvince, 6 May 2020.

2 Civil Ruling Jing 04 Min Te [2020] No. 502, Fourth Beijing Intermediate People's Court, 25 August 2020.

The Court held that both parties are companies registered in China and should have known that the name of the "China International Economic and Trade Arbitration Commission" contains "International Economic and Trade Arbitration Commission". As they did not specify the name of any foreign arbitration institution or arbitration rules in the contracts, it should be deemed that the contractshave agreed to arbitrate in accordance with the provisions of China International Economic and Trade Arbitration Commissionand that the arbitration clause was valid.

B. Circumstances Where There are Local Arbitration Institution and Branch of Other Arbitration Institution in the Same Place

In the case *Shenzhen Newchabridge Communication Co., Ltd. v. Huizhou Juntaixiang Industrial Co., Ltd., Zhang Junpeng, Chabridge Electronics Co., Ltd & Li Juan*,[3] the Claimant applied to determine the validity of an arbitration agreement, arguing that the arbitration institution specified in the arbitration clause was an "arbitration institution in Shenzhen", whereas at the time when the contracts were signed, the arbitration institutions in Shenzhen included not only SCIA but also the CIETAC South China Sub-commission (after the reorganization of CIETAC), so it was a situationof unclear agreement on the arbitration institution. On this, the Claimant requested the Court to declare the arbitration clause invalid. The Court held that on 25 December 2017, with the approval of the Shenzhen Municipal Party Committee and Shenzhen Municipal Government, the former "South China International Economic and Trade Arbitration Commission (Shenzhen International Arbitration Court)" and the "Shenzhen Arbitration Commission" merged into "Shenzhen International Arbitration Court (Shenzhen Arbitration Commission)". Therefore, the "arbitration institution in Shenzhen" set forth

3 Civil Ruling Yue 03 Min Te [2020] No. 749, Shenzhen Intermediate People's Court, GuangdongProvince, 17 September 2020.

in the arbitration clause in this case shouldbe interpreted as referring to the Shenzhen International Arbitration Commission, so the arbitration clause involved in this case was valid.

C. Determination of the Validity of the "Arbitration before Trial" Clause

In the case *Shanghai Chicmax Cosmetics Co., Ltd. & Shanghai Kans Cosmetics Co., Ltd. v. NBA Hong Kong Operations Ltd*,[4] the Claimants applied to determine the validity of an Arbitration Agreement.The Arbitration Clause in this case agreed to refer the disputes to CIETAC for arbitration but at the same time stipulated that "the reviewof the award can be filed in any court with statutory jurisdiction". The Claimant claimed that the Arbitration Agreement impliedtwo meanings: resolution of disputes through arbitration and repeated trial of the award through litigation, which has constituted "either arbitration or litigation" and violated the relevant provisions of China's *Arbitration Law* on the "finality of arbitral awards", so the Arbitration Clause should be declared null and void. The Court held that the intention of the Arbitration Agreement to resolve disputes through arbitration was clear and that the agreement that "the review of the award canbe filed in any court with statutory jurisdiction" cannot be interpreted as a choiceof "either arbitration or litigation" but should be interpreted as the parties to the contract agreeing to refer the arbitration award to a court for judicial supervision. This agreement did not violate the relevant provisions of law, and therefore the arbitration clause in this case shall be deemed valid.

D. Determination of Validity of Unstamped Arbitration Clause

In the case *Seiki Digital Company Limited v. Tongfang Global Ltd.*,[5] the Claimant applied

4 Civil RulingJing 04 Min Te [2020] No. 21, Fourth Beijing Intermediate People's Court, 27 April 2020.

5 Civil Ruling Yue 03 Min Te [2019] No. 922, Shenzhen Intermediate People's Court, GuangdongProvince, 30 April 2020.

to determine the validity of an arbitration agreement, arguing that its registered name was not "Seiki Digital Co., Ltd." and it did not affix seal to the Agreement so the arbitration clause therein was not binding on it. The Court held that "Co., Ltd." was the abbreviation of "Company Limited" and that Seiki Company has failed to prove that there was another company, other than itself, named "Seiki Digital Co., Ltd.", registered in the Hong Kong SAR. As the sole shareholder and director of Seiki Company, Lin Dexiong signed the agreement on behalf of Seiki Company. Therefore, the arbitration clause in the Agreement was binding on Seiki Company.

E. Whether an Objection to Jurisdiction Can Still be Raised by Virtue of Arbitration Agreement after Elevation of Jurisdiction

In thecase *Asian Optics Co., Ltd. & Dongguan Xintai Optical Co., Ltd. v. Fujifilm Holdings Corporation& Fujifilm (China) Investment Co., Ltd*. concerning a dispute over commissioned processing contract,[6] due to the fact that the subject matter in this lawsuit exceeded RMB200 million, the Guangdong High People's Court held that in accordance with the relevant provisions on foreign-related hierarchical jurisdiction,the Shenzhen Intermediate People's Court had no jurisdiction over this case and ruled that the case should be under the jurisdiction of the Guangdong High People's Court. Later, it reported this case to the International Commercial Court of the Supreme People's Court asthe case was a difficult and complex international commercial case.The Supreme People's Court ruled that the First International Commercial Court should accept the case. The Defendants then raised an objection to jurisdiction before the first hearing, claiming that the eight Commissioned Development Contracts entered into by all parties have agreed on a valid arbitration clause, that is, the dispute should be finally settled through arbitration in Tokyo in accordance with the commercial arbitration

6 Civil Ruling Zui Gao Fa Shang Chu [2019] No.2, Supreme People's Court, 25 October 2019.

rules of the Japan Commercial Arbitration Association. Upon review, the International Commercial Court held that the Guangdong High People's Court only found that the Shenzhen Intermediate Court had violated the provisions on hierarchical jurisdiction. The High Court did not make a ruling on whether there was an arbitration agreement involved in this case and whether the court had jurisdiction over this case. Therefore, the Plaintiffs were still entitled to raise an objection to court jurisdiction by virtue of an arbitration agreement. The eight Commissioned Development Contracts signed by the Plaintiffs and the Defendants agreed on, in addition to the commissioned development business, other issues such as infringement upon a third party's intellectual property rights and commercialization of the developed products involved in the performance of the contracts. The commercialization of products, i.e., consignment processing and manufacturing, was also part of the Commissioned Development Contracts, or at least closely related to thosecontracts. Therefore, disputes arising out of the commissioned processing relationship fell within the scope of arbitration clauses and shall be resolved through arbitration. The Court ruled to reject the claim filed by the Plaintiffs.

II. LEGAL ISSUES CONCERNING CASES OF APPLICATION FOR SETTING ASIDE AND NON-ENFORCEMENT OF FOREIGN-RELATED ARBITRAL AWARDS

A. Waiver of Objection to the Validity of an Arbitration Agreement

In the case *Zou Lizao v. Wenzhou Haoda Luggage Co., Ltd.*[7] the Claimantappliedto set aside the Arbitral Award on the grounds that the legal representative of the Respondent did not seal and sign the IOU Agreement for Loans and thus the contractual dispute was not within the jurisdiction of the arbitration commission and the arbitration was

7 Civil Ruling Jing 04 Min Te [2020] No. 229, Fourth Beijing Intermediate People's Court, 1 June 2020.

in violation of the statutory procedures. The Court found out that the IOU Agreement for Loans clearly stated that any dispute arising from or in connection with the contract shall be referred to CIETAC Zhejiang Sub-commission. The Court held that the clear expression of the intention for arbitration, the arbitration institutions, and the matters for arbitration in the aforesaid clauses satisfied the formal and substantive requirements for the legality and validity of anarbitration agreement as provided for in Article 16 of the *Arbitration Law*; and this case did not fall under the circumstances justifying the invalidity of an arbitration agreement as provided for in Article 17 of the *Arbitration Law*. Therefore, the Arbitration Agreement in this case is legal and valid. As the Claimant failed to challenge the validity of the Arbitration Agreement during the arbitration proceedings, the Court found no merit inits application for setting aside the Arbitration Award, holding that according to the provisions of Paragraph 1, Article 27 of the *Judicial Interpretation of the Arbitration Law* that "if a party does not raise an objection to the validity of the arbitration agreement during the arbitration proceedings but claims to revoke the arbitration award or raise a defense against enforcement on the grounds that the arbitration agreement is invalid after the arbitration award is made, the people's court will not uphold the claim."

B. Circumstances where the Award is *ultra vires* to the Agreement

In the case *Beijing Branch of CITIC Bank Co., Ltd. v. Zhang Guozhe & Ors*,[8] the Claimant applied for setting aside the Arbitral Award on the grounds that the matters to be arbitrated exceeded the scope of the Arbitration Agreement and the Claimant's submission. Specifically, the contract stipulated that the breaching parties shall bear their respective liabilities for breach of the contract and, if their actions jointly cause damages to other party, they shall bear joint and several liability for compensatory

8 Civil Ruling Jing 04 Min Te [2020] No. 431, Fourth Beijing Intermediate People's Court, 13 August 2020.

damage; therefore, the Arbitral Tribunal may only rule that the parties in breach of the contract shall be liable severally or jointly, and shall not rule to impose supplementary compensation liabilities. The Court held that the "matters to be arbitrated do not fall within the scope of the arbitration agreement" stipulated in Article 274 of the *Civil Procedure Law* refer to the "matters" *per se*, rather than the liability rule for breach of contract. As the matters to be arbitrated agreed upon in the Arbitration Agreement included the performance of the contract and the liability for breach of the contract, etc., the Arbitration Award's determination on the liability for breach of contract did not exceed the scope agreed upon in the Arbitration Agreement. The Respondent's arbitration claim included the return of the subscription price and compensation for losses. The Award on supplementary compensation liability was also within the scope of compensation liability, so it did not exceed the scope of the arbitration claim. Therefore, the Award was no *tultra vires* to the Agreement.

C. Proper Notice by the Arbitral Tribunal

In the case *Shenzhen Yingyida Import & Export Co., Ltd. v. Chongqing Hongli Motorcycle Manufacturing Co., Ltd.*[9] concerning the application for setting aside an arbitral award. The port of destination agreed upon in the contract was Port of Beira, Mozambique, so this case involved foreign-related elements and therefore CIETAC administered the case as a foreign-related arbitration case. The Claimant applied for setting aside the Award on the grounds that CIETAC's service and submission of defense to the Claimant by ordinary mail has violated the arbitration rules. The Court found that CIETAC's service by notarized ordinary mail did not violate the *CIETAC Arbitration Rules*, Article 8(1) of which provides that "all documents, notices and written materials in relation to the arbitration may be delivered in person or sent by registered mail or express mail, fax, or

9 Civil Ruling Jing 04 Min Te [2020] No. 3, Fourth Beijing Intermediate People's Court, 24 March 2020.

by any other means considered proper by the Arbitration Court or the arbitral tribunal." Article 8(2) of the *Arbitration Rules* provides that "the arbitration documents … shall be sent to the address provided by the party itself or by its representative(s), or to an address agreed by the parties. Where a party or its representative(s) has not provided an address or the parties have not agreed on an address, the arbitration documents shall be sent to such party's address as provided by the other party or its representative(s)." As such, CIETAC may serve the documents to the address provided by the other party or its representative(s) in the arbitration. In this case, CIETAC first served the Notice of Arbitration, the *Arbitration Rules* and the Panel of Arbitrators by EMS, which was a successful delivery, and subsequently sent the Notice of Hearing, etc., by EMS, however this time the documents were returned by the post office with a reason "no such recipient here". CIETAC then requested the Claimant, Hongli Motorcycle, to provide the effective address of Yingyida and served the documents notarized to Yingyida's effective address confirmed in writing by Hongli Motorcycle, which also conformed to the provisions of the *Arbitration Rules*. Further, Article 8(3) of the *Arbitration Rules* provides that "any arbitration correspondence to a party or its representative(s) shall be deemed to have been properly served on the party if delivered to the addressee or sent to the addressee's place of business, place of registration, domicile, habitual residence or mailing address, or where, after reasonable inquiries by the other party, none of the aforesaid addresses can be found, the arbitration correspondence is sent by the Arbitration Court to the addressee's last known place of business, place of registration, domicile, habitual residence or mailing address by registered or express mail, or by any other means that can provide a record of the attempt at delivery, including but not limited to service by public notary, entrustment or retention." In this case, the service on the parties to the arbitration by notarized service of process that can provide a record of attempt at delivery can be deemed an effective service. Therefore, the Court found no merit in the grounds

on which the claim wasbased.

D. Discretion of the Arbitral Tribunal to Admit Evidence

In the case *Zhejiang Qiangguangjian Precision Casting Co., Ltd. v. P & T Machinery International Co., Ltd.*,[10] the Claimant applied for setting aside the arbitration award, arguing that the Tribunal only admitted the new evidence submitted by the Respondent but did not admit the new evidence submitted by the Claimant, nor did it allow the Claimant to apply for a second hearing to state its opinion on the basis of the new evidence, thus depriving it of its right to state important opinions, which constituted a violation of legal procedure. The Court held that, according to Paragraph 2, Article 37 of the *Arbitration Rules* of thearbitration institution, the Tribunal shall decide on the admissibility of new evidence submitted by the parties after the expiration of the deadline for proof, so the admissibility of evidence falls within the scope of the exercise of the tribunal's discretion. If the tribunal admits new evidence submitted by one party but doesto admit new evidence submitted by the other party after the arbitration hearing, it does not violate the *arbitration rules*, nor does it contradict other relevant laws and regulations, and thus is not a violation of legal procedures. However, according to Paragraph 2, Article 41 of the *Arbitration Rules* on the production of evidence, the Arbitral Tribunal shall decide whether to approve the application for a second hearing put forward by a party after the conclusion of the hearing. Therefore, the Arbitral Tribunal's disapproval of the party's application for a secondhearing did not violate the arbitration rules, nor did it fall within the circumstance where the respondent "fails to state its opinions due to other reasons not attributable to itself" as specified in Paragraph 1(2), Article 274 of the *Civil Procedure Law*.

10 Civil Ruling Jing 04 Min Te [2020] No. 34, Fourth Beijing Intermediate People's Court, 1 June 2020.

Similarly, in the case *Hu Lijian&Ors v. Zhongshang Tobacco Group Co., Ltd.*[11] concerning the application for setting aside an arbitral award, the Claimant assertedthat the Arbitral Tribunal's acceptance and admission of the evidence submitted by the other party after the expiration of the time limit for producing evidence has violated the legal procedures. The Court held that according to Article 41 of the *Arbitration Rules* of the arbitration institution, the Arbitral Tribunal may refuse to admit evidence submitted by the parties after the expiration of the time limit. In this case, the Arbitral Tribunal's admission of the evidence submitted by one party after the expiration of the time limit constituted an exercise of discretionary powers, which did not violate the provisions of the *Arbitration Rules*.

E. Composition of the Arbitral Tribunal

In the case *Shenzhen Yapai Optoelectronic Devices Co., Ltd. v. Dongguan XinfeiTongguang Electronic Technology Co., Ltd.*,[12] the Claimant applied for setting aside the Arbitral Award on the grounds that one of the arbitrators did not appoint the presiding arbitrator, so the composition of the Arbitration Tribunal has violated the *Arbitration Rules*. The Court held that the Arbitral Award in this case expressly stated that the Arbitrators have jointly appointed Lu as the Presiding Arbitrator and that Arbitrator Shen and Arbitrator Chen also signed the Arbitral Award, which clearly showed that Arbitrators Shen and Chen knew and confirmed the fact that they have jointly appointed Lu as the Presiding Arbitrator for the case. The Claimant's grounds for claiming that the appointment of the Presiding Arbitrator was in violation of the legal procedures were untenable. Arbitrator Shen was in the list of arbitrators and selected by one party to the case to be the Arbitrator of the Arbitral Tribunal in this case, which conformed to the *SCIA Arbitration*

11 Civil Ruling Jing 04 Min Te [2020] No. 791, Fourth Beijing Intermediate People's Court, 29 December 2020.

12 Civil Ruling Yue 03 Min Te [2020] No. 402, Shenzhen Intermediate People's Court, 10 July 2020.

Rules. Therefore, the Claimant's allegation that the Arbitrator was the Chairman of the Arbitration Institution which caused the case to be unable to carry out fairly and impartially, was not established.

F. Judicial Identification Procedures

In the case *Li Hongwen v. Mai Wen*,[13] the Claimant applied for setting aside an arbitral award on the grounds that the judicial authentication procedures were illegal and the expert conclusion was erroneous. The Court held that whether the judicial authentication procedures during the arbitration were legal or whether the expert conclusion was correct was the Arbitral Tribunal's determination of whether the expert conclusion made by the judicial authentication institution had probative force and the magnitude of probative force. Such determination in nature fell within the scope of substantive arbitration hearing and did not fall within the scope of judicial review of the arbitration by the people's court, nor was it a statutory ground for setting aside an arbitral award, so the Claimant's application for a new judicial authentication was also not granted.

G. Time Limit for Ruling

In the case *Hu Lijian&Ors v. Zhongshang Tobacco Group Co., Ltd.*[14] concerning an application for setting aside an arbitral award, to address the Claimant's assertionthat the Award was made beyond the time limit, the Court held that in accordance with Article 62 of the *Arbitration Rules* of the arbitration institution, for a case heard through the summary procedures, the arbitration tribunal shall render an award within three months after the arbitration tribunal is formed. However, upon the request of the

13 Civil Ruling Yue 04 Min Te [2020] No. 19, Zhuhai Intermediate People's Court, 29April 2020.

14 Civil Ruling Jing 04 Min Te [2020] No. 791, Fourth Beijing Intermediate People's Court, 29 December 2020.

arbitration tribunal, the period may be extended by the president of the arbitration court/commission if he/she deems it justifiable and necessary. The Award in this case has clearly stated that "as required by the arbitration proceedings, upon the application of the Arbitration Tribunal, the president of the arbitration court/commission agreed and decided to extend the time limit for rendering the award of this case to 28 October 2019." Therefore, the Award rendered on 28 October 2019 did not violate the *Arbitration Rules*.

H. Definition of Violations of Public Interests

In the case *Guangzhou Lonkey Industrial Co., Ltd. v. Xing Fa (Hong Kong) Import & Export Ltd.*,[15] the Claimant applied for setting aside an arbitral award, arguing that due to the Arbitral Tribunal's unclear determination of basic facts, unclear identification of the nature of the contract, error in determining the validity of the contract, etc., the Award not only caused significant losses to the Claimant, but also caused significant losses to investors and infringed public interests. The Court held that public interests should be public interests relating to the interests of all members of society, enjoyed by the public, and needed for the development of the whole society, which are of public and social nature and different from the interests of the parties to acontract. In this case, the dispute between the parties over the performance of the contract in question was a contractual dispute between civil subjects of equal footing, and the case handling result only affected the parties to the contract. The Arbitral Tribunal heard the case and rendered an award based on the evidence and law involved, which fell within the scope of exercising its authority.The Award should not be deemed violating public interests merely because the facts ascertained by the Arbitral Tribunal hadan adverse effect on a party or indirectly affected the interests of the party's investors. The Court thus did not

15 Civil Ruling Jing 04 Min Te [2020] No. 661, Fourth Beijing Intermediate People's Court, 24 November 2020.

acceptthe reasons for the application.

III. ISSUES CONCERNING APPLICATIONS FOR RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In 2020, there was a total of 15 cases applying the *New York Convention* and made public on the Internet, namely, Singapore International Arbitration Centre ("SIAC") (2 cases), Singapore Chamber of Maritime Arbitration ("SCMA") (1 case), Korean Commercial Arbitration Board ("KCAB") (1 case), ICC International Court of Arbitration ("ICC") (1 case), Arbitration Institute of the Stockholm Chamber of Commerce (1 case), International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("ICAC at the RF CCI") (1 case), British Columbia International Commercial Arbitration Centre ("BCICAC") (1 case), American Association of Food Industries ("AFI") (1 case), International Cotton Association ("ICA") (1 case), Independent Film & Television Alliance Arbitration Court ("IFTA") (2 cases), and London Maritime Arbitrators' Association ("LMAA") (3 cases). All these awards were recognized and enforced, except for two arbitration awards rendered by the IFTA that were refused to be recognized and enforced due to the invalidity of the arbitration agreement, as well as the arbitral award rendered by AFI for which the application was rejected due to failure to submit satisfactory materials.

A. Objection to Jurisdiction over a Case Involving an Application for Recognition and Enforcement of a Foreign Arbitral Award

In an appeal case *Jiayou Shopping Group Co., Ltd. v. Hyundai Family Shopping Company and Hyundai Green Food Co.*[16] concerning an objection to jurisdiction over a case

16 Civil Ruling Jing Min Xi Zhong [2019] No.98, Beijing High People's Court, 14June 2019.

involving an application for recognition and enforcement of a foreign arbitral award, Jiayou Shopping Group appealed on the grounds that its main office was located in Guiyang Province, thus this case should be under the jurisdiction of the Intermediate People's Court of Guiyang, Guizhou Province. The Court of Second Instance held that Jiayou Shopping Group was a legal person shareholder of many companies in Beijing. The domicile of these companies, i.e., the location of the property of Jiayou Shopping Group, was in Chaoyang District, Beijing. In accordance with Article 283 of the *Civil Procedure Law*, the Fourth Beijing Intermediate People's Court had competent jurisdiction over this case as the Intermediate People's Court of the place where the property was located.

B. Examination of the Application Materials under Article 4 of the *New York Convention*

In the case *Octaform Systems Inc. v. Huajun Plastic Building Materials Co., Ltd.*,[17] the Claimant Octaformapplied for recognition and enforcement of the arbitral award rendered by BCICAC, while the Respondent Huajunasserted that the English and Chinese versions of the Arbitration Agreement have not been notarized and certified, which did not comply withArticle IV of the *New York Convention*, so this case shall be dismissed. Article IV of the *New York Convention* provides:

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

17 Civil Ruling Zhe 05 Xie Wai Ren [2019] No.1,Huzhou Intermediate People's Court, Zhejiang Province, 24 November 2020.

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

The Court held that Article IV aims to ensure the reliability and uniqueness of the translation of an arbitral award and arbitration agreement that is not made in an official language of the country of recognition and enforcement. In this case, both parties acknowledged the execution of the Supply Agreementin English which contained the Arbitration Agreement, and the Respondent also had no objection to the Chinese and English versions of the Supply Agreement submitted by the Claimant. Thus, the contents of the Arbitration Agreement can be ascertained, which complies with Article V of the *New York Convention*.

In the case *Royal Food Import Corp. America v. Yantai Luokexi Import and Export Co., Ltd.*[18] where the Claimant Royal Food applied for recognition and enforcement of an arbitral award rendered by AFI, the Respondent submitted its defense that it did not enter into the contract in this case and that the seal affixed by the seller in the contractwas not the same as the official seal of the Respondent company, but belonged to another company registered in Hong Kong, "Adu International Group Corp. Ltd.". The Court held that the Claimant failed to furnish sufficient evidence to prove that "Adu International Group Corp. Ltd", the party to the arbitration award and the contract, was the Respondent in this case. According to Article IV1(a)and IV1(b) of the *New*

18 Civil RulingLu 06 Min Chu [2017] No.382,Yantai Intermediate People's Court, Shandong Province, 16 March 2020.

York Convention, the claimant for recognition and enforcement of an arbitral award should provide the duly authenticated original award or a duly certified copy thereof, the original arbitration agreement or a duly certified copy thereof, when applying for recognition and enforcement of the arbitral award. The Claimant's application failed to meet the requirement for case acceptance and was thus rejected.

In the case *EmphorFzco v. Guangdong Yuexin Ocean Engineering Equipment Co., Ltd.*,[19] the Claimant applied for recognition and enforcement of a foreign arbitral award. The Respondent Yuexin claimed that both the Arbitral Award rendered by SCMA and the Shipbuilding Contract in this case were written in English and that the Chinese translation submitted by Emphor was not authenticated by Chinese embassy or consulate stationed in the foreign country involved or notarized by a notary public in China, thus did not meet the requirements of Article IV of the *New York Convention*, so the application of Emphor shall be rejected. The Court held that Emphor submitted the Arbitral Award and the Shipbuilding Contract notarized by law as well as the Chinese translation by a qualified translation company, so its application complied with Article IV of the *New York Convention* in terms of document submission. Moreover, Yuexin did not object to the accuracy of the Chinese translation of the Arbitral Award submitted by Emphor, therefore, Xuexin's claim that the evidence submitted by Emphor did not meet the case filing requirement for application for recognition and enforcement lacked factual and legal basis and was thus rejected by the Court.

C. Capacity for Civil Conduct of a Party to Conclude an Arbitration Agreement

In the case *IM Global, LLC v. Northern Films Group*,[20] the Claimant IM Global applied

19 Civil Ruling Yue 72 Xie Wai Ren [2020] No.1, Guangzhou Maritime Court, 17 June 2020.

20 Civil Judgment Jin 01 Xie Wai Ren [2018] No.2, First Tianjin Intermediate People's Court, 18 May 2020.

for recognition and enforcement of an arbitral award rendered by IFTA in Los Angeles, USA, in April 2017, which ruled against Northern Films and awarded IM Global a momentary sum. Northern Films raised an objection to the recognition and enforcement of the Award based on Article V1(a), V1(b), and V1(c) of the *New York Convention*, one of its reasons being that the contracting party, "Sun Ran", was not its employee and had no authority to enter into the agreement on behalf of Northern Films. The Court's findings revealed that Northern Films did not have any senior manager or ordinary staff named "Sun Ran". With regard to "Sun Ran"'s rights of agent, in accordance with Article 16 of the *Law of the People's Republic of China on Application of Laws to Foreign-related Civil Relations* which provides that "Agency is governed by the law of the place where the agency acts, but the civil relationship between the principal and the agent is governed by the law of the place where the agency relationship occurs", as the agreement was concluded in France, the rights of agent shall be determined in accordance with the *French Civil Code*. Therefore, IM Global is obliged to provide notarial certificate, privately signed documents, letters, witness testimony and other evidence to prove the establishment of the agency relationship, yet IM Global failed to do so. Moreover, the *French Civil Code* provides that the party claiming the existence of apparent representation shall produce evidence to prove that it can legitimately believe that it "had that person's authority, notably by reason of the latter's behavior or statements". IM Global's claim for reasonable reliance on the representation was founded mainly on the business card of "Sun Ran" and the film industry database Cinando, but it did not provide evidence to prove the information source, operator, login method, and operation mode of the database. Neither the business card nor the database can constitute reasonable reliance. Therefore, the Court refused to grant recognition and enforcement of the Award in this case by virtue of Article V1(a) of the *New York Convention* which provides that the arbitration agreement is invalid due to the incapacity of the contracting

party.

In the case *FSOJ International, LLC v. Northern Films Group* where the Claimant FSOJ sought for recognition and enforcement of an arbitral award rendered by IFTA, the case details were basically similar, and the Court also refused to recognize and enforce the award on the same grounds.[21]

D. Authenticity of Signature on Arbitration Agreement

In the case *Oue Lippo Healthcare Ltd v. Lin Gaokun*[22] where the Claimant Oue Lippo applied for recognition and enforcement of an arbitral award rendered by SIAC, the Respondent asserted thathenever signed the Arbitration Agreement in dispute. The Court found out that the arbitration clauses involved were agreed upon in the *Share Purchase Agreement* and that the Respondent acknowledged that "D" on the signature page at the end of the *Share Purchase Agreement* was signed by himself. Hehowever asserted that the *Share Purchase Agreement* was a forgery because the signature page was taken from other agreements and that the abbreviated signature "D" signed on each page of this agreement was not signed by himself. The Court found that the *Share Purchase Agreement* consisted of the agreement text and five attachment hereto, and that the parties who signed on the last signature page are the same as the parties as recorded in the agreement. In addition to the signature page, there were the abbreviated signatures of all parties at the bottom of the other pages, including the signature "D"representing Lin Gaokun. The entire agreement text and attachments hereto were continuous and complete, and the Claimanthas submitted to the Court the original copy of the *Share Purchase Agreement*. Therefore, the authenticity of the *Share Purchase Agreement* can be confirmed, and the arbitration clause agreed upon therein shall be deemed lawful and

21 Civil Ruling Jin 01 Xie Wai Ren [2018] No.3, First Tianjin Intermediate People's Court, 18 May 2020.

22 Civil Ruling Hu 01 Xie Wai Ren [2019] No.5, First Shanghai Intermediate People's Court, 16 April 2020.

valid. The Respondent claimed that the signature page was a signature page of other agreements but failed to present such other agreements as it claimed. Moreover, the matter as to whether the signature "D" on each page was signed by the Respondent himself was insufficient to refute the authenticity of his signature on the signature page. Therefore, the Respondent's objection lacked basis and was not upheld by the Court.

E. Issues Relating to Arbitration Proceedings

1. Pre-arbitration negotiation procedures

In the case *IM Global, LLC v. Northern Films Group*[23] where the Claimant IM Global applied for recognition and enforcement of an arbitral award, the Respondent asserted, *inter alia*, that paragraph (B) of "Choice of Law/Arbitration/Arbitral Agency" of the Transaction Memorandum set out the pre-arbitration procedure, that is, the Claimant shallfirst issue a notice for negotiation and apply for arbitration after 120 days. However, the Claimanthad never issued any notice for negotiation to the Respondent, failing to comply with the agreement on the negotiation period, and directly commenced the arbitration procedure, which has constituted the circumstances under Article V1(d) of the *New York Convention*. The Court held that Article V1(d) of the *New York Convention* expressly defines the "composition of arbitral authority" and the "arbitral procedure", both of which are matters after the commencement of the arbitral procedure;yet the negotiation period claimed by the Respondent was a matter before the commencement of the arbitral procedure.Whether the parties had to negotiate in the agreed process was neither an issue of "composition of arbitral authority"nor an issue of "arbitral procedure". It is therefore difficult to define the performance criteria for "negotiate and settle" process set forth in paragraph (B) of "Choice of Law/Arbitration/Arbitral Agency" under the

23 Civil Judgment Jin 01 Xie Wai Ren [2018] No.2, Frist Tianjin Intermediate People's Court, 18 May 2020.

Transaction Memorandum. Furthermore, in light of the circumstances of the case, since the Claimant has already submitted the dispute for arbitration, it should be deemed that the dispute between the parties was difficult to be settled through negotiation. The Court rejected the Respondent's objection.

2. Litigation procedure for claiming the validity of an arbitration agreement does not necessarily hinder the offshore arbitration procedure

In the case *Shanghai Bestway Machinery & Equipment Import & Export Co., Ltd. v. Mekers Offshore Co., Ltd.*,[24] the Claimant sought recognition of a LMAA award while the Respondent asserted that it had filed a lawsuit to confirm the validity of the arbitration agreement in question wiht the Shanghai Maritime Court and thus the LMAA procedure should be suspended. However, the LMAA Arbitral Tribunal did not suspend the arbitral procedure, which rendered the Respondent unable to fully participate in that arbitral procedure and to exercise its right of defense. The Court held that the Claimant's attorney has submitted the statement of claim and evidence to the Arbitral Tribunal and served a copy thereof on the Respondent. Article 4 of the Second Schedule to the *London Maritime Arbitrators Association Terms (2017)* provide that, save in exceptional circumstances, the defence and counterclaim submissions must be served within 28 days from the date of service of the claim submissions. The Respondent did not submit any statement of defense within the specified time limit, and the Arbitration Tribunal sent several e-mails to postpone the submission deadline for the Respondent's final statement and to inform it of the consequences of not responding within the time limit; despite this, the Respondent did not submit any other defense to the Arbitration Tribunal except for sending an e-mail to the Arbitration Tribunal on 27 April 2018 requesting

24 Civil Ruling Zhe 04 Xie Wai Ren [2018] No.2, Jiaxing Intermediate People's Court, Zhejiang Province, 1 July 2020.

the suspension of the arbitration procedure in this case. Therefore, the Court held that the Arbitration Tribunal has given the Respondent reasonable time and opportunity to defend itself, yetthe Respondent has failed to actively exercise its right of defense. This case did not involve a denial of the Respondent's right to present its case in the arbitration procedure.

3. Proper notice of arbitration

In the case *Koz Group Distribution LLC v. Guangdong Dongguan Animal By-products Import & Export Co., Ltd.*,[25] the ClaimantKoz Group applied for recognition and enforcement of an arbitral award rendered by ICAC at the RF CCI. The Respondent argued thatit had never received any arbitral notice from ICAC at the RF CCI;and thatalthough the Arbitration Award stated that the notice was served by way of DHL Express but was rejected, even if there was such courier service, the delivery method was illegal. The Court found that DHL Express courier made multiple attempts to deliver arbitration materials to the Respondent, but the recipient refused to accept. According to the mailing list, the delivery address used by ICAC at the RF CCI was consistent with the address specified by the Respondents in the supply agreement involved in this case. Thus, the Court held that pursuant to Article 11 of the *ICAC International Arbitration Rules* which provides that a document sent by the secretariat shall be deemed to have been received by a party on the day the document is received or on the day it is delivered if the party does not appear for receiving the document or refuses to receive it, or ifthe party is not found or does not dwell at the recorded address. That is, according to these arbitration rules, the Respondent shall be deemed to have received the arbitration notice if it refuses to accept mails delivered by DHL Express. The Arbitral Award in this case

25 Civil RulingYue 19 Xie Wai Ren [2019] No.1,Dongguan Intermediate People's Court, Guangdong Province, 30 April 2020.

did not contain any circumstances under Article V1(b) of the *New York Convention* under which recognition and enforcement of the award may be refused. Hence, it was ruled that the Arbitral Award shall be recognized and enforced.

In the case *Oue Lippo Healthcare Ltd v. Lin Gaokun*,[26] the Claimant applied for recognition and enforcement of an arbitral award rendered by SIAC. The Court held that with regard to the issue of proper arbitration notice, the service procedure in arbitration shall be examined in accordance with the *SIAC Arbitration Rules*. In this case, the Respondent Lin Gaokun has provided the address in the *Share Purchase Agreement*, so theservice of relevant arbitration documents to the agreed address in the arbitral proceedings complies with the provisions of Rules 2.1 and 2.2 of the *SIAC Arbitration Rules*, and therefore it shall be deemed as legal and valid. The matter as to whether the Respondent hasindeed received the arbitration documents is not the basis for determining the legality of the service procedure in arbitration. It follows that the Court rejected the Respondent's challenge to the service procedure in arbitration.

In the case *ACME Cleantech Solutions Pte Ltd. v. China Electric Equipment Group (Shanghai) Solar Technologies Co., Ltd*.,[27] the Claimant applied for recognition and enforcement of a foreign arbitral award, while the Respondent argued in its defense that it did not received from SIAC's written notices of arbitration hearings. All the applications and evidence materials submitted by the Claimant were sent by SIAC to the Respondent by email, and SIAC failed to organize a hearing, which made it impossible for the Respondent to confirm the authenticity of the evidence in a timely manner and to exercise its rights of statement, crossexamination, and debate. The Court held that SIAC had sent the Notice of Arbitration to the Respondent several times by e-mail, with

26 Civil Ruling Hu 01 XieWai Ren [2019] No.5, Frist Shanghai Intermediate People's Court on 16 April 2020.

27 Civil Ruling Hu 01 Xie Wai Ren [2019] No.12, First Shanghai Intermediate People's Court, 17 December 2019.

Mr. J as the recipient designated for the purpose in the Purchase Agreement and that the email was copied to the Respondent's five senior executives, including the Chairman of the company. Thereafter the Respondent's employee, Liu, sent an email to SIAC on behalf of the Respondent inquiring about the case, which showed that the email address sent by SIAC to the Respondent was correct. After Liu applied for postponement of the hearing on behalf of the Respondent, the Arbitral Tribunal decided to extend the period for the Respondent's submission of statement of defence and the date of the hearing. The Respondent had no objection to this and confirmed that it had received the evidence from the other party. Although the Respondent later claimed that Liu failed to attend the hearing in time due to his resignation, this was an internal management issue of the Respondent. According to the relevant correspondence submitted by the Respondent to the Arbitral Tribunal, Liu had received Procedural Order No. 2 of the Arbitral Tribunal on behalf of the Respondent and had confirmed the new date of the hearing. Therefore, both the notice of the arbitral tribunal and the evidence from the other party were sent to the Respondent by e-mail and successfully received by the Respondent, which complied with the *SIAC Arbitration Rules*. After a two-day hearing, the Arbitral Tribunal held that the Respondent's failure to appear at the hearing and the Arbitral Tribunal's rejection of over-due submission of the Respondent's statement of defence were attributed to the Respondent itself, and there was no violation of the *SIAC Arbitration Rules*. Thus, the Court found no merit in the Respondent's objection to the service and hearing proceedings.

4. Composition of arbitral tribunal

In the case *Singapore Mansheng Shipping Co., Ltd. v. Intermarine Shipping Co., Ltd.*,[28] the Claimant applied for recognition and enforcement of a LMAA arbitral award. The

28 Civil Ruling Jin 72 Xie Wai Ren [2019] No.1, Tianjin Maritime Court, 4 February 2020.

Respondent asserted that it had not been given proper notice of the appointment of arbitrators and the arbitration proceedings, nor had it been given written notice of the appointment of arbitrators, as a result of whicha sole arbitrator was appointed by the Claimantand failed to meet the requirement of the number of arbitrators specified in Article 17 of the contract between the parties. The Court found that the Claimant served an Application for Arbitration and a Notice of Arbitration by way of notarization on the Respondent on 10 May 2016 to notify the Respondent that it may appoint one arbitrator. The Court held that according to Article 17 of the contract between the parties, the Respondent is entitled to appoint one arbitrator, and the arbitrator appointed by the Respondent and the arbitrator appointed by the Claimant shall jointly appoint another arbitrator to form an arbitral tribunal. However, upon receipt of the notice of appointment of arbitrator, the Respondent did not appoint an arbitrator. Under this circumstance, the appointment of a sole arbitrator by the Claimant complied with the applicable "BIMCO Standard Arbitration Clause" agreed by the parties in Article 17 of the contract. Moreover, in the arbitration the Respondent did not raise any objection to the appointment of the sole arbitrator. Therefore, the Court found no merit in the Respondent's assertion.

5. Rights of theparties to be heard in arbitration proceedings

In the case *EmphorFzco v. Guangdong YuexinOcean Engineering Co., Ltd.*,[29] the Claimant Emphor applied for recognition and enforcement of a foreign arbitral award, while the Respondent plead not to enforce the Award on the grounds, inter alia, that it has explicitly informed the Arbitral Tribunal of reservation of its right to reply to Emphor's statement of the legal costs incurred in the arbitration; however, after receiving Emphor's statement of costs, the Arbitral Tribunal only requested Yuexin to submit its closing

29 Civil Ruling Yue 72 Xie Wai Ren [2020] No.1, Guangzhou Maritime Court, 17 June 2020.

statement, but did not request Yuexin to submit a reply. It has, based on Emphor's statement of costs, directly determined the amount of the legal costs incurred by Emphor in the arbitration, thus depriving Yuexin of the right to state its opinions on costs. The Court held that on 16 April 2018 the Arbitral Tribunal received Emphor's statement of costs, and immediately on the same day requested Yuexin to submit its closing statement; Yuexin could have presented its opinion on Emphor's statement of costs to the Arbitral Tribunal, yet it did not submit its opinion to the Arbitral Tribunal. The Arbitral Tribunal therefore did not deprive Yuexin's the right to state its opinion on Emphor's statement of legal costs, so the circumstances provided for in Article V1(b) of the *New York Convention* did not trigger. Yuexin's claim for non-recognition and non-enforcement of the Arbitral Award in this case on the ground that it was deprived of its right to present its case lacked factual and legal basis and was therefore not upheld by the Court.

F. Identification of Circumstances of Arbitration Beyond the Scope of its Authority

In the case *Octaform Systems Inc. v. Huajun Plastic Building Materials Co., Ltd.*,[30] the Claimant applied for recognition and enforcement of an arbitral award rendered by BCICAC, while the Respondent argued that the *Supply Agreement* in the case was an agreement between the two parties for the purchase of profiled material (template) products, and the fast-wire panel productssubsequently traded between the two parties were not bound by the *Supply Agreement*. Since the Arbitrators did not accept this argument, the Respondent submitted a counterclaim with respect to the sum related to the fast-wire panel products. The Respondent asserted that the counterclaim submission did not mean that it has acknowledged the Arbitral Tribunal's jurisdiction over the fast-

30 Civil Ruling Zhe 05 Xie Wai Ren [2019] No.1,Huzhou Intermediate People's Court, Zhejiang Province, 24 November 2020.

wire panel products, so the Arbitral Award rendered by the Arbitral Tribunal has dealt with issues falling outside the scope of the submission.The Court held that, *firstly*, the parties have entered into an agreement on three aspects, namely, the quality warranty issueand the losses suffered by the Claimant, the compensation for losses, and the quality warranty procedures that they have unanimously agreed to implement. The compensation for losses stated that the Respondent must replace all defective goods or goods with flaws in accordance with Article 22 of the *Supply Agreement* and indemnify the Claimant for any expenses, claims or damages caused by unqualified goods. The detailed list of defective goods or goods with flaws includedfast-wire panel products. Therefore, the parties applied the provisions of the *Supply Agreement* to the fast-wire panel products in the actual transaction. *Secondly*, the Respondent alleged during the arbitration that the Claimant should pay the Respondent the costs of specialized equipment for punching holes on the fast-wire panels and reconstruction of the fast-wire panel products, and on this basisthe Respondent submitted a counterclaim with respect to the fast-wire panel products. *Thirdly*, Article 15(5) of the *BCICAC Arbitration Rules* provides that the arbitral tribunal may rule on a plea that the arbitral tribunal is exceeding the scope of its authority, either as a preliminary question or in an arbitral awardon the substance of the dispute. The Arbitral Award in this case stated thatthe Claimant alleged,in accordance with the provisions of Article 29 of the *Supply Agreement* on confidentiality, that the Respondent has used the confidential size of its fast-wire panel products to manufacture competing products and sold 16-inch panels in the Claimant's designed size, which has misappropriated the confidential information of the Claimant. The Arbitral Award specifically analyzed and addressed the defense of the Respondentthat the *Supply Agreement* was an agreement on profiled products and not applicable to the fast-wire panel products, andheld that the general terms and conditions of the *Supply Agreement* would be added to or amended to the parties' subsequently

accepted purchase orders. In conclusion, the Arbitral Award rendered by the Arbitral Tribunal on fast-wire panel products does not go beyond the provisions of the arbitration agreement and does not fall under the circumstances of deciding issues beyond the scope of submission to arbitration as stipulated in ArticleV1(c) of the *New York Convention*.

G. Allocation of Burden of Proof as to Whether an Award Has been Set Aside by the Court of the Place Where the Award was Made

In the case *Vertex Shipping Co., Ltd. v. Fairwind International Shipping Co., Ltd.*,[31] the Claimant applied for the recognition and enforcement of a foreign arbitral award, while the Respondent Fairwind International resisted the application, claiming that it had filed a lawsuit in an UK court to challengethe final Award and thus the validity of the Award was pending. The Court found that Timothy Marshall and Ian Gunter, members of the Baltic Exchange and arbitrators of LMAA, formed an *ad hoc* Arbitral Tribunal in London to render the first Arbitral Award on 7 June 2017 in respect of part of the preliminary matters under the charter party dispute. The Court held that the Arbitral Award in this case was rendered in London, UK, and both China and UK were contracting states of the *New York Convention*, thus the review should be conducted in accordance with the *New York Convention* and other relevant provisions. According to Article V1(e) of the *New York Convention*, if an award is not binding or if enforcement of the award is set aside or suspended in the country where it is rendered, recognition and enforcement may be refused, but the party under the obligation to perform the award shall adduce evidence to prove the refusal. Although the Respondent alleged that it has filed a lawsuit to challenge the final award in the UK court, it failed to submit any evidence in conformity with the *pro forma* requirements of law and there was no evidence to prove that the Arbitral Award had been set aside by the UK court. Therefore, such ground was

31 Civil Ruling Zhe 05 Xie Wai Ren [2019] No.1, Shanghai Maritime Court, 23 August 2019.

not tenable.

H. Determination of Violation of Public Policy

In the case *Shanghai Bestway Machinery & Equipment Import & Export Co., Ltd. v. Mekers Offshore Co., Ltd.*,[32] the Claimant Shanghai Bestway applied for recognition of a maritime arbitration award rendered by the LMAA Arbitral Tribunal. The Respondent asserted that the failure of the LMAA Arbitral Tribunal to suspend the proceedings, prior to the Shanghai Maritime Court's ruling on the application to confirm the validity of the arbitration agreement in dispute, has seriously impaired China's jurisdiction and thus went against China's public policy. The Court held that the "public policy" in Article V2(b) of the *New York Convention* should be generally construed to include the violation of the basic principles of China's laws, infringement of China's national sovereignty, endangering China's national and social public security, violation of good customs or any other circumstance that endanger China's public interest. Jurisdiction as a power conferred by law, to a significant extent, relates to China's fundamental principles of the laws and national judicial sovereignty. However, in accordance with one of the civil rulings (Hu 72 Civil Te [2017] No.182) rendered by the Shanghai Maritime Court, the parties' agreement to submit the matter in dispute to arbitration by LMAA is legal and valid. Therefore, the jurisdiction of the LMAA Arbitral Tribunal over this case is not prejudicial to China's jurisdiction and does not violate China's public policy.

In the case *Octaform Systems Inc. v.Huajun Plastic Building Materials Co., Ltd.*,[33] the Claimantapplied for recognition and enforcement of an arbitral award rendered by BCICAC. The Respondent provided litigation materials to prove that it obtained a

32 Civil Ruling Zhe 04 Xie Wai Ren [2019] No.2,Jiaxing Intermediate People's Court, Zhejiang Province, 1 July 2020.

33 Civil RulingZhe 05 Xie Wai Ren [2019] No.1,Huzhou Intermediate People's Court, Zhejiang Province, 24 November 2020.

utility model patent in respect of four types of PVC ceilings on 29 April 2016 and filed a lawsuit with the Primary People's Court of Deqing County on 27 June 2017 seeking a declaration of non-infringement of intellectual property rights. The Respondent claimed that the Arbitral Award in question was wrong to conclude that the products patentedin China violated the agreed confidentiality obligation and thus it constituted a violation of public policy under Article V2(b) of the *New York Convention*. The Court held thatthe violation of public policy, as provided in Article V2(b)of the *New York Convention*, shall be construed as thatthe recognition and enforcement of a foreign arbitral award would seriously violate China's basic principles of the laws, infringe upon China's national sovereignty, endanger public safety, violate good customs, and endanger China's fundamental public interest. The *Supply Agreement* in question provided that the obligations of the parties under the purchase order shall be governed by the laws of British Columbia, Canada. The disputed Arbitral Award stated that both parties have confirmed to adoptthe common law provision as criteria totest the breach of confidentiality obligations, that is, information must possess the necessary confidential characteristics and the provision of information gives rise to the confidentiality duty.The Arbitral Tribunal shall use these criteria to examine whether the Respondent has used the information without authorization. Moreover, the patent rights granted byvarious countries are independent of each other. The Respondent failed to adduce evidence to prove that it has also applied for and obtained the patent authorization and ensuing protectionin Canada. The determination of the Arbitral Award on whether there is a breach the confidentiality duty can only affect the economic interests of the Claimantand the Respondent and does not violate China's basic legal system or damage China's fundamental public interest. Therefore, the Respondent's submission that the recognition and enforcement of the Arbitral Award would be contrary to the public policy of Chinais untenable.

I. Circumstance of non-defense review

In the case *UNID International Corp., Korea v. Changrong International Trade Co., Ltd., Ningbo Boned Zone*,[34] the Claimant UNID applied for recognition of an arbitral award rendered by KCAB, and the Respondent Changrong failed to defend itself. The Court held that UNID has submitted the Arbitral Award, a copy of the sales contract concluded by and between the parties and the translation thereof, which complied with Article IV of the *New York Convention*. The Arbitral Award has been served on both parties and is binding on both parties. The Arbitral Award rendered by KCAB in this case did not fall under any of the circumstances stipulated in Article V1 of the *New York Convention* under which recognition and enforcement may be refused. It also conformed to the *Decision of the Standing Committee of the National People's Congress on China's Accession to the Convention on Recognition and Enforcement of Foreign Arbitral Awards* and did not violate the clause of reservations made by China at the time of China's accession to the *New York Convention*. Therefore, the validity of the arbitral award should be upheld.

In the case *Shanghai Nokia Bell Co., Ltd. v. UztransgazJSC*,[35] the Claimant Nokia Bell applied for recognition of an arbitral award rendered by the ICC International Court of Arbitration in Singapore, and the Respondent did not raise any defense. The Court held that since the Arbitral Award in question was made by the ICC International Court of Arbitration in Singapore and both China and Singapore are the member states of the *New York Convention*, the Claimant's application for recognition of the arbitral award rendered by the ICC International Court of Arbitration in Singapore should comply with the provisions of the *New York Convention*. The Claimanthas submitted

34 Civil Ruling Zhe 02 Xie Wai Ren [2019] No.4,Ningbo Intermediate People's Court, Zhejiang Province, 2 March 2020.

35 Civil Ruling Hu 01 Xie Wai Ren [2018] No.4, First Shanghai Intermediate People's Court, 17 February 2020.

the documents required by Article IV of the *New York Convention* to the Court, and the Arbitral Award in question did not fall under any of the circumstances specified in Articles V1 and V2 of the *New York Convention*, hence the Court upheld the validity of the Award.

In the case *Olam International Ltd v. Qingdao Sino Commerce Suntton International Trade Co., Ltd.*,[36] the Claimant Olam applied for recognition and enforcement of a foreign arbitral award rendered by ICA on 28 February 2020. The Court that heard the case held that the Arbitral Award in question was issued by ICA in Liverpool, England, on 28 February 2020 and was a foreign arbitral award, thus the relevant provisions of the *Civil Procedure Law* and the *New York Convention* shall apply. The Respondent did not appear in court to present its caseor conduct cross-examination, nor did it object to the validity of the Arbitration Agreement in question, the appointment of arbitrators, *ultra vires* to the agreement, the composition of the arbitral tribunal, the arbitration procedures and other matters.It did not submit evidence to prove the flaws in the above matters orraise defenses to refuse recognition and enforcement. In addition, the Arbitration Award in question did not exceed the time limit for application for enforcement as prescribed in Article 239 of the *Civil Procedure Law*, and the Arbitral Award submitted by the Claimant to the Court was legally notarized, authenticated and translated, and the Claimant's application for submission of documents complied with Article IV of the *New York Convention*. Meanwhile, the sales contract signed by and between the Claimant and the Respondent agreed on matters for arbitration, and the Arbitral Tribunal served the Arbitral Award on both parties after handing down the Award. So, the Arbitral Award did not fall under any circumstances where recognition and enforcement may be refused as provided for in Article V of the *New York Convention*, and thus the Court ruled to

36 Civil Ruling Lu 02 Xie Wai Ren [2020] No.5,Qingdao Intermediate People's Court, Shandong Province, 31 December 2020.

recognize and enforce the Award.

Judging from the trial of the cases to which the *New York Convention* applied in 2020, the people's courts in China have adhered to the spirit of the Convention in favor of enforcement of arbitral awards, examined the party's submission for non-recognition and non-enforcement according to Article V1 of the *New York Convention,* respected the arbitration agreement and arbitration rules agreed upon by the parties, and properly examined the clauses on public policy. The reasoning and analysis of the *New York Convention* in the civil rulings are becoming more and more detailed, and the judges appropriately referred to the *UNCITRAL Secretariat Guide on the New York Convention* based on their understanding of the specific provisions of the Convention, demonstrating a high level of foreign-related judicial adjudication overall. In respect of the application of the *New York Convention*, the following new trends are worthy of attention:

First, the provisions of Article IV of the *New York Convention* shall be interpreted leniently. The *Octaform* case adopted a more liberal and pragmatic approach in understanding the duly-certified translation under Article IV2 of the *New York Convention*, and did not mandatorily require a notarized certification of the translation when the parties had no dispute over the content of the English translation, which was conducive to facilitating the enforcement of the award. In addition, Article IV of the *New York Convention* stipulates that the original and duly certified copies of the arbitral award and the arbitration agreement shall be submitted, which is thematerial requirement for application for recognition and enforcement of a foreign arbitral award. The people's court shall accept the application if it conforms to the requirements of Article IV upon *pro forma* examination; otherwise, the people's court shall reject the application. In the event of any substantive dispute over the validity of an arbitration agreement, such as the invalidity, nullification, or unenforceability of the arbitration

agreement, the respondent shall raise its objection to the recognition and enforcement of the arbitral award pursuant to Article V1(a) of the *New York Convention*, rather than the defense under Article IV. However, there are inconsistent judicial practice as to whether the examination of the validity of an arbitration agreement under Article V1(a) of the *New York Convention* includes the examination of whether the arbitration clause is concluded.

Second, the issue concerning the agency right of signatory of an arbitration agreement. According to Article V1(a) of the *New York Convention* that "The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity…", the question as to whether the parties have agency power falls within the scope of capacity for conduct. However, the *New York Convention* does not provide for the determination of the law applicable to capacity for conduct. Judging from drafting process of the Convention, theprovision on "the law applicable to them" is to be determined according to the law governing (a party's) personal status.[37] Past cases mostly applied the domestic law of the "agent", i.e., the law of the agent's nationality law or the law of the agent's habitual residence. In *IM Global* case, the Court for the first time referred to the conflict rules of the country where the application for recognition and enforcement is filed, i.e., the *Law of the People's Republic of China on the Application of Laws concerning Foreign-related Civil Relations*, to determine that the law of the place where the agency relationship occurs, that is, the law of the country where the agreement is signed (ie., French law in this case) shall determine whether the agency relationship is established, which is more predictable in confirming agency relationship and protecting the interests of the counterparty to the transactions.

37 Travaux preparetoires, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24, p.7.

Third, the pre-arbitration consultation procedure. In the dispute resolution clause, it is very typical and common for the parties to set negotiation, settlement, mediation, etc., as a prerequisite procedure to initiate arbitration. This clause is called escalation clause. In general, the people's court adopts a lenient approach to interpret and determine whether the pre-arbitration negotiation procedure is substantively satisfied. The people's court in *IM Global* case strictly interpreted the term "arbitration proceeding", holding that it only covered procedural matters in the arbitration but not the negotiation and dispute resolution procedures prior to the arbitration.Thisis a new approach whichrules out the possibility for the people's court to determine whether pre-arbitration negotiation procedures have been satisfied under ArticleV1(e) of the *New York Convention*. However, this approach seems to be inconsistent with the recent practice of overseas courts[38] that tends to determine pre-arbitration negotiation procedure as an admissibility issue of arbitral tribunals rather than a jurisdiction issue. If anarbitration agreement has very clear and explicit agreements on mandatory pre-arbitration negotiation procedure and the arbitral tribunal has accepted the case in violation of the agreed procedure, how will the people's court deal with such violation of the arbitration agreement? This remains to be further observed as to whether the court will examine this issue as a matterof jurisdiction under Article V1(a) of the *New York Convention* or as an exception to the examination under Article V1(e) of the *New York Convention*.

Fourth, the circumstances in violation of public policy. Since China's *Arbitration Law* does not fully recognize the doctrine of *kompetenz-kompetenz*, most cross-border disputes involve parallel proceedings where one party submits to the arbitration outside China according to the arbitration agreement while the other party files a lawsuit with a China court to confirm the validity of the arbitration agreement. The reason why the Shanghai Bestway case was deemed not violating public policy is that the Shanghai Maritime

38 C v. D [2021] HKCFI 1474, High Court of Hong Kong.

Court held, on the application for confirming the validity of the arbitration agreement, that the arbitration clause was valid. However,in the past there were many cases where China courts applied the *lex fori*, that is,China law, to invalidate arbitration agreement in the lawsuits applying for confirmation of validity of arbitration agreement, and then refused to recognize the foreign arbitral award on the grounds of infringement of judicial sovereignty. This issue essentially involves the recognition of the doctrine of *kompetenz-kompetenz* and is an issue of allocation of jurisdiction between the court and arbitral tribunal. Therefore, how this issue will be dealt with in future amendment tothe *Arbitration Law* deserves further observation. On the other hand, recent years have seena clear tendency to choose overseas arbitration for intellectual property disputes involving trade secrets. Due to the regional nature of intellectual property rights and the different protection levels in different countries, there may be more disputes over the interpretation of the public policy clause in the intellectual property field, which is also worthy of attention.

IV. LEGAL ISSUES CONCERNING APPLICATIONS FOR RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS MADE IN HONG KONG, MACAO, AND TAIWAN

In 2020, there were seven cases to which the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region* ("Arrangement Concerning Mutual Enforcement of Arbitral Awards") applied, all of which have been granted recognition and enforcement. There were three cases with jurisdictional challenges involving the *Arrangement Concerning Mutual Enforcement of Arbitral Awards*. Seven cases were granted property preservation according to the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong*

Special Administrative Region ("Arrangement on Interim Measures in Aid of Arbitral Proceedings"). On 27 November 2020, the Supreme People's Court and the Department of Justice of the Hong Kong Special Administrative Region ("SAR") signed the *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* ("Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards"), and at the same time published for the first time 10 typical court judgments in both Chinese and English which involved mutual enforcement of arbitral awards. This is of great significance to further improve the judicial assistance systems of the two zones. Out of the five typical court judgments published by mainland China, some were rendered in 2019 and 2020, which have been included in this Chapter.

In addition, judgment delivered in 2020in which the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Macao Special Administrative Region and the Provisions of the Supreme People's Court on Recognition and Enforcement of Arbitral Awards Made in Taiwan Region* applied are not available for public research.

A. Interim Relief in Aid of Arbitral Proceedings in Hong Kong

In the contract dispute case *UBS AG, Singapore Branch v.China Energy Reserve and Chemicals Group Overseas Co., Ltd.*,[39] before an arbitral award was made, the ClaimantUBS AGapplied for property preservation in accordance with the *Arrangement on Interim Measures in Aid of Arbitral Proceedings*. The Court issued a garnishee order to freeze the Respondent's bank deposits or to seize, distrain or freeze other assets of equivalent value. In the property preservation case *Chengwei Capital HK Ltdv. Jiang*

39 Civil Ruling Hu 74 Cai Bao [2020] No.7, Shanghai Financial Court, 9 June 2020.

Yuehai & Yang Ru,[40] the case *China-Africa Development Fund v.Startimes Communication Network Technology Co., Ltd.*[41] involving disputes over breach of shareholder agreement, the contract dispute case *Pahxd Co., Ltd. v. Cui Zhen & Success Genius Corp. & Ors*,[42] the property preservation case *SINO-BLR Industrial Investment Fund, L.P. v. Chen Gongmeng, Shenzhen GTA Education Tech Co., Ltd., GTA Education Technology Co., Ltd., CZGA Education Holding Ltd., Total Truth Ltd. & GTA Investment Ltd.*,[43] the property preservation case *Kefei Investment (Hong Kong) Ltd v. Golden Concord Group Ltd & Sinopro Enterprises Ltd*,[44] the property preservation case *E Land (Shanghai) Fashion Trading Co., Ltd. v. Jinhong Fashion GroupCo., Ltd.*,[45] the courts have approved the property preservation applications filed by the claimants and enforced property preservation measures according to the *Arrangement on Interim Measures in Aid of Arbitral Proceedings*. The assistance provided by mainland China courts to enforceinterim measures granted by arbitral tribunals in the Hong Kong SAR not only marks the improvement of the mutual judicial assistance system, but also is one of the important measures adopted by the Mainland to support and develop Hong Kong in becoming a dispute resolution services center in the Asia-Pacific region.

B. Jurisdictional Objections

In the case *Elim Spring Marine (Hong Kong) Ltd. v. Shanghai Zunwen Industrial Co., Ltd.*,[46] the Claimant applied for recognition and enforcement of an arbitral award rendered in Hong Kong. The Respondent challenged the jurisdiction during the

40 Civil Ruling Hu 01 Cai Bao [2020] No.26,First Shanghai Intermediate People's Court, 11 December 2020.

41 Civil Ruling Jing 01 Cai Bao [2020] No.276,First Beijing Intermediate People's Court, 11 November 2020.

42 Civil Ruling Jing 01 Cai Bao [2020] No.198, First Beijing Intermediate People's Court, 21 September 2020.

43 Civil Ruling Yue 03 Cai Bao [2020] No.47,Shenzhen Intermediate People's Court, Guangdong Province, 5 June 2020.

44 Civil Ruling Hu 01 Cai Bao [2020] No.20, First Shanghai Intermediate People's Court, 16 October 2020.

45 Civil Ruling Hu 01 Cai Bao [2020] No.13, First Shanghai Intermediate People's Court, 15 July 2020.

46 Civil Ruling Hu 72 Ren Gang [2020] No.1, Shanghai Maritime Court, 18 June 2020.

submission of defense, asserting that the dispute arising from the *Settlement Agreement* signed by both parties was not a dispute overthe lease in this case, but a new and separate creditor-debtor contractual relationship. It was not within the scope of maritime contract,but an ordinary civil and commercial contract dispute instead. Thus, the Respondent asserted that the Shanghai Maritime Court had no jurisdiction over this case and that this case be transferred to a people's court with jurisdiction. The Shanghai Maritime Court held that the *Settlement Agreement* signed by and between the Claimant and the Respondent was to regulatethe rights and obligations agreed in the charter contract, for the purpose of resolving the disputes arising from the charter contract. The dispute between the parties was a dispute over voyage charter contract, and the Arbitral Award rendered on this basiswas a maritime arbitral award. In accordance with the *Provisions of the Supreme People's Court on the Scope of Acceptance of Cases by Maritime Courts*, this case should be under exclusive jurisdiction of the maritime court, and this Court, as the court withcompetent jurisdiction at the respondent's domicile, shall have jurisdiction over this case. The challenge to the jurisdiction was thus dismissed.

In the case *Tianyang Holding Group Co., Ltd. v. Chenggong (China) Grand Plaza Co., Ltd.,Beijing Tianyang International Holding Co., Ltd. & Zhou Zheng* which involved a jurisdictional challenge to the recognition and enforcement of a HK arbitral award,[47] the Court held that, according to Articles 1 and 2 of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards*, "if the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated falls within the jurisdiction of different Intermediate People's Courts of the Mainland, the applicant may apply to any one of the people's courts to enforce the award. The applicant shall not file his application with two or more people's courts." Since the Respondent's domicile was in the jurisdiction of Beijing Municipality and its

47 Civil Ruling Jing Min Xia Zhong [2020] No.161, Beijing High People's Court, 23 November 2020.

equity and other properties have been frozen, so the Fourth Beijing Intermediate People's Court had jurisdiction over this case. Tianyang Group failed to adduce evidence to prove its claim that its main office was in Sanhe City, Hebei Province. Even if the claim was tenable, the Claimant was still entitled to choose one of the courts for enforcement of the award. The matter of whether enforcement would be more convenient did not affect the determination of jurisdiction. The Court therefore ruled to reject the appeal and uphold the original ruling.

Article 10 of the *Provisions of the Supreme People's Court on Several Issues concerning the Hearing of Cases Involving Judicial Review of Arbitration* provides that after a people's court accepts a case involving judicial review of arbitration, if the respondent objects to the jurisdiction of the court, it shall raise the objection within 15 days upon receipt of the notice from the people's court. The people's court shall examine and make a ruling over the objection raised by the respondent. If the party concerned refuses to accept the ruling, it may lodge an appeal. This provision clarifies that the doctrine of jurisdictional challenge applies to cases involving judicial review of arbitration. In addition to the *Provisions of the Supreme People's Court on the Scope of Acceptance of Cases by Maritime Courts* which provides that the maritime courts shall exercise exclusive jurisdiction over the cases involving judicial review of maritime arbitration, the *Provisions of the Supreme People's Court on the Jurisdiction of Shanghai Financial Court* and the *Provisions of the Supreme People's Court on the Jurisdiction of Beijing Financial Court* have successively stipulated the jurisdiction over the cases involving judicial review of arbitration for civil and commercial financial disputes, which increases the complexity of the allocation of jurisdiction over the cases involving judicial review of arbitration. It remains to be seenwhether the jurisdictional objection procedure will reduce the efficiency of cases involving judicial review of arbitration.

C. Refusal to Enforce a Mainland Award in Hong Kong Does not Affect the Award's Validity in the Mainland

In an appeal case *Chen Leiyuv.He Zhilan & Guangzhou Loudwailou Real Estate Consulting Co*., Ltd. involving the dispute over a house purchase and sale contract,[48] the Guangzhou Arbitration Commission rendered an arbitral award in accordance with the arbitration clause of the house purchase and sale contract, ordering He Zhilan to return the purchase price of the house and pay liquidated damages to Chen Leiyu. As He Zhilan has major assets in Hong Kong, Chen Leiyu applied to the High Court of Hong Kong for enforcement.The High Court of Hong Kong made an order granting leave to enforce. He Zhilan applied for the setting aside of the award on the grounds that he had not been given proper notice of the arbitral proceedings and thus was unable to present his case. The High Court of Hong Kong ruled to set aside the enforcement order. Chen Leiyu filed a lawsuit with the Yuexiu PrimaryPeople's Court, Guangzhou, which subsequently rejected his claim. Chen Leiyu appealed, claiming that the *Arrangement Concerning Mutual Enforcement of Arbitral Awards* mandatorily required to choose, and could only choose, one court of either the Mainland China or Hong Kong SAR to file an application, and that there was no legal basis for continuing to apply for enforcement by the court of the other place after the court of one place had refused to enforce, therefore he was entitled to file a separate lawsuit. The Appellate Court held that the Arbitral Award in question rendered by the Guangzhou Arbitration Commission was legal binding before it was set aside by the people's court or before it was ruled not to be enforced, and the parties concerned could apply to the people's court with competent jurisdiction for enforcement. There was no legal basis for Chen Leiyu to file a separate lawsuit with a Mainland court on the same dispute merely relying on the fact that

48 Civil Ruling Yue 01 Min Zhong [2020] No. 18160, Guangzhou Intermediate People's Court, Guangdong Province, 1 September 2020.

Arbitral Award was set aside by the order of the High Court of Hong Kong. The ruling of the first instance to dismiss the lawsuit shall be upheld.

Paragraph 3, Article 2 of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards* provides that:

"If the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated is in the Mainland as well as in the HKSAR, the applicant shall not file applications with relevant courts of the two places at the same time. Only when the result of the enforcement of the award by the court of one place is insufficient to satisfy the liabilities may the applicant apply to the court of another place for enforcement of the outstanding liabilities. The total amount recovered from enforcing the award in the courts of the two places one after the other shall in no case exceed the amount awarded."

The *Chen Leiyu* case shows the confusion in understanding Article 2 in judicial practice, whichdoes not seem to facilitate the enforcement of award. In view of this, on 9 November 2020, the Adjudication Committee of the Supreme People's Court passed the *Supplementary Arrangement Concerning Mutual Enforcement of Arbitral Awards* to amend Paragraph 3, Article 2 of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards* as:

"If the party against whom the application is filed is domiciled or has property in both the Mainland and the HKSAR which may be subject to enforcement, the applicant may file applications for enforcement with the courts of the two places respectively. The courts of the two places shall, at the request of the court of the other place, provide information on its status of the enforcement of the arbitral award. The total amount to

be recovered from enforcing the arbitral award in the courts of the two places must not exceed the amount determined in the arbitral award."

In this case, the fact that the Award is not enforceable in the Hong Kong SAR does not affect its legal force and enforceability in mainland China, so it is proper for the Court to reject Chen Leiyu'sclaim.

D. Procedure for Appointing Arbitrators

In the case *International Finance Corp. v. Sichuan Jiuda Salt Manufacturing Co., Ltd.*,[49] the Claimant applied for recognition and enforcement of a Hong Kong arbitral award, while the Respondent claimed that the appointment of the sole arbitrator by the Hong Kong International Arbitration Centre ("HKIAC")has violated the agreement ofArticle 7.05 of the *Loan Agreement* between the parties. That Article provided that the composition of the arbitral tribunal should be three arbitrators. The Respondent asserted that this violation warranted the refusal to enforce the Arbitration Awardunder the circumstance where "the composition of the arbitral authority or the arbitral procedure was not in accordance with agreement of the parties" as provided for in Paragraph 1(4), Article 7of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards*. The Court held that HKIAC had adjusted the original agreement of Article 7.05(c) of the Loan Agreement regarding a three-arbitrator tribunal andappointmentthe sole arbitrator, but such adjustment has been agreed upon by both parties. The Respondent had not challenged HKIAC's appointment of the arbitrator pursuant to the *Arbitration Rules of the United Nations Commission on International Trade Law* (the "UNCITRAL Arbitration Rules")in the course of arbitration. Therefore, the appointment of the sole arbitrator by HKIAC did not constitute a violation of Paragraph 1(4), Article 7 of the *Arrangement*

49 Civil Ruling Chuan 03 Ren Gang [2020] No.1,Zigong Intermediate People's Court, Sichuan Province, 30 November 2020.

Concerning Mutual Enforcement of Arbitral Awards. Thus, the Hong Kong Arbitral Award should be enforced.

In the case *Bensley Design Group International Consultancy Ltd. v.Chengdu MenliwangjiangLand Co., Ltd. & Chengdu Chenchuan Industry Co., Ltd.*,[50] the Claimant applied for recognition and enforcement of a Hong Kong arbitral award, while the Respondents argued that the arbitration proceedings for the appointment of arbitrator by HKIAC were inconsistent with the agreement between the parties. Article 15.10 of the Service Agreement stipulated that the parties agreed to refer any dispute arising from the performance of the Service Agreement to HKIAC for arbitration and to be governed by the *UNCITRAL Arbitration Rules. In accordance with Article 8 of the UNCITRAL Arbitration Rules*, HKIAC shall appoint arbitratorsusing the list-procedure unless the parties have agreed not to use such procedure. The Respondents asserted that HKIACfailed to consult the parties on the appointment of arbitratorthrough the list-procedure, but directly appointed Mr. Huang Jin as the sole arbitrator, which did not conform to the above arbitration rules. The Court held that the Service Agreement agreed toapply the *UNCITRAL Arbitration Rules* and to arbitrate in English by a sole arbitrator, the arbitration be administered by the HKIAC, and the appointing authority for the arbitrator be the HKIAC. Article 8 of the *UNCITRAL Arbitration Rules* provides that:

"The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the list-procedure is not

50 Civil Ruling Chuan 01 Ren Gang [2019] No.1, Chengdu Intermediate People's Court, Sichuan Province, 6 January 2020, which is the fifth typical case of mutual enforcement of arbitration awards by the Mainland and Hong Kong.

appropriate for the case: … (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator."

In the arbitration procedure in this case, HKIAC exercised its discretion to appoint a sole arbitrator in compliance with the above requirements. In addition, the Respondents did not make any reply when the Arbitration Tribunal sent a letter to inform the Respondents of the matters relating to the arbitration proceedings. Therefore, the composition of the tribunal conforms to the parties' agreement in the *Service Agreement*.

In recent years, the number of cases in which the parties agree to apply the *UNCITRAL Arbitration Rules* has been increasing. Article 8 of the *UNCITRAL Arbitration Rules* grants the appointing authority greater discretion in appointing a sole arbitrator. If the parties have agreed that a sole arbitrator is to be appointed but failed to reached agreement on the selection of the sole arbitrator after receiving the proposal for appointment, any party may request the appointing authority to appoint the sole arbitrator. The appointing authority may opt not to apply the list-procedure if the parties agree not to use it, or if the appointing authority decides in its discretion that the list-procedure is inappropriate. The above case reflects that the courts in mainland China exam the specific composition of the tribunal in accordance with the arbitration rules agreed upon by the parties, and respect the discretion granted by the arbitration rules to the appointing authority, while at the same time taking into account whether the respondent haswaived its right to object to the procedural flaw in the arbitration proceedings.

E. Arbitrators' Obligation of Disclosure in Arbitration Proceedings

In the case of *David Dein Consultancy Ltd. & Bramley Corp. Ltd. v. Beijing*

SinoboGuoanFootball Club Co., Ltd.,[51] the Claimant applied for recognition and enforcement of a Hong Kong arbitral award, while the Respondent argued that the award should not be recognized on the grounds that the composition of the tribunal was in conformity with the agreement between the parties and the laws of the Hong Kong SAR. The Court held that the composition of the tribunal in this case did not violate the *2018 HKIAC Administered Arbitration Rules* effective at the time of the arbitration. The fact that both the arbitrator and the company directors of the two Claimants servedin the British Football Association did not necessarily indicate an interest or stake between the arbitrator and the two Claimants. Hence the Court granted recognition and enforcement of the Arbitral Award in this case. This case clarifiesthat in determining the "composition of the arbitral authority or the arbitral procedure was not in accordance with agreement of the parties" under Article 7(4) of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards*, if procedural issues such as the disclosure or recusal of arbitrators are involved, the court should make a reasonable judgment based on the arbitration rules, taking into account the social life experience, and examine whether it is sufficient to affect the impartiality and independence of the arbitration. In this case, the fact that the arbitrator works for the same organization due to work, life, study and other social activities does not necessarily constitute a stake or a relationship that may affect the fairness of the arbitration; non-disclosure of facts unrelated to arbitrators' independence and impartialityin arbitration does not violate arbitration rules.

F. Winding Up of a Party Does not Affect its Subject Status in the Judicial Review of Arbitration

In the case of *Xiongfeng Group (Shenzhen) Co., Ltd. v. Hong Kong Xiongfeng Group Ltd.*,[52]

51 Civil Ruling Jing 04 Ren Gang [2020] No.5, Fourth Beijing Intermediate People's Court, which is the third typical case of mutual enforcement of arbitration awards by mainland China and the Hong Kong SAR.

52 Civil Ruling Yue 03 Min Chu [2018] No.2267, Shenzhen Intermediate People's Court, Guangdong Province,

the Claimant applied for recognition of an arbitral award rendered by HKIAC. The Arbitral Award showed that the Respondent Hong Kong Xiongfeng was compulsorily wound up by a winding up order of the Hong Kong court on 27 November 2000, and a liquidator was appointed on 28 September 2001. After accepting the case, the Shenzhen Intermediate People's Court served the statement of submission and a notice of hearing on the liquidator of the Respondent; however, the liquidate did not appear before the Court in person nor put forward any written opinions. The Court held that although the Respondent was wound updуring the arbitration, its capacity for conduct was not thus affected. In view of the facts that both parties to the arbitration had full capacity for conduct and had never objected to the validity of the arbitration agreement and had participated in the hearing of the arbitration case, the Court affirmed the arbitration agreement as valid. Even though the application of the Claimant was filed after the two-year period for application for enforcement, since the Respondent did not raise any objection, the people's court shall accept the case according to Article 483 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*. The Arbitral Award in this case did not fall under any of the circumstances for non-enforcement as specified in Article 7 of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards*, and thereforeshould be recognized.

G. Governing Law of Hong Kong Arbitration Agreements

In the case *Farenco Shipping Pte. Ltd. v. Eastern Ocean Transportation Co., Ltd.*[53] concerning the application for recognition and enforcement of a Hong Kong arbitration award, both parties have entered into a shipping contract, agreeing that all disputes

22 June 2020.

53 Civil Ruling Yue 72 Ren Gang [2018] No.1-A and Yue 72 Ren Gang [2019] No.1, Guangzhou Maritime Court, which is a typical case of mutual enforcement of arbitration awards by mainland China and the Hong Kong SAR.

arising from that contract shall be submitted to arbitration in Hong Kong and English law shall be applied. In the same year, Farenco Shipping sent an email to Eastern Ocean to confirm that both parties have reached a supplementary contract on the basis of the aforesaid shipping contract to cover a new batch of cargo transportation and that the other terms and conditions shall apply to the shipping contract. Later, when the parties had a dispute concerning the performance of the supplementary contract, Farenco Shipping referred the dispute to arbitration in Hong Kong. The Arbitration Tribunal in Hong Kong rendered a first final award and a final costs award respectively, ordering Eastern Ocean to pay damages and the relevant arbitration costs. Farenco Shipping then applied for recognition and enforcement of the above two arbitration awards. In this case, Eastern Ocean plead that the supplementary contract was reached orally by both parties via telephone without forming any arbitration clause or agreement, and Eastern Ocean never recognized the jurisdiction of the Arbitral Tribunal. The Court held that the matter as to whether the arbitration agreement is formed falls within the scope of the assessment of the validity of the arbitration agreement. As both parties failed to agree on the governing law for determining the validity of the arbitration agreement, according to Paragraph 1, Article 7of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards*, the law of the seat of arbitration, i.e., the law of Hong Kong in this case, should apply to the determination of whether the arbitration agreement in question has been formed. According to the relevant provisions of Hong Kong law, the contract incorporation clauses recorded in the email in this case constituted a valid arbitration agreement.

Paragraph 1, Article 7 of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards* clearly provides that if an arbitration agreement is invalid, the court may rule not to enforce the agreement. However, in practice, it is controversial whether the

circumstances of invalidity of an arbitration agreement includes the circumstance where the arbitration agreement is not formed. In this case, it is held that whether an arbitration agreement is formed is the prerequisite to determine the validity of the arbitration agreement, which falls within the scope of the assessmentof the validity of the arbitration agreement. Invalidity of an arbitration agreement shall cover the circumstance where the arbitration agreement is not concluded, and the issue of whether the arbitration agreement has been concluded shall be determined based on the law of the seat of arbitration specified in Paragraph 1, Article 7 of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards*.

H. Notice of Arbitration

In the case *Bensley Design Group International Consultancy Ltd.v. Chengdu Menliwangjiang Land Co., Ltd. &Chengdu Chenchuan Industry Co., Ltd.*[54] concerning the applicationfor recognition and enforcement of a Hong Kong arbitral award,the Respondentsargued that the HKIAC and the sole arbitrator failed to service legal documents relating to the arbitral proceedings in a proper and effective manner. In accordance with the relevant provisions of the *Administrative Measures for China's Entrusted Notaries (Hong Kong)* (Decree No.69 of the Ministry of Justice), for legal acts as well as facts and documents with legal significance that take place in the Hong Kong SAR, if they are to be used in mainland China, they should first be notarized by a registered Hong Kong lawyer who has been appointedby the Ministry of Justice, and then be examined and forwarded by China Legal Service (Hong Kong) Ltd with its seal affixed. In this case, the Respondents asserted that the relevant arbitration instruments were not served in accordance with the above provisions, resulting in the Respondents being unable to

54 Civil Ruling Chuan 01 Ren Gang [2019] No.1,Chengdu Intermediate People's Court, Sichuan Province, 6 January 2020, which is the fifth typical case of mutual enforcement of arbitration awards by the Mainland and the Hong Kong SAR.

identify the authenticity of the instruments and unable to participate in the arbitral proceedings, depriving themof the right to present their cases. The Court held that the Service Agreement in dispute agreed that the *UNCITRAL Arbitration Rules* shall apply to the arbitration. According to Article 2 of the *UNCITRAL Arbitration Rules*, "A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission". "If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address" according to the model arbitration clause for contracts set out in the annex to the *Arbitration Rules*, and "if so delivered shall be deemed to have been received". "In the absence of such designation or authorization, a notice is received if it is physically delivered to the addressee; or deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee." In the arbitration proceedings in this case, the arbitrator served relevant documents at the address agreed by the parties in the Service Agreement and the Respondents has acknowledged the receipt, so the issue that the arbitrator failed to properly notify the Respondents did not arise. The Respondents' claim that relevant arbitration documents shall be served on them in accordance with the *Administrative Measures for China's Entrusted Notaries (Hong Kong)* was not in line with the applicable arbitration rules previously agreed, and thus it should berejected.

I. Definition of Social Public Interests

In the case *David Dein Consultancy Ltd & Bramley Corp. Ltd v. Beijing SinoboGuoan Football Club Co., Ltd.*,[55] the Claimants applied for the recognition and enforcement of a HKIAC arbitral award, while the Respondent objected on the grounds of social

55 Civil Ruling Jing 04 Ren Gang [2020] No.5, Fourth Beijing Intermediate People's Court, which is the third typical case of mutual enforcement of arbitration awards by the Mainland and the Hong Kong SAR.

public interests. The Court held that social public interests should be the interests of all members of the society and enjoyed by the public, which is different from the interests of the parties to a contract. Although part of the assets of Guoan FootballClub were State-owned assets, it is improper to regard all its relevant matters as social public interests. Thus, the Court rejected the objection andruled to recognize and enforce the HKIAC Arbitral Award.

Annual Summary

At present, the domestic and international situation is undergoing profound and complex changes. Looking around the world, we are facing unprecedented changes in a century. It is necessary to grasp the opportunities and challenges brought about by the development and changes of the world today. As General Secretary Xi Jinping pointed out, "We should adhere to the basic state policy of opening up to the outside world, coordinate the overall situations at home and abroad, make good use of both international and domestic markets and resources, develop an open economy at a higher level, actively participate in global economic governance, and resolutely safeguard China's development interests." The emphasis on building a new development pattern in which the domestic cycle plays a dominant role and the domestic and international cycles promote each other is not to engage in closed-door operations, but to firmly implement the strategy of expanding domestic demand and make greater efforts to open wider to the outside world and build new advantages in international cooperation and competition.

In recent years, China has been participating in global economic governance with an unprecedented open approach. As an important means to optimize the business environment and enhance the soft power of the rule of law, China's international commercial arbitration has played an active role in continuously enhancing marketization, rule of law and international business environment governance, promoting investment facilitation and liberalization, driving the implementation of the "Belt and Road Initiative", and building a diversified resolution mechanism for international commercial disputes. It has become an active participant and contributor in advancing the overall rule of law, promoting economic and social development, and serving the country's opening to the outside world. Over the past 65 years, China's

international arbitration institutions, featured by the China International Economic and Trade Arbitration Commission (CIETAC), have been engaged in and contributed to the integrated development of Chinese arbitration and international arbitration. Especially since the outbreak of the COVID-19 pandemic, China's international arbitration institutions have adhered to the guidance of *Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*, fully implemented the major decisions and arrangements of the Central Committee of the Communist Party of China, followed new development concepts, served the overall situation, adhered to the principle of independence and impartiality, coordinated promotion of epidemic prevention and control as well as the development of arbitration business, provided quality and efficient arbitration legal services for Chinese and foreign parties concerned, constantly enhanced the competitiveness of Chinese arbitration, and improved the credibility of arbitration in China.

Looking back at 2020, the theoretical research and practice of the international commercial arbitration in China mainly focus on the following hot issues and have made positive progress.

First, the international influence of China's arbitration, especially CIETAC, has been further expanded, and its international status and voice have been significantly enhanced. All major international arbitration institutions achieved significant growth in terms of the total amount of subject matters involved in cases accepted in 2020, among which the amount of subject matter involved in arbitration cases administered by CIETAC exceeded the RMB 100 billion benchmark again and the number of cases with the amount of subject matter exceeding RMB 100 million was particularly prominent. The inflow of cases with a large amount of subject matter will undoubtedly boost the steady development of China's international commercial arbitration business. The parties to the

cases are from a wider range of countries and regions, which also reflects that the service quality and competence of China's international commercial arbitration institutions have been continuously recognized by the parties. CIETAC has a team of 483 foreign arbitrators from 85 countries and regions, three overseas branches, and more than 80 overseas partners. CIETAC initiated the "The Beijing Joint Declaration Mechanism of the 'Belt and Road' Arbitration Institution" with the participation of nearly 30 overseas arbitration institutions, "China Arbitration Week", "China Arbitration Summit Forum" and other extensive international exchanges and cooperation. By relying on these resources, channels, and platforms, CIETAC has constantly strengthening the international influence of China's arbitration, built a good image of China's rule of law, and fully demonstrated China's achievements in the development of rule of law and innovative achievements in resolving international commercial disputes. At the same time, it demonstrates the leading role of CIETAC as a featured international arbitration agency in China in promoting the global economic and trade development and driving the anti-pandemic cooperation in the international arbitration sector, and receives high recognition and positive comments from people from all walks of life both at home and abroad.

Second, by actively responding to and exploring the development and practice of international commercial arbitration in times of the COVID-19 pandemic, China's arbitration institutions have greatly improved their ability to handle international commercial arbitration cases. The COVID-19 pandemic has brought a serious negative impact on the economic development of various countries and even the world. The economic activities of many countries have fallen into a state of "setback". This serious impact has been manifested in many industries, specifically in international trade, construction, aviation, and finance. Breach of contract and disputes resulting therefrom

have imposed a substantial burden on domestic and international commercial arbitration institutions in terms of arbitration procedure and the form of hearing. China has gradually emerged from the shadow of the COVID-19 pandemic. During the pandemic, CIETAC and other arbitration institutions have promptly introduced a series of measures to ensure the smooth progress of arbitration activities in times of the pandemic, and fully employed Internet information technologies for remote hearing. Nevertheless, measures such as remote hearing have also brought doubts to arbitration procedure. For example, the issues as to whether the consent of the parties is the prerequisite for conducting arbitration procedure and how to balance the relationship between the powers of the arbitral tribunal and the rights of the parties have become the focus of discussion. The impact of the COVID-19 pandemic on international commercial arbitration shall be analyzed on a case-by-case basis, taking into account the circumstances of each specific case. It is necessary to analyze the substantive legal issues of commercial disputes arising from the COVID-19 pandemic, and on the other hand, analyze how to ensure that changes brought about by the COVID-19 pandemic to the arbitration procedure and arrangement are justified and reasonable. The experience accumulated by the international arbitration industry in handling the disputes caused by the COVID-19 pandemic and various countermeasures taken in response to the impact of the pandemic on arbitration procedure based on practical experience of each individual case will surely become an important page in the history of the constant development and progress of international commercial arbitration.

Third, as a convenient and effective way to resolve disputes, financial arbitration has a very important position in resolving legal disputes between financial institutions and financial consumers. The trend of the increasing number of financial arbitration cases and the increasing amount of the subject matter involved year by year proves that the

advantages of arbitration procedure in the resolution of financial disputes have been increasingly recognized by market players. Since its establishment, CIETAC has been working in the financial sector, focusing on serving the development of the financial sector and meeting the needs of innovation therein, and accumulated rich experience in more than 60 years of practice. As early as 2003, CIETAC promulgated its *Financial Arbitration Rules*, making it the first arbitration institution in China to issue specialized rules for the field of the financial sector. The CIETAC Annual Report (2020-2021) specifically observes the characteristics of current arbitration cases involving domestic and cross-border financial disputes and the development of arbitration concepts in financial cases. In the financial arbitration cases administered by CIETAC, the top three types of the institutional parties involved in the most disputes are fund managers, fund custodians, and securities firms, respectively; and the top three contract disputes are fund contract disputes, bond contract disputes, and loan contract disputes, respectively. Financial arbitration cases basically cover all licensed financial institutions and *quasi*-financial institutions, involving a wide range of industries including banking, trust, securities, fund, insurance, asset management, etc. However, the types of institutions with frequent disputes are also relatively concentrated. For example, financial arbitration cases often arise from fund disputes. Financial arbitration cases are characterized by small amount and dispersion, but the cumulative amount involved in disputes of the same nature or involving the same subject entity may be huge. Based on the above characteristics of financial disputes, compared with the dispute resolution in traditional litigation, financial arbitration is equal, fast, confidential, and authoritative, which is conducive to reducing the costs and risks of legal remedies for financial consumers. At the same time, financial arbitration will also play a more active role in preventing and mitigating financial risks and maintaining financial stability and security, and provide the financial industry with arbitration services of higher quality and in line with

international standards.

Fourth, focus on the practice trends and developments of arbitrator's conflicts of interest and recusal in international commercial arbitration before and after 2020, strive to capture the latest picture in this field, and analyze the problems identified. In the past three years, CIETAC accepted 71 applications for arbitrator recusal and issued zero written decision on recusal; all courts in China accepted 989 cases involving arbitrators' conflicts of interest, of which 6 cases were set aside or refused to be enforced by the courts. The above data can basically reflect the true situation of arbitrators' conflicts of interest in judicial practice, that is, there is a relatively low proportion of cases in practice where arbitrators are withdrawn due to conflicts of interest or the validity of the awards are revoked. This indicates that China has initially established a high-quality arbitration team and arbitration is steadily gaining popularity as a dispute resolution method among the public. On the other hand, it also demonstrates the support and trust of Chinese courts in arbitration. The CIETAC Annual Report (2020-2021) is devoted to analyzing the typical cases of arbitrator's conflicts of interest, which can be broadly classified into four types: violation of arbitration laws and regulations, violation of arbitration rules, violation of the code of conduct for arbitrators, and other types of cases. Such analysis is of a great reference for clarifying the boundaries of arbitrators' conflicts of interest. Although the relevant laws and regulations have not changed since the *Arbitration Law* came into effect in 1995, the arbitrator's conflicts of interest and recusal system in China has undergone tremendous changes and is gradually aligning with the international mainstream practice, with the joint efforts of CIETAC and other arbitration institutions. At the same time, in order to enhance the reputation of arbitration in China, it is necessary to continuously optimize and integrate the arbitrator-related systems. It is viable to learn from the concepts of the 2014 *IBA Guidelines on Conflicts of Interest*,

establish a mechanism for rating arbitrators' conflicts of interest in China, clarify the consequences of a party's waiver, and strengthen training for arbitrators.

Fifth, it has become a basic consensus that the people's courts uphold the concept of "judicial support for arbitration", conduct limited judicial review of arbitration, and support the advancement of arbitration procedure and the enforcement of arbitral awards. The CIETAC Annual Report (2020-2021) sorts out and summarizes the typical court cases of judicial review of arbitration award and the enforcement of extraterritorial arbitration awards. Based on the court cases involving applications for recognition and enforcement of foreign arbitral awards under the *New York Convention*, the people's courts uphold the spirit of the Convention which is conducive to the enforcement of awards, respect the arbitration agreements and arbitration rules agreed upon by the parties, strictly comprehend public policy clauses, lay out detailed reasoning and analysis of the *New York Convention* in civil rulings, and properly refer to the *UNCITRAL Guide on the New York Convention* based on their understanding of the clauses thereof, and demonstrate a higher juridical adjudication level in hearing foreign-related cases. With regard to the application of the Convention, the following new trends deserve attention. *First*, the provisions of Article IV of the *New York Convention* should be leniently interpreted. *Second*, with regard to the agency authority of the signatory to an arbitration agreement, the law of the place where the agency relationship occurs, i.e., the law of the place where the agreement is signed, should be used to determine whether the agency relationship is established; this will make it more predictable in the determination of the agency relationship and the protection of the interests of a counterparty in a transaction. *Third*, the issue of appropriate notice of arbitration. Whether the respondent has received the arbitration documents is not a basis to determine whether the arbitration service procedure is compliant with the law. Fourth, with regard to the pre-arbitration

negotiation procedure, it remains to be seen as to how the people's courts will deal with breach of arbitration agreement, whether to examine it as a matter of jurisdiction or to make an exception to the examination. *Fifth*, regarding the violation of public policies, arbitral award's determination of whether there is a violation of the confidentiality obligation affects merely the economic interests of the claimant and the respondent and does not violate the basic legal system of China. Due to the geographical nature of intellectual property rights and different levels of protection among various countries, it is likely to see increasing disputes over interpretation of public policy provisions in the field of intellectual property rights in the future, which merits attention. In terms of the applications for the recognition and enforcement of Hong Kong, Macao or Taiwan arbitration awards, these cases mainly concern legal issues pertaining to the interim measures in aid of Hong Kong arbitration procedure, jurisdictional objections, the refusal of enforcement of a Mainland award in Hong Kong which does not affects the validity of the award in the mainland, the procedural issues for appointing arbitrators, the disclosure obligations of arbitrator in arbitration procedure, the winding-up of the parties concerned which does not affect the subject status of the parties in the judicial review proceeding, the governing law for Hong Kong related arbitration agreements, the notice of arbitration, the definition of public interest, etc.

2021 is a year of special significance in China's modernization drive and the first year of the 14th Five-Year Plan. Standing at a new and higher starting point in history, we should firmly uphold the international system with the United Nations as the core, uphold the international order based on international law, uphold the fundamental principles of international law and the basic principles of international relations based on the purposes and principles of the Charter of the United Nations, and accelerate the construction of a more stable and win-win international economic and trade order

and governance system. China is determined to promote a higher level of opening-up to the outside world, build pilot free trade zones and the Hainan Free Trade Port, jointly build the "Belt and Road Initiative", strengthen regional economic and trade cooperation, participate in the reform of the global governance system, and respond to the COVID-19 pandemic, all of which bring new challenges to the international commercial arbitration work in China. In this context, China's international commercial arbitration work must rise to the challenge, promote the continuous achievement of new development for international commercial arbitration, continuously improve the capacity and level of international commercial arbitration, and strive to make the parties concerned feel impartiality and justice in each international commercial arbitration case.