

Annual Report on International Commercial

Arbitration in China

2017

中国国际经济贸易仲裁委员会

China International Economic and Trade Arbitration Commission

地址：北京市西城区桦皮厂胡同2号国际商会大厦6层

邮编：100035

电话：(86 10) 82217788

传真：(86 10) 82217766 / 64643500

网址：<http://www.cietac.org>



中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND
TRADE ARBITRATION COMMISSION

Table of Contents

Preface	5
---------------	---

Chapter 1 Overview of China's International Commercial Arbitration Development

in 2017	9
---------------	---

I. Data Analysis of International Commercial Arbitration Cases in China	9
---	---

i. Overview of Cases Accepted by Arbitration Commissions Nationwide	9
---	---

ii. Comparison of International Commercial Arbitration Practice in China	17
--	----

II. Legislative Practice of International Commercial Arbitration in China	29
---	----

i. About Legislative Amendments to Qualifications of Arbitrators.....	29
---	----

ii. About Judicial Supervision of Arbitration	30
---	----

iii. About the Arbitration Rules.....	43
---------------------------------------	----

III. Theoretical Research on International Commercial Arbitration in China.....	45
---	----

i. About the "Belt and Road" Dispute Resolution Mechanism	45
---	----

ii. About <i>Ad Hoc</i> Arbitration	46
---	----

iii. Police Powers Doctrine in the Context of International Investment	
--	--

Arbitration	47
-------------------	----

Chapter 2 Observation on PPP-Related Arbitration Practice in China..... 49

I. Observation on the Track of PPP Development	49
--	----

i. Basic Concept of PPP	49
-------------------------------	----

ii. Development History of PPP Mode in China.....	53
iii. Fields of Application of PPP Mode	58
II. Observation on Fundamental Legal Issues of PPP Projects	61
i. The Current PPP-Related Legal Framework.....	61
ii. Legal Entities Involved in PPP Projects	65
iii. Legal Relationships Involved in PPP	68
III. Observation on Hot Legal Issues of PPP Projects	70
i. Legal Disputes on PPP Projects	70
ii. Arbitrability of PPP-Related Disputes	74
iii. Advantages of Resolving PPP-Related Disputes through Arbitration	78
iv. Service Features and Strengths of the CIETAC PPP Arbitration Center	80
IV. Observation on Typical Arbitration Cases Relating to PPP Projects	81
i. Characteristics of CIETAC Arbitration Cases Involving PPP Projects	81
ii. Analysis of Typical PPP-Related CIETAC Cases Concluded from 2005 to 2016	82
V. Conclusion	101

Chapter 3 International Investment Arbitration Practice and Survey 103

I. Overview of International Investment and Resolution of International Investment Disputes	103
i. Overview of International Direct Investment.....	103
ii. Overview of Resolution of International Investment Disputes	108
II. Legal Framework of Protection of International Investments	119
i. Overview.....	119
ii. Multilateral Investment Conventions	122

iii. Free Trade Agreements	125
iv. Bilateral Investment Treaties	128
III. Practice and Exploration of International Investment Disputes.....	130
i. Amicus Curiae.....	130
ii. Annulment and Court Review of Awards.....	131
iii. Identification of Loss	134
iv. Third-Party Funding	134
v. State-to-State Dispute Settlement (SSDS)	137
IV. New Development of International Investment Arbitration in China	139
i. Overview	139
ii. CIETAC International Investment Arbitration Rules	139
V. Conclusion	149

Chapter 4 Judicial Review of International Commercial Arbitration in China 169

I. Confirmation of Validity of Foreign-Related and HMT-Related Arbitration Agreements	169
i. Interpretation of Arbitration Institutions Agreed in Arbitration Clauses	169
ii. Decision on Validity by Arbitration or Court	171
iii. Matters about the Scope of Judicial Review of Arbitration.....	172
iv. Whether to be Bound by the Arbitration Clauses	173
v. The Issue of Agency	175
vi. Validity of Arbitration Clauses in the Bill of Lading	177
vii. Conclusion	179
II. Annulment and Non-Enforcement of Foreign-Related and HMT-Related Arbitral Awards.....	180

i. Scope of Judicial Review of Arbitration.....	180
ii. Problems about Arbitration Proceedings	182
iii. Whether the Parties Can Apply for Setting Aside the Arbitral Awards on the Ground of "Wrong Application of Laws"	184
iv. Conclusion	186
III. Recognition and Enforcement of Foreign-Related and HMT-Related Arbitral Awards	187
i. About the Jurisdiction	187
ii. About the Validity of Arbitration Clauses	188
iii. About the Scope of Courts' Review	191
iv. About the Notice on Arbitration	193
v. About the Composition of the Arbitral Tribunal	194
vi. Which One Shall Prevail in Case of Inconsistency between Arbitration Clauses and Arbitration Rules	196
vii. About the Awards beyond the Scope of Arbitration Agreement	198
viii. About the Identification of Recognition or Enforcement of Arbitral Awards Contrary to the Public Policies	201
ix. Application of the Expedited Procedure Rules	205
x. Interpretation of "Disputes Incapable of Being Resolved through Arbitration"	207
xi. Conclusion	208

Preface

The Fourth Plenary Session of the 18th Central Committee of the Communist Party of China (CPC) put forth the guiding principles of "Perfecting the arbitration system and enhancing the credibility of arbitration" and the Report at the 19th National Congress of the CPC further specified that the law-based governance was an essential requirement and important guarantee for socialism with Chinese characteristics, which points out the direction and raises requirements for the development of China's arbitration cause. As the most representative permanent international arbitration institution in China, China International Economic and Trade Arbitration Commission (CIETAC) has long been committed to pushing the development of international commercial arbitration, thus accumulating distinctive advantages and abundant experience in this regard. In recent years, CIETAC has been ranking among the top international arbitration institutions in terms of caseload, the total dispute amount, the universality of nationality of parties involved, and so forth. With a group of internationalized arbitrators proficient in the international trade and investment laws and specialized in cross-border economic and trade disputes, CIETAC has strong capacity and abundant resources to resolve disputes arising from international economic and trade activities in a professional and efficient way.

CIETAC released the *Annual Report on International Commercial Arbitration in China (2014)* in Beijing on 22 September 2015, which was the first annual summary ever released in China on the development of China's international commercial arbitration (normally called "foreign-related arbitration in China"). Moreover, the release of the *Annual Report on International Commercial Arbitration in China* in

both Chinese and English for the years of 2014, 2015 and 2016 attracted extensive attention of domestic and foreign arbitration scholars and practitioners. Therefore, CIETAC decides to move on to the preparation and publication of the *Annual Report on International Commercial Arbitration in China (2017)* (2017 Annual Report) to further sum up the construction of the legal system of international commercial arbitration in China, promote the improvement of China's international commercial arbitration system, the development of arbitration cause and the exchange of information, enhance the voice and influence of China in international commercial arbitration arena and provide references for further development of international commercial arbitration cause in China.

Combining empirical analysis with theoretical research, the *2017 Annual Report* reflects the highlights in the development of international commercial arbitration in China. Specifically, based on the analysis of international commercial arbitration cases in 2017, the *2017 Annual Report* follows up the development of the legal system of international commercial arbitration in China, discusses judicial review in this field, analyzes the resolution of international investment disputes and current situation and prospect of investment arbitration in China, makes special observation on China's arbitration practice of PPP-related projects and takes them as the development of international commercial arbitration in China of the year.

Apart from the *Preface* and *Summary of the Year*, the *2017 Annual Report* comprises four chapters. Chapter 1 *Overview of International Commercial Arbitration Development in China* summarizes the development of international commercial arbitration nationwide, and the theoretical research on China's international commercial arbitration in 2017. Chapter 2 *Observation on Arbitration Practice of*

PPP-related Projects in China, on the basis of analyzing the development track, scope of application, legal framework and legal relationship, makes a special observation of the dispute type of PPP projects and arbitrative issues thereof, in particular advantages and distinctive services of CIETAC in solving PPP-related disputes through arbitration. Chapter 3 *International Investment Arbitration Practice and Observation in China* sets forth the legal framework for resolution of international investment disputes for the first time, actively explores the way to resolve international investment disputes, and takes the *CIETAC Investment Arbitration Rules* as an example to introduce the new development of international investment arbitration practice in China. Chapter 4 *Judicial Review of International Commercial Arbitration in China* focuses on discussing judicial review over the confirmation of the validity of arbitration agreements involving foreign countries, Hong Kong, Macao and Taiwan, the revocation and non-enforcement of foreign-related and Hong Kong-related, Macao-related and Taiwan-related (HMT-related) arbitral awards, as well as recognition and enforcement of arbitral awards made in foreign countries, Hong Kong, Macao and Taiwan.

The *2017 Annual Report* was prepared by the Research Team of Renmin University of China, led by Professor Du Huanfang, Vice President and Deputy Party Secretary of the Law School of Renmin University of China, and Ms. Li Bing, Director of the Arbitration Research Institute of CIETAC. Main members of the Research Team include Song Lianbin, Professor and Tutor to PhD students of the International Law School of China University of Political Science and Law, Ms. Liao Yuyi, postdoctoral researcher of The Research Office of Application of Law of the Supreme People's Court (SPC), Mr. Dong Xiao, Partner of Anjie Law Firm, Ms. Yue Jie, lawyer of

Beijing Zhengxin Law Firm, and Mr. Tang Gongyuan, the former Senior Legal Advisor of IBM Corporation and lawyer of JunZeJun Law Offices. Their respective duties are as follows: *Preface* and *Summary of the Year* were prepared by Professor Du Huanfang. Chapter 1 was jointly prepared by Mr. Song Lianbin, Ms. Liao Yuyi and Mr. Dong Xiao, Chapter 2 was compiled by Mr. Dong Xiao and Ms. Yue Jie, Chapter 3 was prepared by Ms. Liao Yuyi, and Chapter 4 was prepared by Ms. Liao Yuyi. After the initial draft was completed at the beginning of this year, Ms. Shen Hongyu, Chief Judge of the Civil Adjudication Tribunal of the SPC and Judge of the International Commercial Court, reviewed and finalized Chapter 4, Professor Du Huanfang and Ms. Li Bing finally compiled and edited this Report, and Mr. Wang Chengjie, Deputy Director and Secretary-General of CIETAC, Mr. Li Hu, Party Secretary and Vice Secretary-General of CIETAC, and Mr. Zhao Jian, Vice President of the Arbitration Court of CIETAC reviewed the draft.

We hereby acknowledge substantial support and generous assistance from the Civil Adjudication Tribunal No. 4 of the SPC, Renmin University of China, China University of Political Science and Law, Anjie Law Firm, JunZeJun Law Offices, etc. in providing information, draft compilation and interim review. We also extend our gratitude to the Arbitration Research Institute of CIETAC for great efforts in information collection, proofreading, typesetting and printing of this Report.

Research Team of the *Annual Report on International Commercial Arbitration in China (2017)*

30 July 2018

Chapter 1 Overview of China's International Commercial Arbitration Development in 2017

Chinese arbitration institutions underwent a continuous sharp increase in terms of caseload in 2017. The legislature made amendments regarding the qualification of arbitrators to the *Arbitration Law of the People's Republic of China* (the *Arbitration Law*) that came into force in 1995. The Supreme People's Court (SPC) vigorously supported arbitration as usual and released multiple important judicial interpretations. Investment arbitration, arbitration of third-party funding, interim measures and the "Belt and Road" dispute resolution mechanism are major concerns of researchers in international commercial arbitration this year.

I. Data Analysis of International Commercial Arbitration Cases in China¹

i. Overview of Cases Accepted by Arbitration Commissions Nationwide

1. Caseload and Dispute Amount

In 2017, 253 arbitration commissions across China accepted a total of 239,360 cases, an increase of 30,815 cases with the growth rate of 15% compared with 2016. The dispute amount of these cases totaled RMB533.8 billion, growing by RMB64.3 billion with the growth rate of 14% compared with 2016. Moreover, 6 arbitration

¹ Source of figures: *Details of Caseload of Arbitration Commissions in China throughout 2017* provided by the Department for Government Legislation of the Ministry of Justice

commissions handled a total of 85,399 cases by online arbitration, accounting for 36% of the total cases nationwide.

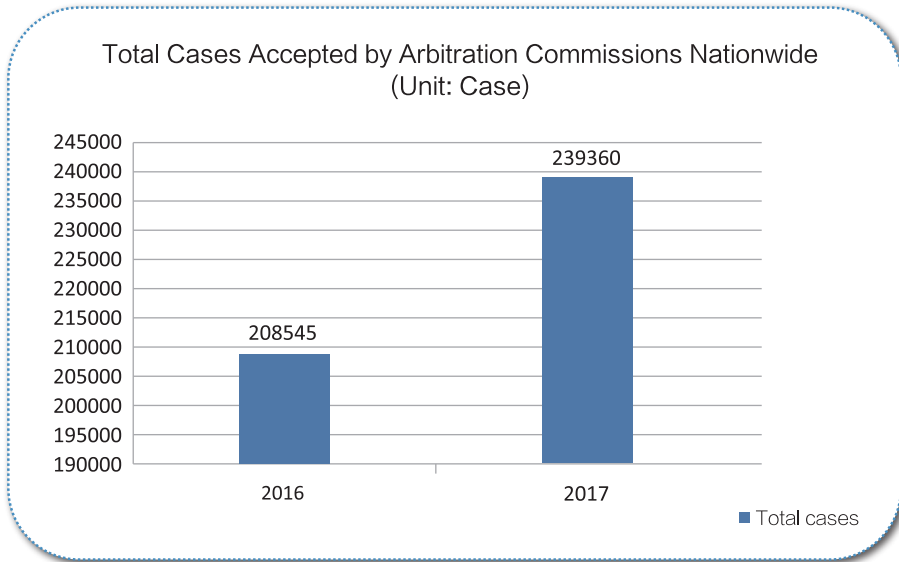


Figure 1-1

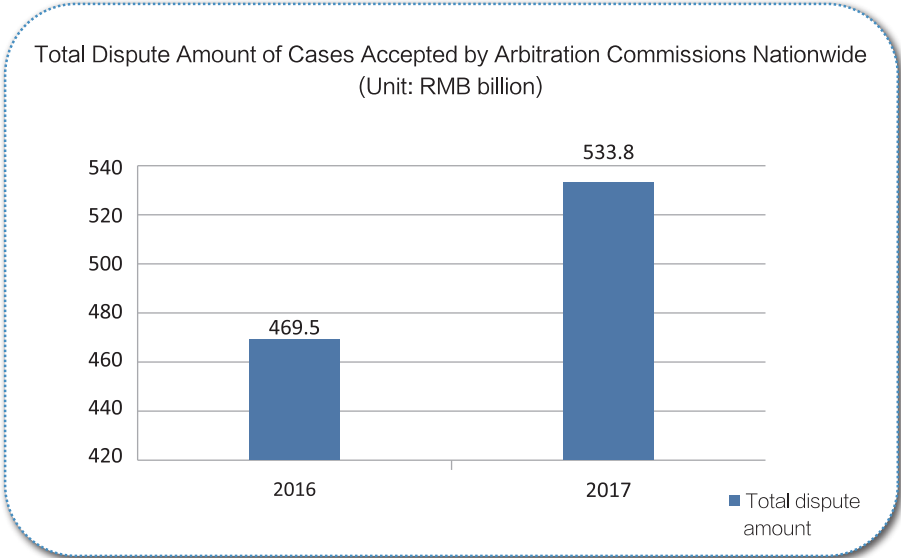


Figure 1-2

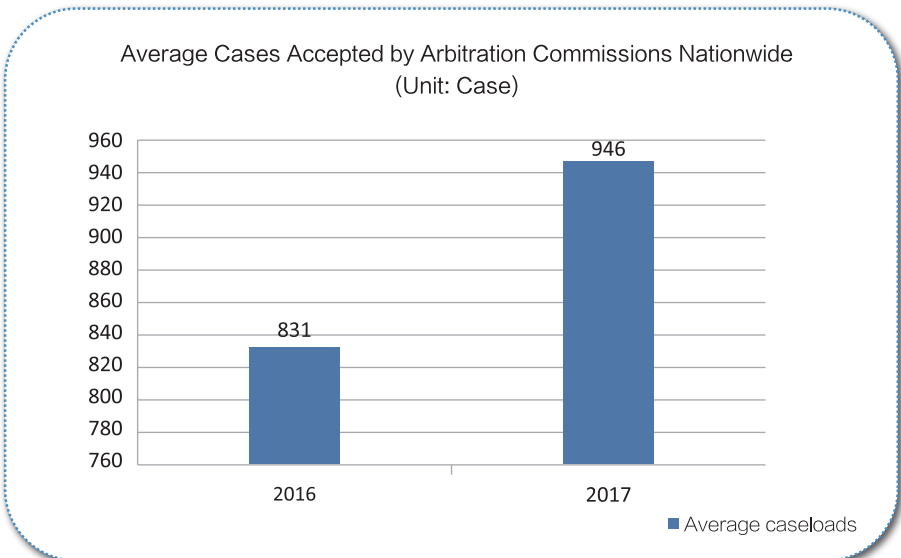


Figure 1-3

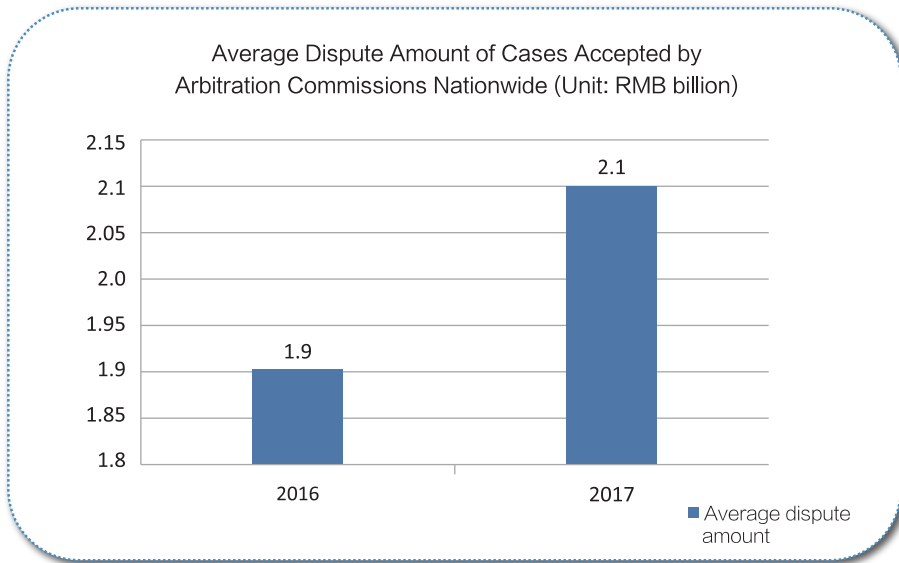


Figure 1-4

In 2017, the 3 arbitration institutions under the China Chamber of International Commerce (CCOIC) accepted a total of 2,370 cases, occupying 1% of the total cases. The dispute amount of these cases added up to RMB72.9 billion, accounting for 14% of the total amount. China International Economic and Trade Arbitration Commission (CIETAC) alone has accepted 2,298 cases, involving a total dispute amount of RMB71.888 billion.

The 5 arbitration institutions established by the municipalities directly under the central government accepted a total of 12,221 cases, accounting for 5% of the total cases; the dispute amount of these cases added up to RMB92.4 billion, occupying 17% of the total amount.

The 27 arbitration institutions established by the cities where the people's governments of provinces and autonomous regions are located accepted a total of 127,970 cases, accounting for 54% of the total cases; the dispute amount of these cases added up to RMB149 billion, accounting for 28% of the total amount.

A total of 219 arbitration institutions established by other cities accepted 95,588 cases altogether, accounting for 40% of the total cases. The dispute amount of these cases reached RMB220.6 billion, occupying 41% of the total amount.

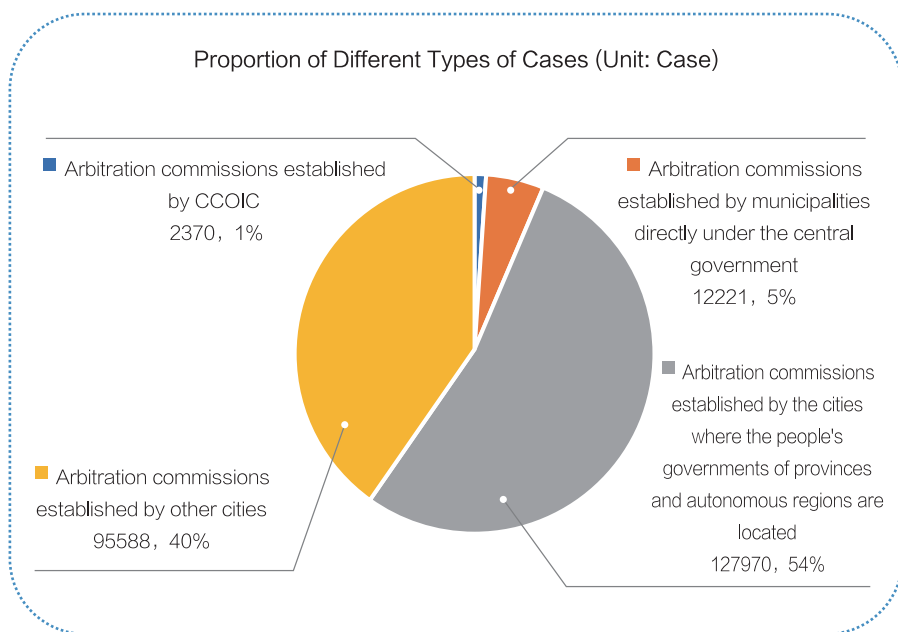


Figure 1-5

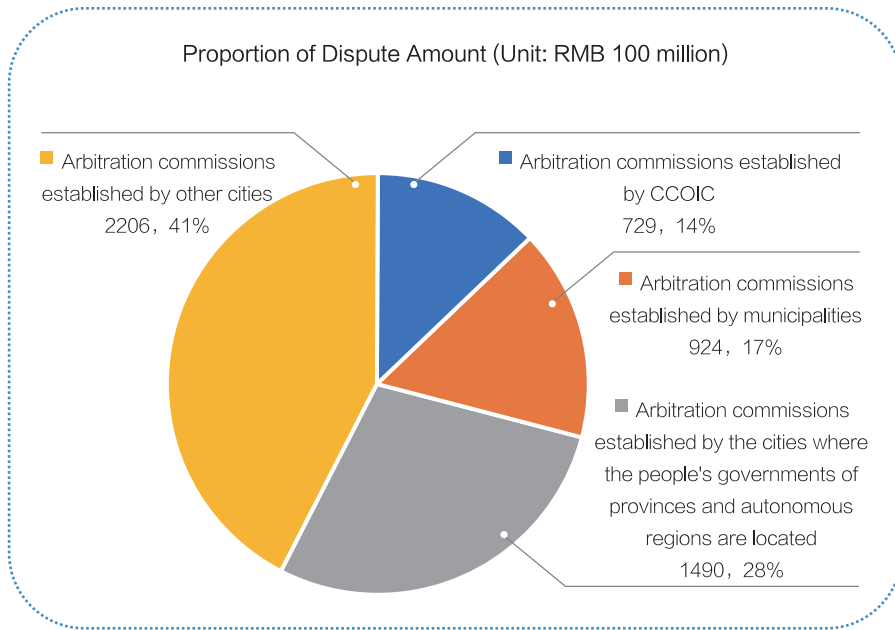


Figure 1-6

2. Types of Major Cases

In 2017, the types of cases accepted by arbitration institutions in China were sequenced as follows by quantity: 35,427 real-estate cases accounting for 14.8% of the total cases; 25,677 financial cases accounting for 10.73%; 23,696 traffic accident and compensation cases occupying 9.9%; 16,350 purchase and sales cases accounting for 6.83%; 9,412 construction project cases occupying 3.93%; 8,414 property cases accounting for 3.52%; 7,384 leasing cases accounting for 3.08%; 4,331 insurance cases occupying 1.81%; 1,825 equity transfer cases accounting for 0.76%; 809

land transaction cases occupying 0.34%; 316 medical dispute cases accounting for 0.13%; 302 agricultural production and operation cases occupying 0.13%, and 261 e-commerce cases accounting for 0.11%.

The dispute amounts of the said types of cases were ranked as follows: financial cases involved RMB155.8 billion, taking up to 29.18% of the total amount; construction project cases amounted to RMB76.2 billion, accounting for 14.27%; equity transfer cases involved RMB56.2 billion, occupying 10.5%; purchase and sale cases amounted to RMB46.2 billion, accounting for 8.64%; real-estate cases involved RMB40.8 billion, taking up to 7.64%; land transaction cases amounted to RMB36.2 billion, accounting for 6.79%; leasing cases involved RMB13.9 billion, occupying 2.6%; e-commerce cases amounted to RMB4.2 billion, accounting for 0.79%; insurance cases involved RMB3.2 billion, occupying 0.61%; traffic accident and compensation cases involved RMB1.3 billion, taking up to 0.25%; property cases amounted to RMB1.1 billion, accounting for 0.2%; agricultural production and operation cases amounted to RMB200 million, occupying 0.04%; and medical dispute and compensation cases involved RMB100 million, accounting for 0.02%.

3. Handling of Cases on Average

The 253 arbitration commissions across China accepted 946 cases on average in 2017, up by 115 cases with the growth rate of 14% compared with 2016. The dispute amount of these cases was RMB2.1 billion on average, increasing by RMB200 million with the growth rate of 11% compared with 2016.

4. Conciliation and Judicial Supervision

In 2017, 69,450 cases were concluded by conciliation, taking up to 29% of the total caseload, dropping by 52,077 cases and 29% compared with 121,527 cases resolved through conciliation (with the conciliation rate of 58%) in 2016.

In 2017, Chinese people's courts ruled to set aside arbitral awards rendered by Chinese arbitration institutions in 186 cases, accounting for 0.07% of the total cases and falling by 0.04% compared with 0.11% (232 cases) in 2016, and refused to enforce arbitral awards in 100 cases, accounting for 0.04% of the total cases, a decrease of 0.01% compared with 0.03% (63 cases) in 2016.

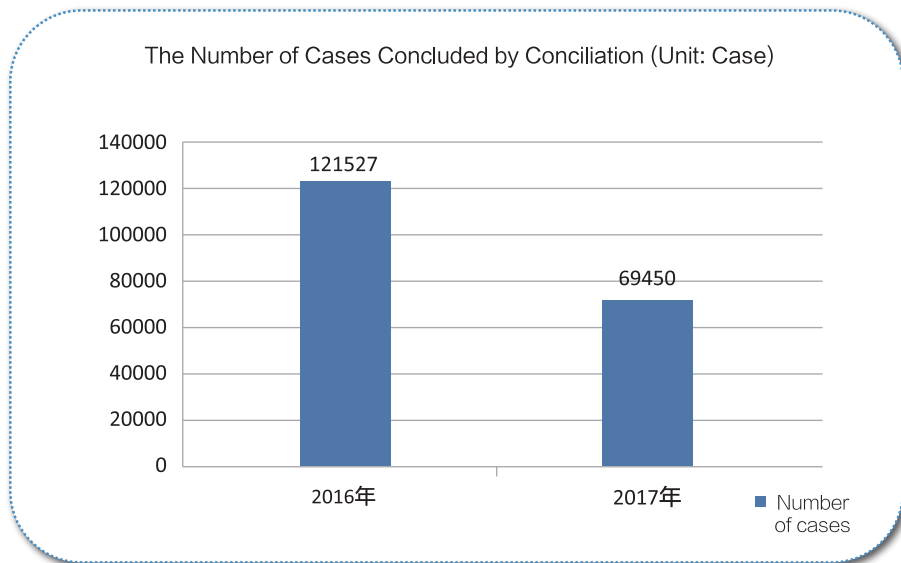


Figure 1-7

5. Acceptance of Foreign-Related and HMT-Related cases

A total of 60 Chinese arbitration institutions accepted 3,188 cases involving foreign countries (foreign-related), Hong Kong, Macao and Taiwan (HMT-related) in 2017, accounting for 1.3% of the total cases and remaining basically the same as that of 2016. Among these cases, 1,405 ones involved Hong Kong and Macao, 307 ones were related to Macao, 308 ones were related to Taiwan, and the remaining 1,168 cases were foreign-related.

ii. Comparison of International Commercial Arbitration Practice in China

Considering that China's international commercial arbitration is institutional arbitration in the sense of both legislation and practice, this Chapter focuses on analyzing the features, the latest trend and development direction of China's international commercial arbitration practice mainly through longitudinal comparison based on the 2017 annual reports and case statistics published by the major international arbitration institutions on their websites or through other official channels.

1. Caseloads

CIETAC accepted a total of 2,298 cases in 2017, up by 5.36% compared with 2016, including 476 foreign-related and HMT-related cases which accounted for 20.7% of its total caseload. Among these cases, there were 288 involving one overseas party, 42 with both parties coming from abroad, and 146 in which both parties were from mainland China, but the places where the contracts were signed or performed or where the subject matters of contract is located were outside mainland China.

The International Court of Arbitration of International Chamber of Commerce (ICC) accepted a total of 810 cases throughout 2017, a slight decline compared with its historical highest record in 2016.

The London Court of International Arbitration (LCIA) accepted 285 cases in 2017, a slight decrease compared with 2016. Among them, 233 cases were administered by the LCIA in accordance with its *LCIA Arbitration Rules*, and for the remaining 50 cases, the LCIA either acted as the appointing authority or provided other administrative services for cases where the *UNCITRAL Arbitration Rules* (the *UNCITRAL Rules*) applied, or functioned as the fund trustee in such cases and other *ad hoc* arbitration cases.

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) accepted 200 cases in 2017, ranking third in its record since its establishment in 1917. Among them, 96 were Swedish domestic cases and 104 were international arbitration cases. The *SCC Arbitration Rules* were applied in 108 cases, and the *SCC Rules for Expedited Arbitration* were applied in 72 cases, while emergency arbitrators were appointed for 3 cases.

The Singapore International Arbitration Centre (SIAC) accepted a total of 452 cases in 2017, involving a total amount of USD4.07 billion (SGD5.44 billion), 421 of which were administered by the SIAC, accounting for 93%, while the average dispute amount per case was USD15.82 million (about SGD21.14 million).

The Hong Kong International Arbitration Centre (HKIAC) accepted 532 cases in 2017, an increase of 15.7% compared with 2016. Among them, 297 were the arbitration cases, 15 cases were resolved through conciliation and 220 involved

domain name disputes. Among the arbitration cases, 156 were administered by the HKIAC according to its arbitration rules or the *UNCITRAL Rules*, increasing by 66% compared with the previous year. Caseloads of the aforesaid arbitration institutions in 2017 are illustrated in Figure 1-8.

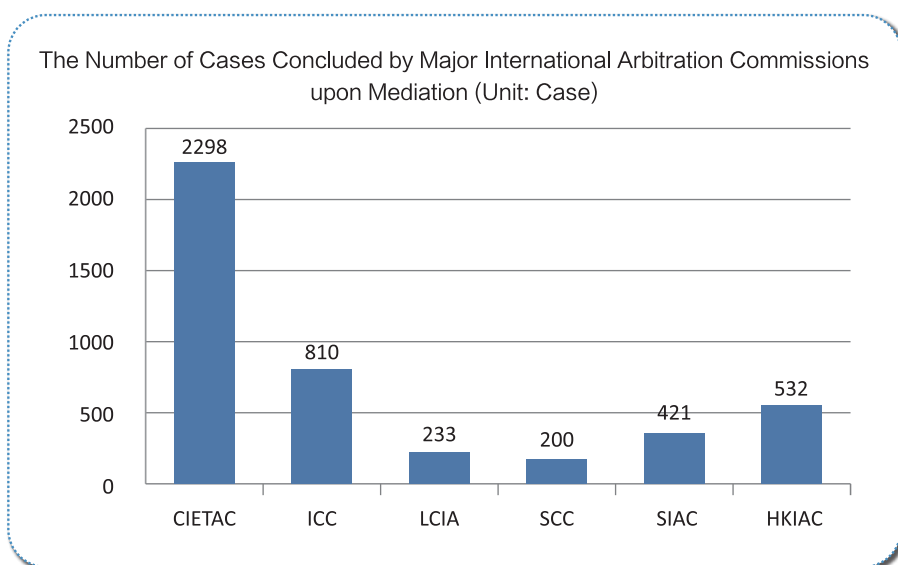


Figure 1-8

2. Parties Involved in Cases

The internationalization of the parties involved in the international commercial arbitration cases may reflect the extent of recognition of an arbitration institution in international arbitration. According to the data published by the major international arbitration institutions, parties involved in 2017 cases were from the following

countries or regions:

Parties in CIETAC cases were from 60 countries and regions, including the USA, Canada, Brazil, Mexico, Germany, the UK, France, Italy, Austria, the Netherlands, South Africa, Russia, Australia, India, Japan, South Korea, Singapore and Hong Kong, etc.

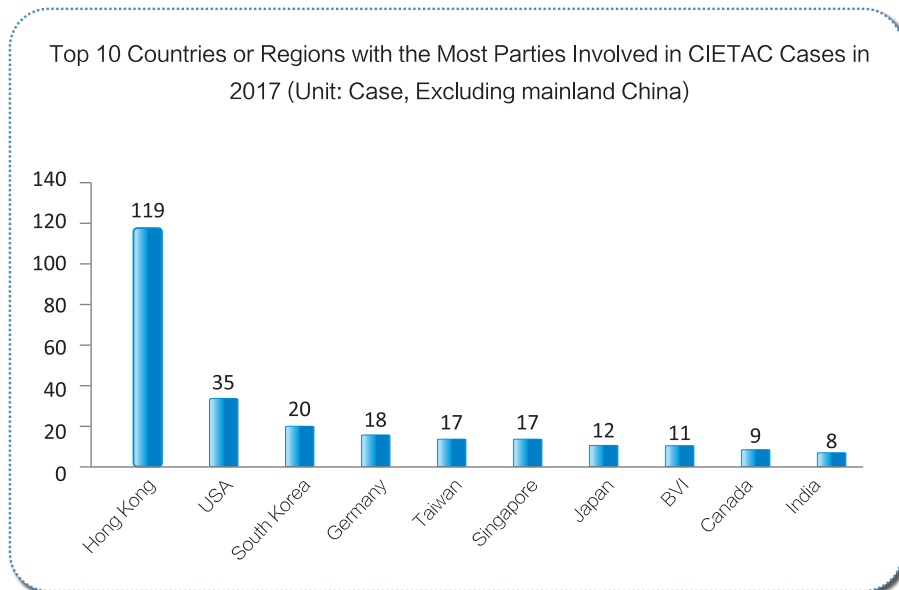


Figure 1-9

In 2017, the top five countries or regions with the most parties involved in the 810 cases accepted by the ICC were the USA, Germany, France, Brazil and Spain. China (including Hong Kong) took the seventh place.

More than 80% of the parties of the cases accepted by the LCIA in 2017 came from

countries other than the UK in 2017, which was basically the same as that in 2016. Most of the parties were from the west Europe, accounting for 19.3%, and parties from the USA kept soaring.

Parties of the cases accepted by the SCC in 2017 were from 40 countries or regions, and there were 137 parties from Sweden, ranking atop. The rest top 6 countries or regions with the most parties involved were Russia, Germany, the UK, Norway and Turkey.

Parties of the cases accepted by the SIAC in 2017 came from 58 jurisdictions, and the majority of parties (176) were from India, closely followed by China and Sweden (77 and 72 parties, respectively). The top 10 countries or regions with the most parties involved were the USA, Germany, Hong Kong, the United Arab Emirates (UAE), Indonesia, Japan, South Korea, Malaysia and the UK.

In 2017, the majority of the arbitration cases accepted by the HKIAC were international ones, 73.1% of the cases involved at least one party from outside Hong Kong, 72.3% of the institutional arbitration cases were international cases, 40.8% of the cases had no connection with Hong Kong, and 5.2% of the cases had no relation to Asia. Parties of the cases accepted by the HKIAC in 2017 were from 39 countries or regions. The top 10 countries or regions with the most parties involved were Hong Kong, mainland China, Singapore, the British Virgin Islands (BVI), the Cayman Islands, the USA, South Korea, Thailand, Macao and the UK.

3. Types of Disputes

Cases accepted by CIETAC in 2017 involved 18 types, remaining basically the

same as those in 2016. Among these cases, 446 involved disputes arising from sale of goods, ranking atop. Cases relating to service contracts were 100 more than that of the previous year, up to 337 cases. Cases in connection with equity investment and share transfer increased slightly up to 219. The numbers of cases involving electro-mechanical equipment, construction, decoration, contracting, real estate development, housing, land and real estate, and entrusted contract remained high, reaching up to 265, 172, 127 and 91, respectively.

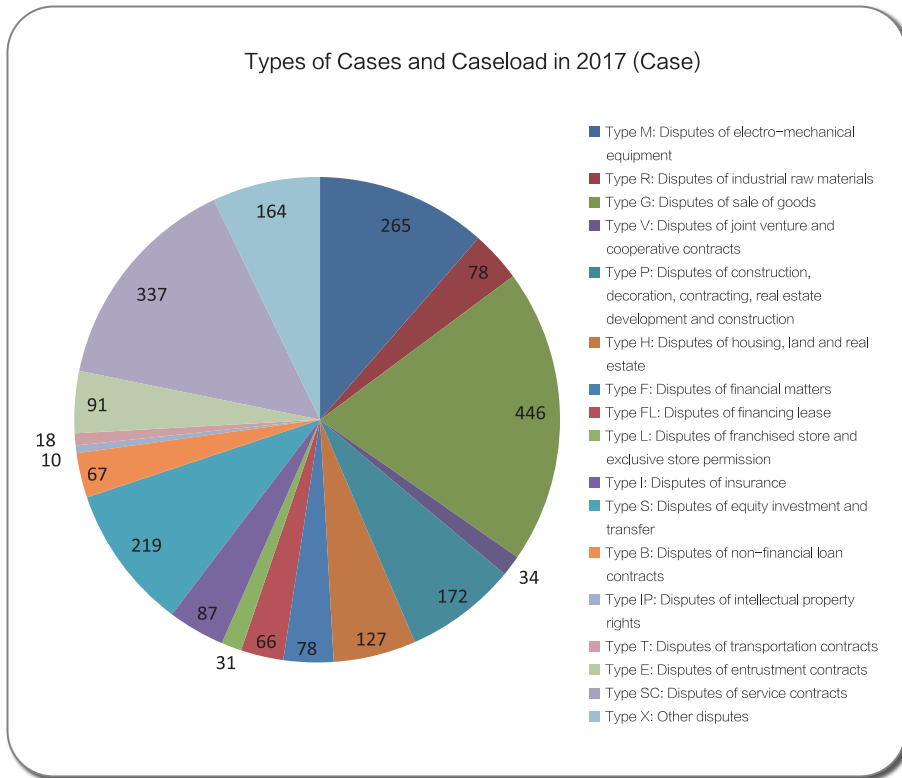


Figure 1-10

In the 810 cases accepted by the ICC in 2017, the top 5 types of disputes involved construction project (186 cases accounting for 23.0%), energy (155 cases accounting for 19.1%), transport (accounting for 6.8%), telecommunication and proprietary technology (accounting for 6.2%) and industrial equipment (accounting for 5.9%).

According to the annual report of the LCIA, cases accepted by the LCIA in 2017 were mainly concerned with the following sectors: banking and financial sector (24%), mineral and energy (24%), consulting and other professional services (11%), transport and commodities (11%), construction project (7%), etc. To be specific, the cases involving disputes arising from the banking and financial sector, mineral and energy remained as the main types of cases of the LCIA. Cases in the following two sectors have undergone the biggest change in the proportion since the beginning of 2017, i.e., professional services arbitration (soaring from 5% to 10%) and construction and infrastructure arbitration (dropping from 15% to 7%).

According to the data published by the SCC, main types of disputes involved in the 200 cases accepted by the SCC in 2017 were as follows: carriage contract disputes (43 cases), service agreement disputes (43 cases), disputes of mergers and acquisitions (29 cases), shareholder agreement disputes (19 cases), construction project disputes (16 cases), and employment agreement disputes (12 cases).

Main types of disputes involved in the cases accepted by the SIAC were trade disputes (accounting for 31% of the total caseload), commercial affairs disputes (including agency, distribution, franchising and licensing, etc., accounting for 22%), transport/maritime disputes (accounting for 20%), company disputes (accounting for 14%) and construction/project disputes (accounting for 9%).

Main types of disputes involved in the cases accepted by the HKIAC in 2017 were: international trade disputes (accounting for 31.9%), construction project disputes (accounting for 19.2%), company disputes (accounting for 13.5%), maritime disputes (accounting for 8.8%), professional services (accounting for 8.1%), banking and financial disputes (accounting for 6.2%), intellectual property disputes (accounting for 4.6%), energy disputes (accounting for 1.9%), insurance disputes (accounting for 1.2%) and other disputes (accounting for 4.6%).

4. Place of Arbitration

Mainland China remained as the place of arbitration for the majority of the cases accepted by CIETAC in 2017. Parties, when drafting arbitral clauses, normally agreed to choose major cities in mainland China, including Shanghai, Shenzhen, Guangzhou, Chongqing, etc., which are usually regarded as the parties' agreement on the place of oral hearing.

Cases accepted by the ICC were arbitrated widely in 104 cities of 63 countries. The top 5 places of arbitration were as follows: France (121 cases), Switzerland (90 cases), the UK (73 ones), the USA (51 ones) and Singapore (38 cases).

In the cases accepted by the LCIA, London was chosen or designated as the place of arbitration in 218 cases, accounting for 94% of the total caseload, while the UAE ranked 2nd with 3 cases and the USA ranked 3rd with 2 cases.

The places of arbitration of the cases accepted by the SCC in 2017 were diverse, Stockholm was chosen in 73% of the cases while Goteborg and Malmo, located at the southern end of Sweden, ranked 2nd.

Hong Kong was the only place of arbitration in the cases accepted by the HKIAC in 2017.

5. Arbitrators

A total of 47 arbitrators from outside mainland China participated in the hearing of 71 foreign-related cases accepted by CIETAC in 2017. There are 1,437 arbitrators in the new CIETAC Panel of Arbitrators effective as from 1 May 2017. Among them, 405 are from 65 countries and regions, accounting for 28.2% of the total arbitrators, an increase of 24 countries than previously, and the number of "Belt and Road" countries also increased from 15 to 28, which provides more choices for the parties when choosing the arbitrators.

Arbitrators from 85 countries were appointed by the ICC for the hearing of cases in 2017. The top 6 countries with the most arbitrators were the same as those in 2016, i.e., the UK (219), France (141), Switzerland (116), the USA (100), Germany (99) and Brazil (77), respectively. Among them, there were 249 female arbitrators, accounting for 16.7% of the total arbitrators.

In 2017, the LCIA made 412 appointments of arbitrators in 2017, whereby 241 arbitrators were appointed. Although the majority of the arbitrators listed the UK as their first nationality, there were a considerable number of arbitrators coming from the USA, Europe and Asia. The parties of 26% cases and the arbitrators of 20% cases chose arbitrators from countries other than the UK, and the LCIA appointed arbitrators from countries other than the UK for 52% cases. Besides, 24% of the arbitrators who participated in the hearing of cases were female, a growth of 3% compared with 2016.

the SCC appointed a total of 254 arbitrators in 2017, 82% of them were male and 18% were female. the SCC preferred arbitrators from Europe and appointed a total of 231 European arbitrators, followed by those from Australia and North America (5 were appointed respectively).

The SIAC appointed a total of 145 arbitrators for 114 sole arbitrator tribunals and 31 three-arbitrator tribunals. These arbitrators came from Australia, Canada, China, Denmark, France, Germany, Greece, India, Indonesia, Japan, Malaysia, New Zealand, Portugal, Singapore, South Africa, South Korea, the UK and the USA. The statistics shows that the SIAC and the parties preferred arbitrators from Singapore (112 arbitrators), the UK (64 arbitrators) and the USA (15 arbitrators).

The HKIAC appointed 97 arbitrators in 2017, with 16.5% female arbitrators. 32% of the arbitrators were appointed for the first time over the past 3 years. The top 4 countries of the arbitrators' origin were the UK, Hong Kong, Canada and Australia.

6. Dispute Amount

In 2017, the total dispute amount of 2,298 cases accepted by CIETAC was RMB71.888 billion (about USD10.444 billion), jumping by 22.55% compared with 2016. The average dispute amount was RMB31.2829 million per case, hitting a record high. The dispute amount of foreign-related and HMT-related cases reached RMB35.02408 billion, soaring by RMB19.60256 billion with the growth rate of 127.11%, and the average dispute amount of foreign-related and HMT-related cases reached RMB73.58 million.

The average dispute amount of cases accepted by the ICC was about USD137

million in 2017, and cases involving the dispute amount of USD2 million took up 60.4% of the total cases, and those lower than USD2 million were about 31.7%.

Cases accepted by the LCIA in 2017 that involved a large dispute amount continuously increased, and 31% of the cases recorded the dispute amount of USD20 million, higher than those in 2016 and 2015 (28% and 18% respectively).

The total dispute amount of the cases accepted by the SCC in 2017 exceeded EUR1.5 billion (about USD1.75 billion). The dispute amount of cases where *SCC Rules for Expedited Arbitration* applied was EUR31 million (about USD36.16 million), and those where the general rules applied involved an amount of EUR1.4 billion (about USD1.63 billion).

The total dispute amount of cases accepted by the SIAC in 2017 was SGD5.44 billion (about USD4.07 billion). The highest dispute amount involved in a case was SGD8.035 billion (about USD6.0103 billion), while the average dispute amount per case was SGD193.4 million (about USD144.7 million).

The total dispute amount of the cases accepted by the HKIAC in 2017 was about HKD3.93 billion (about USD5 billion), surging by 100% compared with 2016.

7. Conclusion

The following basic conclusion may be drawn from the aforesaid statistics and analyses of the annual reports and case data released by relevant major international commercial arbitration institutions:

Firstly, the caseloads of major international commercial arbitration institutions

varied in their changes and development trends. The caseloads of the ICC and the LCIA declined slightly. In contrast, the caseloads of CIETAC, the HKIAC, the SIAC and other arbitration institutions in the Asia-Pacific Region increased sharply and boomed with great potential. In terms of the total caseload, CIETAC continued to take the lead among international arbitration institutions.

Secondly, regarding the internationalization, complexity and diversity of the parties involved in the ICC cases, the range of nationalities thereof (142 countries and regions) and the distribution of places of arbitration (104 cities in 63 countries) were significantly higher or wider than those of other international arbitration institutions established in a specific country or region. Cases accepted by arbitration institutions other than the ICC had a high proportion of cases involving domestic parties, and the cases involving foreign parties covered about 50 countries and regions averagely. Meanwhile, the places of arbitration were mainly in the host countries or neighboring ones. As the "Belt and Road" Initiative is implemented in an all-round way and the SPC's International Commercial Court was established, the exchange and cooperation between China's international commercial arbitration and the arbitration communities of other countries were deepened, and the international commercial arbitration in China was further increased.

Thirdly, regarding the diversification of the composition of the arbitral tribunals, China's international commercial institutions were slightly lagged behind other international arbitration institutions, due to the restrictions on the arbitrator panel system, languages and others. However, CIETAC provides the parties with more choices in the appointment of international arbitrators along with the increase in the number of its foreign arbitrators and China's gradual relaxation of restrictions on the

arbitrator panel system. Fourthly, there was an apparent increase in the total dispute amount of all the international arbitration institutions in 2017. The dispute amount of cases accepted by CIETAC was RMB71.888 billion (about USD10.444 billion), jumping by 22.55% compared with 2016, hitting a record high and also taking the lead among the major international arbitration institutions.

In summary, the international commercial arbitration institutions in China, represented by CIETAC, have sped up the pace of internationalization in 2017. With China's strong support for arbitration and its accelerated opening-up, Chinese arbitration institutions will gradually "go global" while international commercial arbitration institutions will be gradually "invited in", so as to enrich the practice of China's international commercial arbitration to a greater extent.

II. Legislative Practice of International Commercial Arbitration in China

Compared with the previous year, the development of China's arbitration legal system in 2017 focused more on judicial supervision, as well as the positive role of arbitration in the implementation of the "Belt and Road" Initiative from the perspective of alternative dispute resolution. As time goes on, these measures will have a profound impact on the international commercial arbitration in China.

i. About Legislative Amendments to Qualifications of Arbitrators

The amendment and improvement of the *Arbitration Law* have been a focus of concern for many years. The 29th Session of the Standing Committee of the 12th National People's Congress of the People's Republic of China held on 1 September

2017 adopted the *Decision of the Standing Committee of the National People's Congress on Amending Eight Laws including the Judges Law of the People's Republic of China*², which came into force as from 1 January, 2018. Pursuant to the Decision, Article 13.2(1) of the *Arbitration Law* was amended from "have at least eight years of working experience in arbitration" to "passed national uniform legal professional qualification examination and obtained the legal professional qualification certificate, and have at least eight years of working experience in arbitration". Article 13.2(3) thereof was amended from "served as senior judges for at least eight years" to be "served as judges for at least eight years". It can be seen that, to respond to the reform from the judicial examination system to the national uniform legal professional qualification examination system, this amendment of the Arbitration Law only addresses the qualifications of arbitrators, regulates and raises entry conditions of legal arbitrators and lowers the threshold for non-incumbent judges to serve as arbitrators.

ii. About Judicial Supervision of Arbitration

Since the mid of 2017, the SPC has released in succession the *Notice on Some Issues Concerning the Centralized Handling of Cases Involving Judicial Review of Arbitration* (F [2017] No. 152 released on 22 May), *Relevant Provisions on Issues Concerning Application for Verification of Cases Involving Judicial Review of Arbitration* (FS [2017] No. 21 issued on 26 December), the *Provisions on Several Issues Concerning Trial of Cases Involving Judicial Review of Arbitration* (FS [2017] No. 22 released on 26 December), and in principle adopted the *Provisions on Several Issues Concerning the Handling of Arbitral Award Enforcement Cases by the People's Courts*, which

² See the *Release Upon Authorization: Decision of the Standing Committee of the National People's Congress on Amending Eight Laws including the Judges Law of the People's Republic of China* through http://www.xinhuanet.com/2017-09/02/c_1121588527.htm, the latest visit on 17 July, 2018.

was officially released on 23 February 2018. This is the greatest innovation in the arbitration regime of judicial supervision after the release of the *Interpretation of Some Issues Concerning the Application of the Arbitration Law of the People's Republic of China* (FS [2006] No.7) in 2005.

1. Centralized Handling of Cases Involving Judicial Review of Arbitration

For the purpose of the *Notice on Some Issues Concerning the Centralized Handling of Cases Involving Judicial Review of Arbitration* (the *Centralized Handling Notice*), "centralized handling" means: (1) Acting as specialized trial divisions, tribunals (collegial panels) of courts hearing the foreign-related commercial cases at various levels shall be responsible for handling the cases involving judicial review of arbitration. (2) Cases in which any party concerned applies for confirming the validity of an arbitration agreement, setting aside an arbitral award made by an arbitral institution in mainland China, or applies for recognition and enforcement of an arbitral award made in Hong Kong Special Administrative Region (SAR), Macao SAR and Taiwan, or applies for recognition and enforcement of a foreign arbitral award, shall be handled by the specialized trial divisions of courts at various levels. After a review, if a specialized trial division rules to recognize and enforce an arbitral award made in Hong Kong SAR, Macao SAR and Taiwan, or recognize and enforce a foreign arbitral award, the relevant cases shall be transferred to the corresponding division for enforcement. It should be noted that arbitral awards made by arbitral institutions in mainland China shall be enforced by the enforcement division of the competent court, without being subject to the *Centralized Handling Notice*. (3) Cases that any party concerned is dissatisfied with the ruling on refusal of acceptance, dismissal of the litigation or on objection to jurisdiction related to the effect of an

arbitration agreement ruled by the court of first instance, and thus files an appeal, shall be handled by the specialized trial division of the people's court of second instance.

Objectively speaking, centralized handling is conducive to improving the standards for judgment of cases involving judicial review of arbitration, as well as the quality and efficiency of judicial supervision over arbitration, and then the development of arbitration. It is worth special noticing that, the *Centralized Handling Notice* also stipulates that courts at various levels shall establish the centralized information management platform for cases involving judicial review of arbitration, so as to strengthen the information-based management and data analysis of relevant cases involving judicial review of arbitration and guarantee the accuracy of application of laws and the unification of judgment standards.

2. Reporting and Approval System for Judicial Review of Arbitration

The reporting and approval system for judicial review of arbitration derives from the reporting system for foreign-related arbitration. The *Notice of the SPC on Disposal of Relevant Issues Concerning Foreign-related Arbitration and Foreign Arbitral Matters by People's Courts* (FF No. 18 [1995] released on 29 August 1995) first established the reporting system, which was further refined through the *Notice on Relevant Matters about Revoking Foreign-related Arbitral Awards by People's Courts* (F [1998] No. 40 released on 23 April 1998) and the *Provisions on Issues Concerning Charges and Review Term for Recognition and Enforcement of Foreign Arbitral Awards* (FS [1998] No. 28 released on 21 October 1998). In contrast, *Relevant Provisions on Issues concerning Reporting for Approval of Cases Involving Judicial Review of Arbitration* (the *Provisions*

on Reporting for Approval) amended the "reporting" to be "reporting for approval", and extended to purely domestic arbitration cases. The main contents are as follows:

(1) On the basis of introducing the reporting system, the *Provisions on Reporting for Approval* extends the reporting and approval system to the judicial supervision over purely domestic arbitration cases. Pursuant to Article 2.2 of the *Provisions on Reporting for Approval*, when handling arbitration cases under judicial review which do not involve foreign countries, Hong Kong, Macao or Taiwan, if an intermediate people's court or special people's court intends to make decision upon review to hold the arbitration agreement invalid or not to enforce or to annul the arbitral award rendered by an arbitration institution in mainland China, it shall report the decision to the high people's court in its jurisdiction for approval; the decision shall be made based on the opinion of the high people's court after examination and review by the high people's court. This is principally because enormous arbitration cases occur in China (up to 208,000 cases in 2016) each year, and reporting all the foreign-related cases involving judicial review of arbitration to the SPC will greatly increase its workload, and will influence the functions of the supreme judicial organ and also lower the efficiency of judicial review. However, it shall still report the same to the SPC for approval and shall make decision based on the SPC's opinion upon examination and review under any of the following circumstances: where the places of domicile of the parties to the cases involving judicial review of arbitration are in different provincial administrative regions, where the arbitral award rendered by an arbitration institution in mainland China is to be refused of enforcement or annulled on the ground of violation of public interest. It is clear that the *Provisions on Reporting for Approval* aim at smashing the local protectionism of cases involving judicial review

of arbitration, and also represents the SPC's consistent position of keeping prudent in applying the public interest clause.

(2) The reporting and approval system was further regulated in the form of judicial interpretation, which is manifested as follows: (A) Clarifying the scope of cases involving judicial review of arbitration: Cases involving application for confirming the validity of arbitration agreements, cases involving application for annulment of the arbitral awards rendered by arbitration institutions of mainland China, cases involving application for enforcement of arbitral awards rendered by arbitration institutions of mainland China; Cases involving application for recognition and enforcement of arbitral awards rendered in Hong Kong SAR, Macao SAR and Taiwan, cases involving recognition and enforcement of foreign arbitral awards; and other cases involving judicial review of arbitration. (B) Balancing the relationship between supporting arbitration and reducing judicial burden: as noted above, only foreign-related cases or some domestic cases involving judicial review of arbitration can be reported to the SPC. Where, in a civil litigation, the party concerned files an appeal due to dissatisfaction with a ruling involving the validity of the arbitration agreement as rendered by the people's court for non-acceptance, rejection of the lawsuit or objection to jurisdiction, the court of second instance shall report the decision level by level for approval. (C) When reporting for approval, a people's court at lower level shall submit a written report and the case files. (D) Where the people's court at higher level thinks that relevant facts of the case are unclear upon receipt of the reporting of the people's court at lower level for approval, it may make inquiry of the parties concerned or return the case to the people's court at lower level for further ascertaining the facts before reporting again.

The *Provisions on Reporting for Approval* narrow the gap between foreign-related arbitration and domestic arbitration in terms of judicial review procedures, which is conducive to improving the domestic arbitration environment. Furthermore, used as internal management measures, the Provisions expand the scope of the original reporting system, and also become an attempt of litigation reform made by the SPC from the perspective of openness, transparency and regularity of judicial review and the procedural guarantee of the parties' rights.

3. Improvement of Arbitration Judicial Review Rules

The *Provisions on Several Issues Concerning Trial of Cases Involving Judicial Review of Arbitration* (the *Provisions on Cases Involving Judicial Review of Arbitration*) are applicable to the subjects same as those of the reporting and approval system, but with richer contents. On the basis of summarizing the current judicial practices, the *Provisions on Cases Involving Judicial Review of Arbitration* make further clarification on the relevant stipulations of the *Arbitration Law* and the *Civil Procedure Law of the People's Republic of China* (the *Civil Procedure Law*).

(1) Jurisdiction of cases involving judicial review of arbitration. Two new points are advanced therein: Firstly, cases where an application is submitted for confirming the validity of the arbitration agreement shall be subject to the jurisdiction of the intermediate people's court or special people's court in the place where the arbitration institution specified in the arbitration agreement is located, the place where an arbitration agreement is signed, the place of the domicile of the applicant or the place of the domicile of the respondent. Secondly, where a foreign arbitral award is related to a case tried by a people's court, neither the place of the domicile of the

respondent nor the place where the property of the respondent is located in mainland China, and the applicant applies for recognition of the foreign arbitral award, the people's court accepting the related case shall have jurisdiction. If the people's court accepting the related case is a basic-level people's court, the people's court at the next higher level of the basic-level people's court shall have jurisdiction in the case of application for recognition of the foreign arbitral award. If the people's court accepting the related case is a high people's court or the SPC, the court shall decide whether to conduct the review itself or appoint an intermediate people's court for review. Where a foreign arbitral award is related to a case tried by an arbitration institution in mainland China and neither the place of domicile of the respondent nor the place of the location of the property of the respondent is in mainland China, the case involving the application by the applicant for recognition of the foreign arbitral award shall be subject to the jurisdiction of the intermediate people's court at the place where the arbitration institution accepting the related case is located.

(2) Finality and appealability of the ruling involving judicial review of arbitration. The ruling rendered by the people's court in a case involving judicial review of arbitration shall take legal effect upon service thereof. The people's court shall not accept the application for review, appeal or application for retrial filed by the party concerned, unless otherwise stipulated by the laws or judicial interpretations. However, the applicant may file an appeal if unsatisfied with the ruling for refusal to accept, for dismissal of application rendered by the people's court or if the respondent is unsatisfied with the ruling for objection to jurisdiction rendered by the people's court.

(3) Applicable law of foreign-related arbitration agreements. It mainly specifies three

circumstances: firstly, where the parties concerned make choice of the law applicable in confirming the validity of the foreign-related arbitration agreement through consultation, they shall do so by express expression of intention and the agreement on the law applicable to the contract alone cannot serve as the agreement on the law applicable for confirming the validity of the arbitration clause in the contract. Secondly, where, in determining the law applicable to the confirmation of the validity of a foreign-related arbitration agreement by the people's court in accordance with Article 18 of the *Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (the Law for Foreign-related Civil Relationships)*, the parties have not made choice of the applicable law, and the application of the law of the place where the arbitration institution is located and the application of the law of the place of arbitration lead to different decisions on the validity of the arbitration agreement, the people's court shall apply the law that confirms the arbitration agreement to be valid. Therefore, where the arbitration agreement fails to specify the arbitration institution or the place of arbitration but the arbitration institution or the place of arbitration can be determined in accordance with the applicable arbitration rules stipulated in the arbitration agreement, such arbitration institution or place of arbitration shall be determined as the arbitration institution or the place of arbitration prescribed in Article 18 of the *Law for Foreign-related Civil Relationships*. Thirdly, where, in reviewing the case involving the application by the party concerned for recognition and enforcement of the arbitral award conducted by the people's court by applying the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (i.e., *the New York Convention*), the respondent makes defense on the ground that the arbitration agreement is invalid, the people's court shall determine the law applicable to the confirmation of the validity of the arbitration

agreement in accordance with Article V:1(a) of the *Convention*.

(4) Basis for judicial review of arbitration. The double-track system will be used. The judicial review of foreign-related and domestic arbitration rendered by an arbitration institution in mainland China shall be applicable to Article 274 and Article 237 of the *Civil Procedure Law* respectively. For "acts of arbitrator to seek or accept bribes, commit malpractices for personal benefits or pervert the law in the arbitration of cases" as stipulated in Article 237.2(6) of the *Civil Procedure Law* and Article 58.1(6) of the *Arbitration Law*, the SPC made restrictive interpretation, i.e., these acts refer to the acts that have been confirmed by effective criminal legal instruments or disciplinary sanction decisions.

In summary, the *Provisions on Cases Involving Judicial Review of Arbitration* further show the SPC's consistent position of supporting arbitration in terms of the judicial review of arbitration.

4. Reform of Arbitral Award Enforcement Rules

The enforcement of arbitral awards has always been the top concern of judicial supervision over arbitration. The *Provisions on Several Issues Concerning the Handling of Arbitral Award Enforcement Cases by the People's Courts* (the *Provisions on Arbitral Award Enforcement*) are rich in contents, with key points as follows:

(1) Introducing the system of application for non-enforcement by a party not involved in the arbitration case (non-involved-party). To deal with the situations of vicious arbitration, fictitious arbitration, undermining rights and interests of the non-involved-party or prejudicing social credibility of arbitration and judicature,

the *Provisions on Arbitral Award Enforcement* expanded the subject scope of non-enforcement application of relevant arbitral award and granted the right to a non-involved-party to apply for non-enforcement of the arbitral award. Article 9 hereof stipulates a non-involved-party may apply for non-enforcement of the relevant arbitral award or arbitration conciliation statement if it satisfies the following conditions: (A) Where there is evidence proving that parties to the arbitration case have maliciously applied for arbitration or engaged in fictitious arbitration, undermining the legitimate rights and interests of the non-involved-party; (B) Where the subject matter for enforcement involving the legitimate rights and interests of the non-involved-party has not been fully enforced; and (C) Where the non-involved-party submits its application within 30 days after it comes to know or should have known that the people's court has taken enforcement measures against the said subject matter. Article 18 hereof stipulates that the application submitted by a party not concerned in accordance with the aforesaid Article 9 shall be upheld upon satisfaction of the following conditions: (a) Where the applicant is a party enjoying relevant rights or interests; (b) Where the rights or interests claimed by the applicant are lawful and truthful; (c) Where the parties to the arbitration case have fabricated legal relationship and facts of the case; and (d) Where the outcome of the disposal of the civil rights and obligations of the parties concerned in the main texts of relevant arbitral award or arbitration conciliation statement is partially or entirely erroneous, prejudicing the applicant's legitimate rights and interests. Regarding the ruling on the application for non-enforcement of arbitral award by a non-involved-party, either the parties to the arbitration case or the non-involved-party may apply for review to the people's court at the higher level within 10 days after receiving the said ruling.

(2) Clarifying the linkage between annulment and enforcement proceedings (including non-enforcement). Pursuant to the relevant provisions of the *Arbitration Law* and the *Civil Procedure Law*, the application for annulment of an arbitral award can be compatible with the application of non-enforcement of such arbitral award. To further improve the efficiency of judicial review of arbitration, the *Provisions on Arbitral Award Enforcement* further detailed the linkage between the application for annulment and for non-enforcement of an arbitral award based on the unified stipulations on the grounds for annulment and non-enforcement of the *Civil Procedure Law*. (A) The competent people's court shall not uphold an application for non-enforcement of an arbitral award submitted by a party concerned during the enforcement proceedings based on the same grounds raised in its previous application for annulment of the arbitral award which has been dismissed by the people's court. The competent people's court shall not uphold an application for annulment of an arbitral award submitted by a party concerned based on the same grounds relied upon in its previous application for non-enforcement of the arbitral award which has been dismissed by the people's court. (B) During the period when a case for non-enforcement of an arbitral award is being reviewed, if a party concerned applies for annulment of the arbitral award to the competent people's court and the said application is accepted, the people's court shall render a ruling to suspend the review of the application for non-enforcement; where the arbitral award is annulled or where re-arbitration is decided, the people's court shall render a ruling to terminate enforcement and the review of the application for non-enforcement; where the application for annulment of an arbitral award is dismissed or the applicant for enforcement withdraws the application for annulment of the arbitral award, the people's court shall resume the review of the application for non-enforcement; and,

where the party against whom the enforcement is sought withdraws the application for annulment of the arbitral award, the people's court shall render a ruling to terminate the review of the application for non-enforcement, unless a non-involved-party applies for non-enforcement of the arbitral award. (C) Where a people's court renders a ruling to dismiss an application for annulment of an arbitral award or an application for non-enforcement of an arbitral award or arbitration conciliation statement, the relevant court of enforcement shall resume enforcement. These measures can effectively prevent the party against whom the enforcement is sought from hindering the enforcement by abusing the procedures and can help minimize waste of judicial resources caused by repeated reviews.

(3) Maintaining the party autonomy and advocating good faith arbitration. Article 14.3 of the *Provisions on Arbitral Award Enforcement*, i.e., "clause of waiving objections", becomes law for the first time in China: Where special reminders have been made with regard to the arbitration procedures or rules of arbitration applied, and a party concerned still chooses to participate or continue to participate in arbitration proceedings and raises no objection although it knows or should have known that statutory arbitration procedures or the rules of arbitration chosen have not been followed, after an arbitral award is rendered, the competent people's court shall not uphold the application by the party concerned for non-enforcement of the arbitral award on the ground that the arbitral award is against statutory procedures. Besides, the *Provisions on Arbitral Award Enforcement* also emphasizes the requirements for party autonomy and good faith arbitration for many times: Where the party against whom the enforcement is sought applies for non-enforcement of the relevant arbitral award, multiple grounds for non-enforcement of the same

arbitral award shall be raised together. A people's court shall review a case for non-enforcement of an arbitral award by focusing on the grounds raised by the party against whom the enforcement is sought in its application or the application submitted by a party not involved in the said arbitration. The people's court shall not examine any ground not raised by the party against whom the enforcement is sought in its application, unless the arbitral award may be against public interest. Where the party against whom the enforcement is sought applies for non-enforcement of the relevant arbitration conciliation statement or the arbitral award rendered according to the conciliation agreement or mediation agreement between the parties concerned, the competent people's court shall not uphold the application, unless the arbitration conciliation statement or arbitral award is against public interest.

(4) Defining the review standards for several grounds for non-enforcement of arbitral awards. The *Civil Procedure Law* specifies the grounds for non-enforcement of arbitral awards, which, however, need to be further detailed and interpreted. To unify the review standards, the *Provisions on Arbitral Award Enforcement* further clarify the grounds for non-enforcement of arbitral awards, and specify the meaning of "beyond the arbitral jurisdiction", "in violation of statutory procedures", "forging evidence" and "concealing evidence", making the provisions more feasible and operable. Taking the circumstances of "concealing evidence" that are often disputed in practice as an example, Article 16 hereof identifies the circumstances meeting the following conditions as "concealing evidence": (A) Where the evidence serves as the major evidence to ascertain basic facts of the case at hand; (B) Where the evidence is under the sole control of the other party, and is not submitted to the relevant arbitral tribunal; and (C) Where the existence of the evidence is known during the arbitration

proceedings, and the other party is required to produce the evidence or the arbitral tribunal is requested to order the other party to submit the evidence, but the other party fails to produce or submit the evidence without any justifiable reason. Where one party concerned conceals the evidence it holds during arbitration proceedings, after an arbitration award has been rendered, the competent people's court shall not uphold the application by the party concerned for non-enforcement of the arbitration award on the ground that the evidence concealed thereby is sufficient to affect impartial arbitration.

The *Provisions on Arbitral Award Enforcement* principally clarify several significant ambiguities in practice, which is certainly the fundamental purpose of judicial interpretation. However, the new provisions that the application submitted by a non-involved-party for non-enforcement of the arbitral award may give rise to new concerns and problems in practice.

iii. About the Arbitration Rules

The arbitration institutions in mainland China has made beneficial exploration in the Chinese arbitration regime through the arbitration rules in the past year, with the most remarkable achievements in the following two aspects:

1. Investment Arbitration Rules

CIETAC published the *China International Economic and Trade Arbitration Commission International Investment Arbitration Rules* on 19 September 2017, filling up a blank in the international investment arbitration rules of China. The Rules summed up the experience of ICSID, the ICC and the SCC in international

investment, carefully researched the investment treaties of the USA and the European Union (EU), deeply examined the bilateral investment treaty (BIT) practice in China, fully absorbed and drew upon the most advanced concepts and practice in procedure design, public hearing, panel of arbitrators, place of arbitration, jurisdiction of arbitral tribunals, consolidated arbitration, third-party funding and transparency of arbitration proceedings, and introduced abundant experience in Chinese arbitration, e.g., absorbing the experience of CIETAC in combining arbitration with conciliation, following up traditional practice of China in establishing the panel of arbitrators, thereby making the Rules with features of openness, inclusiveness and mutual learning, representing not only the feature of internationalization but also meeting actual demand of investment arbitration in China.

2. Establishing the Framework of *Ad Hoc* Arbitration System

After the SPC released its *Opinions on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones*, the arbitration circle in China explored on *ad hoc* arbitration or specific arbitration. Zhuhai Hengqin New Area Management Committee and Zhuhai Arbitration Commission jointly issued the *Ad Hoc Arbitration Rules of Hengqin Pilot Free Trade Zone* on 23 March 2017, CIETAC adopted the *Rules for CIETAC Hong Kong Arbitration Center to Serve as the Appointing Authority* on 27 April, and published the *Guidelines for Third-Party Funding for Arbitration in succession*, Shijiazhuang Arbitration Commission published the *Arbitration Rules of Shijiazhuang Arbitration Commission* on 2 June, defining *ad hoc* arbitration as mentioned in the said judicial opinions, China Internet Arbitration Alliance released the *Rule for Bridging Ad Hoc Arbitration and Institutional Arbitration* on 19

September, and Guangzhou Arbitration Commission amended its arbitration rules accordingly, indicating its recognition and acceptance of the aforementioned *Rules for Bridging*. So far, arbitration institutions in China have made many useful attempts in the *ad hoc* arbitration rules.

III. Theoretical Research on International Commercial Arbitration in China

In 2017, some compelling topics appeared in the research field of international and domestic commercial arbitration. Introduction and comments thereof are as follows:

i. About the "Belt and Road" Dispute Resolution Mechanism

With continuous implementation of the "Belt and Road" Initiative, China shall establish a fair and efficient dispute resolution mechanism to ensure its smooth implementation and actively innovate the resolution mechanism for civil and commercial disputes in connection with the "Belt and Road" construction. This has been the great concern of domestic academic circle in recent years. Some scholars pointed out that China shall resolve the said disputes from the three layers of conciliation arbitration and litigation. Regarding conciliation, focus shall be placed on enhancing the enforcement of conciliation agreements, promoting combination of arbitration and conciliation, pushing ahead the construction of platform connecting litigation and conciliation and the judicial confirmation of conciliation agreements. Regarding arbitration, efforts shall be made to improve the *Arbitration Law*, so as to make arbitration more professional and refined and make innovations in the design of arbitration rules. Regarding litigation, advanced international experience shall be

drawn on to explore the establishment of "Belt and Road" international commercial court, so as to resolve cross-border civil and commercial disputes arising from the construction of the "Belt and Road" in an efficient and convenient way³.

ii. About *Ad Hoc* Arbitration

The *Arbitration Law* does not recognize the validity of *ad hoc* arbitration. As the "Belt and Road" Initiative is further implemented, *ad hoc* arbitration has attracted much attention from the domestic academic community. Many scholars hold the view that China should establish the *ad hoc* arbitration system. In his paper titled *The Thought of Establishing Ad Hoc Arbitration System in Chinese Pilot Free Trade Zone*, Zhang Xianda stated that China should establish the *ad hoc* arbitration system in an all-around way. The *Arbitration Law* does not recognize *ad hoc* arbitration, which is not in line with the international practice and causes many problems of unfairness and inequality. The paper stated that China should give full play to its demonstrative role of FTZ as a pioneer to the greatest extent, take the initiative in actively establishing the *ad hoc* system in FTZs to gain experience for the nationwide adoption and promotion thereof, and finally establish the *ad hoc* arbitration system for the whole nation.⁴

The Significance and Methods on Establishing Ad Hoc Arbitration System in China's Pilot Free Trade Zones, jointly written by Zhang Chaohan and Ding Tongming, specified that the absence of the *ad hoc* arbitration system in China restricts China's

³ See Qi Tong and Rui Xinyue, *The Innovation of Civil and Commercial Dispute Settlement Mechanisms along the "Belt and Road"*, 5 *Chinese Review of International Law* (2016).

⁴ See Zhang Xianda, *The Thought of Establishing Ad Hoc Arbitration System in Chinese Pilot Free Trade Zone*, 3 *Journal of National Prosecutors College* (2017).

adherence to the principles of equality and mutual benefit during the international exchanges, and is not good for safeguarding the legitimate rights and interests of commercial entities in China. The article stated that FTZ was a fundamental platform and important node for China to implement the "Belt and Road" Initiative, and China should establish the *ad hoc* arbitration system for FTZs at an appropriate time, so as to resolve the civil and commercial disputes between enterprises, as well as investment disputes between investors and host countries, in a timely and efficient manner. The arbitration system that focuses on *ad hoc* arbitration and supplemented by the intervention of arbitration institutions and judicial organs as stipulated in the *Ad Hoc Arbitration Rules of Hengqin Pilot Free Trade Zone* will be a significant reference for other FTZs.⁵

iii. Police Powers Doctrine in the Context of International Investment Arbitration

Property loss caused by the police powers doctrine under the jurisdiction of a country does not constitute indirect expropriation, therefore, such country will not be responsible for compensating the loss incurred therefrom. Though a country's police power is subject to its police force, they are not totally coterminous. As Adam Smith pertinently remarked in his *1763 Lectures on Justice, Police, Revenue and Arms*, the word "police" is originally derived from the Greek "πολιτεία [politeia]", which properly signified the policy of civil government. Ms. Catharine Titi, a Professor of Université Paris 2 Panthéon-Assas, explored the police powers doctrine in

5 See Zhang Chaohan and Ding Tongming, *The Significance and Methods on Establishing Ad Hoc Arbitration System in China's Pilot Free Trade Zones*, 8 Academic Journal of Zhongzhou (2017).

international investment law and its legal status, as well as inquiring into its status as a general principle of law, a customary international law, a concept displaying a different kind of timbre, or "an eminently interpretative operation" that belongs to the sphere of arbitral discretion.⁶

⁶ See Catharine Titi, *Police Powers Doctrine and International Investment Law* in Filippo Fontanelli, Andrea Gattini and Attila Tanzi (eds), *General Principles of Law and International Investment Arbitration*, 323-343 (Brill, 2018), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050417.

Chapter 2 Observation on PPP-Related Arbitration Practice in China

PPP, as the abbreviation of "Public-Private Partnership", is translated as "政府和社会资本合作"¹ in Chinese, which is a project operating mode for the public infrastructure. Under this mode, private enterprises, private capital and government departments work together to engage in the infrastructure construction. Projects that are operated through the PPP mode are always known as "PPP projects".

With the prosperity of the PPP industry in China, legal disputes on PPP projects are surging. PPP projects always involve two subjects with unequal status, i.e., government capital and social capital. Therefore, arbitration is regarded as an appropriate choice to resolve disputes arising therefrom.

I. Observation on the Track of PPP Development

i. Basic Concept of PPP

PPP is translated into many different expressions in China, e.g., "public-private partnership", "public-private partnership mode", "partnership between public bodies and private institutions", "private capital in the public service area", "public-private cooperation system", etc. Organizations and institutions defined PPP in different ways in practice. The table below itemizes the definitions made by some countries (regions) and international organizations for PPP. At present, no authoritative

¹ Please refer to the information as published in the official website of the World Bank Group by accessing to: <https://ppp.worldbank.org/public-private-partnership/%E6%94%BF%E5%BA%9C%E5%92%8C%E7%A4%BE%E4%BC%9A%E8%B5%84%E6%9C%AC%E5%90%88%E4%BD%9C-0>.

explanation about the concept of PPP is available around the world².

No.	Organization	Definition	Remark
1	World Bank	PPP: A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.	Source of the definition: PPP Reference Guide Version 2.0
2	United Nations Development Programme (UNDP)	PPP is a form of cooperative relationship among governments, profit-making enterprises and nonprofit organizations for a certain project.	Defined in 1998
3	The Canadian Council for Public Private Partnerships (CCPPP)	PPP is a cooperative venture between the public and private sectors, built on the expertise of each partner, which best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards.	
4	Australian Council for Infrastructure Development (AusCID)	PPP is a method that both the public and private sectors work together and make their best efforts to render services, in which the private sector is principally responsible for design, construction, operation, maintenance, financing and risk management, while the public sector is chiefly responsible for working out and developing the strategy plan, and providing the consumption protection service for core businesses.	

² See Lv Hanyang, *PPP Mode: Full-Process Guidance and Case Analysis*, China Legal Publishing House, 2017, p.

3.

5	The National Council for PPP USA (NCPPI)	PPP is a kind of method that falls between the outsourcing and the privatization and integrates the characteristics of the said two ways to provide public products. It makes full use of private resources to design, build, invest in, operate and maintain public infrastructure and renders relevant services to meet public demands.	
6	Efficient Unit, Hong Kong	PPP is an arrangement where the public and private sectors both bring their complementary skills to a project, with varying levels of involvement and responsibility, for the purpose of providing public services or projects.	
7	Institute for Public-Private Partnerships (IP3)	PPP mode is an agreement between private entity and governmental department whereby the private entity is invited to render anticipative services and assume the associated risks. As the return for rendering of services, the private entity can charge the service fee and taxation to obtain the benefits generating therefrom according to the service standards and contractual clauses. The government department will move out of the obsession of providing funds for services and management, but reserve the right to oversee and regulate the operation of private entity.	
8	HM Treasury	PPP is a long-term cooperation mode through which the private and public sectors work together to seek for common interests. It mainly involves three regards: all or part of privatization, Private Finance Initiative (PFI) and rendering of public services together with private enterprises.	

9	Commission of Public Private Partnership (CPPP)	PPP mode is a risk sharing relationship between public sector and private sector based upon a shared aspiration to bring about a desired public policy. Some government bodies, especially education and labor departments, think that outsourcing service is a form of PPP.	
10	European Commission (EC)	PPP is a cooperative relationship between public sector and private sector with the objectives of offering public projects and services that are traditionally provided by the public sector.	

China has released lots of policies and documents about PPP projects, most of which are formulated by the Ministry of Finance (MOF) and the National Development and Reform Commission (NDRC). However, due to their different duties and perspectives about PPP projects, the concept of PPP in policies and documents released by them varies to some extent. The MOF always stresses the division of responsibilities of government and social capitals and the charge mechanism for projects from the perspective of fiscal expenditure. In contrast, the NDRC places an emphasis on the way of cooperation between government capital and social capital. Among policies and documents available in China at the current moment, the concept of PPP as stated in the *Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the Ministry of Finance, the National Development and Reform Commission and the People's Bank of China on Promoting the Public-Private Partnership Mode in Public Service Field* (GBF [2015] No. 42) is the least controversial and is extensively accepted by the public³.

³ See Legal Affairs Department of China State Construction Engineering Corporation Ltd. (ed.) and Qin Yuxiu (chief editor), *The Practice of PPP Full-Process Operation - Illustration of Key Points and Analysis of Knotty*

The said document (GBF [2015] No. 42) was jointly formulated by the MOF, the NDRC and the People's Bank of China (PBC) and forwarded by the General Office of the State Council. According to the document, PPP is defined as "the government uses the competitive method to conduct merit-based selection of social capital with investment and operation management capability, and both parties enter into a contract upon the principle of equal consultation to specify their rights and obligations, namely, the social capital provides public services and the government makes corresponding payment to the social capital pursuant to the performance evaluation of public services so as to guarantee fair return of social capital." This definition specifies such main factors as competitive selection method, conclusion of contract on the principle of equal consultation, delivery of services by the social capital, the government's payment of consideration, performance evaluation and guarantee of fair return of social capital necessary for the PPP, conciliating the dispute of documents released by different ministries and commissions about the concept of PPP.

ii. Development History of PPP Mode in China⁴

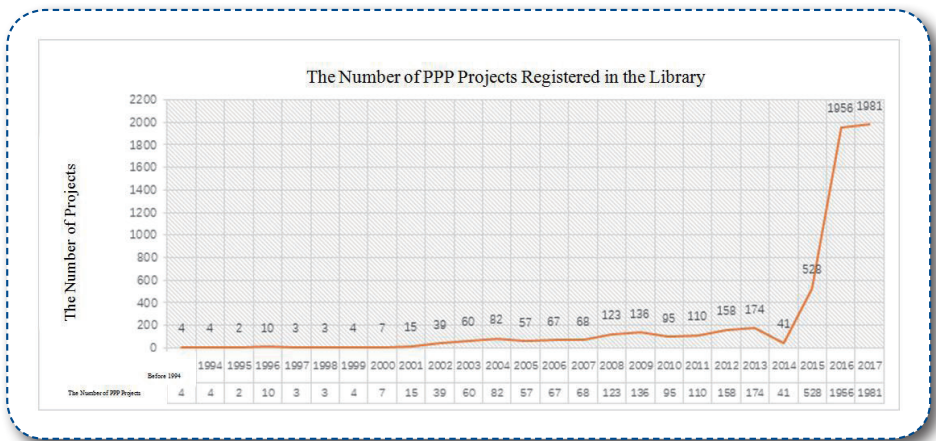
The concept of PPP in China may be traced back to the Sunning Railway that was first built in June 1906. This is the first private railway in China, of which the preparation, design, construction, operation and management were accomplished by Sunning Railway Company. Moreover, the costs of construction were raised by Chin Gee Hee, a Chinese living in the USA for a long term, from the overseas Chinese. Meanwhile, the construction of railway was supported by the government, and the

Problems, China Legal Publishing House, 2017, p. 2.

⁴ See Chen Zhimin et al., *China's PPP Practice: Development, Models, Problems and Solutions*, 4 International Economic Review (2015).

Government of the Qing Dynasty even conferred the "imperial sword" to Mr. Chan, allowing to kill the people obstructing the construction of the railway first and report afterwards. The way of cooperation has shown the characteristics of public-private cooperation and can be deemed as the earliest PPP project in China.

China introduced the PPP project for the first time in the 1980s after the founding of the People's Republic of China. PPP projects have experienced such four stages as exploration and pilot (1984-2002), gradual promotion (2003-2008), adjustment and fluctuations (2009-2013) and regulation and development (2014-present). Collecting the data of PPP projects of the MOF and the NDRC in the database, the figure below shows the development history of PPP projects in China in an intuitive way.



1. Exploration and Pilot Stage (1984-2002)

China needed to attract foreign investment to promote the economic development since the reform and opening up in 1978. Foreign direct investment became the primary driving force of PPP projects at this stage. In 1994, the Chinese Government

selected five Build-Operate-Transfer (BOT) projects as the pilot ones, which involved the construction of water treatment plant, power plant and other infrastructure. Typical projects at this stage include Shenzhen Shajiao Power Plant B, Chengdu No. 6 Tap Water Supply Plant, BOT Project of Dachang Water Treatment Plant, Guangzhou–Shenzhen Highway, BOT Project of Beijing No. 10 Water Supply Plant, BOT Project of Dalian Road Tunnel, etc. All of them adopted the BOT mode and involved the investment amount up to RMB100 million on average, and the average franchising period of these projects was more than 15 years. Each of these projects received the foreign investment, and the capital from Hong Kong was relatively active. It is not difficult to find that PPP projects at this stage mainly involved the foreign investment, and the participation of foreign investors and the input of internationalized capital also contributed to introduction of new technologies. Moreover, most of the projects involve the transportation, energy, water affairs, etc. Amid the early period of reform and opening up, PPP projects relatively had technical barriers, long term of planning and investment invitation and high costs, which restricted the large-scale promotion and application of PPP projects to some extent.

2. Gradual Promotion Stage (2003-2008)

The 16th National Congress of the Communist Party of China (CPC) held in 2002 stressed the market economy. Afterwards, the Ministry of Housing and Urban-Rural Development (MOHURD) released in succession relevant documents to regulate and promote the application of PPP mode, which greatly encouraged the investors both at home and abroad to invest in sewage treatment, water supply, heat supply, public transportation and other public utilities. At this stage, PPP projects became

booming across China because of promotion by the Chinese government.

Typical projects at this stage mainly involved the municipal public utilities (including water supply, transportation, garbage treatment, etc.) projects, e.g., Beijing National Stadium (Bird's Nest), Nanjing Yangtze River No. 2 Bridge, Hefei Wang Xiaoying Sewage Treatment Plant, Hangzhou City Beltway, Beijing Subway Line 4, Zhangjiagang Domestic Garbage Incineration and Power Generation Plant. These projects are chiefly funded by private enterprises and state-owned enterprises, which constitutes the main change in PPP projects at this stage, i.e., shifting from being dominated by foreign-funded enterprises to be funded by state-owned enterprises and private enterprises. Besides, most of these projects selected the investors in the form of public tendering, which effectively reduced the expenses and increased the benefits, as well enhanced the transparency of tendering and safeguarded the public interest. Based on the development at the stage of exploration and pilot, PPP projects at this stage were relatively sophisticated in the implementation process, contractual text and operating mode, greatly helping the promotion and implementation of PPP projects.

3. Adjustment and Fluctuations Stage (2009-2013)

Influenced by the financial crisis in 2008, the development of PPP mode also suffered fluctuations in China at this stage. To cope with the crisis, the Chinese government announced the investment plan involving an amount of RMB4 trillion. The investment of huge national capital drove massive fiscal fund and credit loans to flow into the field of infrastructure construction and squeezed the private capital out of many PPP projects, and the PPP mode at the previous stages thus directly shifted

to be the government-dominated investment, which had a certain impact on the development of PPP projects.

Typical projects at this stage include Mentougou Domestic Garbage Incineration and Power Generation Plant, TOT (Transfer-Operate-Transfer) Project of Lanzhou Qilihe Anning Sewage Treatment Plant, BOT Project of Taiyuan Domestic Garbage Incineration and Power Generation Plant, BOT Project of Xi'an No. 2 Sewage Treatment Plant (Phase II), Daozhen-Weng'an Highway in Guizhou Province, etc., all of which were funded by domestic capital, reflecting the characteristics of PPP projects in the context of financial crisis. Because the state-owned enterprises are of strong strength and good credit standing and are supported by the government resources, they are highly welcomed by local governments.

4. Regulation and Development Stage (2014-Present)

The MOF and the NDRC have published a series of significant policies to drive and regulate PPP projects since the end of 2013. PPP projects thus gradually step into the stage of regulation and development in China. At this stage, lots of policies relating to PPP projects are successively issued, providing the policy guarantee for regularized development of the PPP industry. Meanwhile, PPP projects obtain an unprecedented encouragement and support, which, however, breeds some false PPP projects and the investment and financing under the guise of PPP. Typical projects at this stage include Investment Invitation Project of Beijing New Airport Express, Changzhou Urban Area Sewage Treatment and Municipal Drainage PPP Project, PPP Project of Anqing Outer Ring Road (N) Engineering, PPP Project of Liupanshui Underground Trunk Network, PPP Project of Qian'an Sponge City Construction, PPP Project of Kaifeng

Sport Centre, PPP Project of Xingyang People's Hospital Overall Construction, PPP Project of Wuhu Rail Traffic Line 1 and Line 2 (Phase I), Xuzhou Chengbei Auto Passenger Transportation Station (Phase I), PPP projects of other urban passenger transportation functional complex, etc.

iii. Fields of Application of PPP Mode

As stated above, PPP mode is widely used in the fields of public works, transportation and infrastructure, as well as agricultural construction. Therefore, consideration must be given to conclude and define the scope of application of PPP mode when discussing the development of PPP projects.

1. Requirements for Fields of Application of PPP Mode

The Chinese government issued multiple normative documents to guide the application of PPP mode at the State level. Through the *Guiding Opinions of the State Council on Innovating in Investment and Financing Mechanism and Encouraging Social Investment in Key Fields* (GF [2014] No. 60) (the *Guiding Opinions of the State Council*), the State Council gives guiding opinions on the scope of application of PPP mode and encourages further use of the PPP mode in public service, resources and environment, ecological construction, infrastructures and other key fields, mainly involving the forest administration and ecological and environmental protection, agriculture and water conservancy projects, municipal infrastructures, railway and road transportation, power construction, power grids and energy infrastructure, information and civil space infrastructure, education, health care, old-age service, sports, fitness, cultural facilities and social undertakings.

The *Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the Ministry of Finance, the National Development and Reform Commission and the People's Bank of China on Promoting the Public-Private Partnership Mode in Public Service Field* (GBF [2015] No. 42) stipulates that PPP mode is chiefly applicable to energy, transportation, water conservancy, environmental protection, agriculture, forestry, science and technology, affordable housing project, medical, health care, elderly care, education and public services.

In the *Guiding Opinions of the National Development and Reform Commission on Work Relating to Public-Private Partnership* (FGTZ [2014] No. 2724), the NDPC states that PPP mode is mainly applicable to the projects of public services or infrastructures that the government is responsible for supplying and that are suitable for market-based operation. To be specific, PPP mode shall be given priority for application in the new municipal projects and the pilot projects of new urbanization, including municipal facilities such as gas, power supply, water supply, heat supply as well as sewage and garbage disposal, transport facilities such as road, railway, airport and urban rail transportation, public service projects such as medical treatment, tourism, education and training, and health and elderly services, as well as water conservancy and resources, environment and ecological protection projects.

Other department criteria also specify the scope of application of PPP mode. The *Notice on Issues Concerning the Promotion and Application of Public-Private Partnership* (CJ [2014] No. 76) and the *Operational Guide to PPP Mode (For Trial Implementation)* (CJ [2014] No. 113) state that PPP mode is applicable to the infrastructures and public service projects featuring a large scale of investment, long-term stable demands, flexible price adjustment mechanism and relatively high degree

below⁵:

It is easy to see from the figure above that municipal projects enjoy an absolute advantage among PPP projects, and a great many PPP projects involve the construction of municipal projects. A few number of PPP projects involve forestry and social security. However, such situation reveals that focus may be placed on the construction of projects in these two fields in the future development of PPP projects. In fact, the *Guiding Opinions of the State Council* also gives priority to encouraging PPP projects in the ecological construction, especially the forestry.

II. Observation on Fundamental Legal Issues of PPP Projects

Because of the PPP mode, the original two-way direct relationship between public sector and private sector turns into the multi-party legal relationship among public sector, private sector, consumers and other stakeholders, thereby making the legal entities and relationship involved in the PPP mode more complicated. Therefore, sorting out the fundamental legal issues of PPP projects is an important constituent of observation and research. Before doing so, it is very necessary to sum up the wide range of PPP-related laws and regulations.

i. The Current PPP-Related Legal Framework⁶

After years of development, PPP projects have stepped into the stage of stable

5 Source: "Distribution of Region and Industry Registered Projects Nationwide in the Library (Management Library) (As at 31 January, 2018)" of the CPPPC, the PPP Project Library of the NDRC, accessing to <http://tzs.ndrc.gov.cn/zttp/PPPxmkk/xmk/>.

6 Source: "Policies and Regulations" of CPPPC by accessing to <http://www.cpppc.org/zh/pppzczd/index.jhtml>; PPP Column of the NDRC by accessing to <http://tzs.ndrc.gov.cn/zttp/PPPxmkk/>.

development, and there are numerous legal documents regulating PPP projects, including multilayer laws and regulations regulating PPP projects at the State level and policies and documents issued by local governments for adjusting PPP projects in a concrete manner. By effect, these documents can be divided into laws, administrative regulations, local regulations, bylaws (including bylaws issued by governmental departments and local governments), guiding opinions, etc.

Overall, legal documents released by the Central Government focus on the overall layout to expand the application fields of PPP mode in the infrastructure construction through the investment and financing based on the innovation of mechanisms, so as to provide the complete legal guarantee means for fiscal policies, management system, legal regime and fiscal and taxation support and give a comprehensive guidance and guarantee for the contracts of governments and social capitals.

Among them, some laws, including the *Budget Law of the People's Republic of China*, the *Government Procurement Law of the People's Republic of China*, the *Tendering and Bidding Law of the People's Republic of China* and the *Administrative License Law of the People's Republic of China*, contain articles about regulating PPP projects.

Of the bylaws issued by governmental departments, the State Council, the MOF and the NDRC issued the most bylaws to regulate PPP projects, the MOHURD. The banking and insurance regulatory commissions, and the Ministry of Agriculture also issued some bylaws to regulate the development of PPP projects. Most of these bylaws are the framework documents and have different priorities due to different formulation bodies. Legal documents issued by State Council and relevant ministries and departments in recent years involving the PPP are as follows:

The *Guiding Opinions of the State Council* released in 2014 bring forward general guiding opinions on the PPP, provide for the establishment and improvement of PPP mechanism, regulate key fields for cooperation between social and government capitals, stress the driving role of the government investment and specify that innovative financing methods can be applied in PPP projects.

The *Notice on Issues Concerning the Promotion and Application of Public-Private Partnership* (CJ [2014] No. 76) issued by the MOF in 2014 is the first official document since its promotion of PPP, which regulates the identification, demonstration and procurement, financing arrangement, monitoring over operating performance of PPP projects, as well as division of responsibilities and operation of governments and social capitals.

The *Notice of the Ministry of Finance on Issuing the Operational Guide to PPP Mode (Trial)* (CJ [2014] No. 113) regulates general outline and implementation process of PPP projects, as well as the operating flows of identifying, preparing, purchasing, executing, handing over PPP projects in an all-around manner. But the *Notice* is valid for only 3 years as from the date of issuance.

Together with the *Notice on Regulating the Administration of PPP Contracts* (CJ [2014] No. 56) issued in 2014, the MOF issued the *Guide to Contracts of PPP Projects (Trial)*, specifying the notes and requirements for the formulation of contracts.

The *Guiding Opinions of the National Development and Reform Commission on Work Relating to Public-Private Partnership* (FGTZ [2014] No. 2724) specify main principles for the application of PPP projects, as well as the scope of projects, mode administration and exit mechanism for social capital. Together with the said *Guiding*

Opinions, the *Guide to General Contracts for PPP Projects* was issued, which specifies the notes and requirements for the preparation of contracts from the regards of allocation of rights and duties and risk sharing of parties thereto, handling of default behaviors, government supervision, performance guarantee, etc.

The *Administrative Measures for Infrastructure and Public Utility Concession* (Order No.25 promulgated by 6 commissions and ministries, including the NDRC) specify the principles for infrastructure and public utility concession, supervision and administration, resolution of disputes, legal liabilities, execution, performance, amendment and termination of concession agreement.

In addition, the *Law of Public-Private Partnerships of the People's Republic of China (Exposure Draft)*, the *Notice on Regulating the Administration of PPP Contracts* and other relevant documents explain the legal relationship, operation and supervision of PPP.

PPP projects witnessed substantial development because of being encouraged and supported by a wide range of policies, which, however, gave rise to many problems accordingly. To address the phenomena contrary to the policies or original intention, relevant ministries and commissions have started to promulgate in succession the policies to regulate and rectify the PPP market. These policies are as follows:

Pursuant to the *Notice on Regulating the Management of Integrated Information Platform Project Library of Public-Private Partnership* (CBJ [2017] No. 92) issued by the MOF, PPP projects can be included into the library in strict accordance with the new standards, and local governments shall sort out the existing projects in the library in a collective way before 31 March, 2018.

The *Notice on Further Strengthening Regulation and Management of PPP Demonstration Projects* (CJ [2018] No. 54) issued by the MOF on 24 April, 2018, specifies that great efforts shall be spared to strengthen the regulation and management of PPP projects, intensify the information disclosure and establish the long-acting management mechanism.

In addition, local governments also released lots of local regulations and bylaws to regulate and encourage the development of PPP projects.

ii. Legal Entities Involved in PPP Projects

1. Governments

Governments are one of the main participants of PPP projects. The local people's governments above the level of county (inclusive) can initiate and participate in PPP projects in the capacity of governments. Pursuant to Article 10 of the *Operational Guide to PPP Mode* (the *MOF Operational Guide*), "the local people's governments at the level of county (inclusive) are able to establish the specialized coordination mechanism to take charge of project review and evaluation, organize and coordinate the inspection and supervision, so as to realize the purposes of simplifying the approval flow and the working efficiency. Governments or their functional departments or nonprofit institutions may act as the project implementation bodies to take charge of the preparation, procurement, supervision and handover of PPP projects."

For the PPP projects, a government simultaneously plays two roles: Firstly, as an administrator of public affairs, the government performs the administrative functions

of PPP projects, like planning, procurement, management and supervision, thus forming the legal and administrative relationship with social capital. Secondly, as a purchaser of public products or services, the government exercises due rights and performs due obligations to the extent of equal civil subject relationship with the social capital in accordance with the PPP project contracts.

2. Social Capitals

Social capitals actually mean the enterprises in cooperation with the governments in PPP projects, which always derive from domestic and abroad and engage in the design, construction, operation and maintenance of public infrastructures and services. Social capital may be sourced from domestic and abroad, and state-owned enterprises, private enterprises and foreign capitals can all engage in the national PPP projects in China. However, the government financing vehicle affiliated to a government and other state-owned enterprises (except for the listed companies) controlled by such vehicle cannot participate in the PPP projects as the social capital under the jurisdiction of the government.

3. Project Companies

Project companies are the companies particularly established by social capitals for the implementation of PPP projects. PPP project companies directly undertake the PPP projects, and obtain the concession from the governments or their authorized agencies to take charge of the full process, including financing, design, construction, operation and handover, of PPP projects. Because project companies are established particularly for the implementation of projects, they shall start the operation as from the date of registration, and transfer the right of management and ownership as from

the expiration of the franchise period, and shall be then liquidated and dissolved in a timely manner. A project company may be exclusively funded and established by the social capital, or may be jointly established by governments and social capitals, or an institution designated by the government may become a shareholder of the project company established by the social capital. Where the government injects the equity to the project company upon or after its establishment, the government shall own no more than 50% of the shares and can have neither *de facto* control right nor management right.

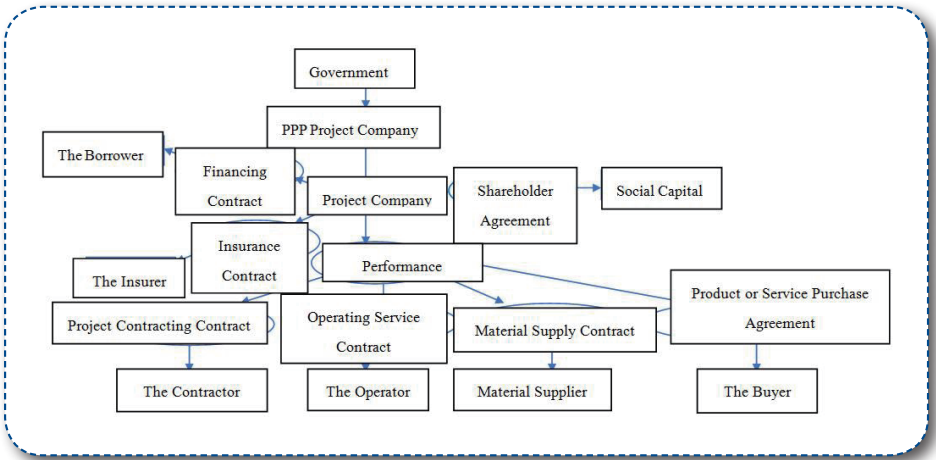
4. Financial Institutions

Financial institutions are the intermediaries engaged in the financial services for PPP projects, and those involved in the PPP projects include banks, insurers, trust agencies and fund institutions. Financial institutions can participate in the PPP projects through three ways: Firstly, they may directly cooperate with the government as social capitals. Secondly, they may participate in the projects in joint with other social capitals, and then exit from the projects in the form of equity transferring or equity repurchase of other social capitals upon the maturity of agreed period. Thirdly, they may serve as financing institutions to provide funds for project companies, including project loans, trust loans, income bonds, etc.

5. Other Entities⁷

Other entities include contractors, operators, material suppliers, project service buyers, etc.

⁷ See [US] E.S. Savas (author), Zhou Zhiren et al. (translators), *Privatization and Public-Private Partnerships*, China Renmin University Press, 2002.



iii. Legal Relationships Involved in PPP

1. Legal Relationship between Public Sector and Social Capital

At the early stage of a project, government and social capitals will always enter into the letter of intent, memorandum or framework agreement, to specify their intent of cooperation and rights and obligations thereof. If both parties decide to incorporate a project company to facilitate the PPP project, the government will generally sign the PPP project contract with the project company after its establishment. If both parties decide not to establish a project company, the government will generally sign an official PPP project contract with the social capital. The contract will always specify that the social capital shall assume the responsibility of raising the fund and performing other duties.

2. Legal Relationship between Social Capital and Project Company

The social capital is the shareholder of a project company, so they both establish the

relationship between shareholder and company. By signing a shareholder agreement for the purpose of establishing the project company, the social capital builds up the long-term cooperative relationship with binding force between shareholders. Besides, material suppliers, operators, financing parties and other entities in the hope of participating in the project may also become the shareholders of the project company.

3. Legal Relationship between the Government and Project Company

The PPP project contract entered into by and between the government and the project company constitutes the core of PPP contract system, and also the basis of other contracts. Terms and conditions of the PPP project contract will directly influence not only the contents of agreement between shareholders of the project company, and the financing contract between the project company and the financing party, and the insurance contract between the project company and the insurer as well.

4. Legal Relationship between Financing Parties of PPP Projects

The loan contract is the most essential financing contract for a PPP project. For the purpose of the security of loans, the financing party will generally ask the project company to convey its property or other rights and interest as mortgage or pledge on loans, or ask its parent company to provide the guarantee in whatever form, or ask the government to make a certain commitment. These guarantee measures will be specified in the guarantee contract, direct intervention agreement or PPP project contract.

5. Legal Relationships during the Implementation of PPP Projects⁸

At the stage of construction and operation of a PPP project, the project company needs to sign the project contracting contract, operation service contract, material supply contract, product or service sales contract with the project contractor, operator, material supplier and product or service provider, respectively, so as to drive smooth progress of the PPP project.

Besides, to guarantee the quality, progress and safety, the project company shall employ a supervision agency in accordance with relevant laws and regulations, and shall then sign a professional supervision service contract. Moreover, the relationships generating from the contract on the type of supervision service and contracts on consulting services reached with other professional intermediaries about investment, laws, technologies, financial affairs and taxation are also the possible legal relationships during the execution of a PPP project.

III. Observation on Hot Legal Issues of PPP Projects

i. Legal Disputes on PPP Projects

After more than two decades of exploration, China has embraced a great many successful examples that use the PPP mode to drive the construction of public projects, and a certain quantity of projects were involved in the legal disputes accordingly. The experience or lessons learned therefrom are important references for China to facilitate the construction of PPP projects in the future and make the practice and construction of PPP projects more feasible.

⁸ See Zhou Lanping, *Brief Analysis of Basic Legal Relationships Involved in PPP Projects*, 18 *Construction and Architecture* (2016), pp. 48-49.

In the practice of PPP projects nationwide, the types of dispute on PPP projects mainly include the ones stated below. These types of dispute can be found frequently in 37 typical cases relating to PPP projects provided by CIETAC.

1. Disputes Arising from Rights and Obligations Involved in PPP Contracts

Because most of the PPP projects involve a large scope, complex work and relationship between participants in terms of rights and obligations, a PPP project always, apart from a master contract, needs a series of transaction contracts, including the letter of intent, contracts on project construction, contracts on project operation and management, supply contracts, contracts on product or service sale and financing contract, etc. Anyway, a PPP project always involves a great many contracts that are complicated in the setting of terms and conditions, and raise high requirements for participants to coordinate terms and conditions in these contracts. Therefore, any participant who does not have design knowledge or professional legal knowledge of PPP projects is easy to make the loopholes in designing the contract, thus being likely to get involved in the legal disputes arising from the loopholes or conflicts during the performance of contracts. The most common types of dispute include the disputes arising from the invalidity of contracts due to its violation of mandatory laws, disputes arising from objection to the identification of nature of contracts, or unclear specification of contractual rights and obligations, as well as the conflicts between terms and conditions in different contracts for the same project.

2. Disputes Arising from Review and Approval, Supervision and Management, Administrative Punishment and Financing Arrangement of PPP Projects⁹

⁹ See Li Wei et al., *Legal and Operational Risks of PPP Mode*, 11 Qinghai Finance (2015), pp. 30-34.

The first type of disputes arises from unstable operating procedures for selection of the investors for PPP projects. The applicable laws and regulations conflict and have a wide zone in the procedures for selection of investors for PPP projects. For example, the *Tendering and Bidding Law of the People's Republic of China* fails to specify the ways of authorization to PPP projects. But in practice, concession to PPP projects may be granted through tendering and bidding, auction, competitive negotiation, even direct authorization and other multiple ways. Disputes arising from the parties' objection to unstable and irregular procedures for selection of investors for PPP projects are very common.

The second type of disputes arises from the establishment, approval and acceptance testing procedures of PPP projects. In practice, government tenderers could probably exaggerate their working achievements obtained from the early stage at the stage of project establishment, so as to attract more investors. No law specifies the way to guarantee the quality of early work and the tenderer's liabilities for commitments they made in the tendering documents. It will be easy to trigger a dispute in case of a big gap between the commitments and the actuality. Furthermore, no law is available to specify the acceptance testing of PPP projects, like the relationship between primary acceptance testing of PPP projects upon completion and final acceptance testing, sequence of accepting testing upon completion and primary acceptance testing, delayed acceptance testing due to intervention of the public sector, which incurs frequent disputes.

The third type of disputes is in connection with the establishment of project companies and the way of capital contribution. After winning the bid, the private investor will establish a limited liability company (special purpose vehicle, SPV) to

participate in the PPP project as social capital. However, the applicable laws and regulations fail to specify the way and proportion of capital contribution for SPV established by the investor. Therefore, public and private sector may suffer from the conflict of interest of the SPV in many forms.

The fourth type of disputes arises from the conflict between the structure of PPP projects and the *Land Administration Law of the People's Republic of China* and other laws and regulations. For example, when granting the concession, the government cannot ensure that the concessionaire will definitely obtain the land use right necessary for the project. In case of failing to obtain such right, the concessionaire will raise the objection and dispute against the government.

The fifth type of disputes arises from unclear ownership of PPP projects during the construction and operation. These disputes are always caused by the conflicts between the applicable laws and regulations in the ownership of PPP projects during their construction and operation, or the concession agreements of different PPP projects vary greatly in the way to specify the ownership of PPP projects during their construction and operation.

The sixth type of disputes arises from the financing methods of PPP projects. No method appropriate to the financing of PPP projects is found through the legal and financial practices in China at present. Therefore, apart from the loans from commercial banks, project owners have to use other innovative ways to raise the fund, which are, however, always immature and irregular, and fail to closely link with the financial regulation policies and are open to the legal risk.

The seventh type of disputes arises from the risk sharing mechanism of PPP projects.

PPP projects always span a long term and involve lots of participants with complex relationships, and also incur various risks throughout the total process. Unclear risk sharing mechanism or the mechanism failing to balance the public interest or legitimate rights and interest of investors will easily give rise to the legal risk and trigger the disputes accordingly.

Based on the comprehensive analysis of the aforesaid legal disputes, we can easily find that possible legal disputes arising out of the PPP projects have the following characteristics: diverse types of dispute involve complex legal relationships and huge dispute amounts, almost all of which are counted by the unit of RMB100 million, disputes shift forwards the projects, and more disputes happen at the stage of procurement. One cause of dispute may trigger a series of cases involving multiple entities, causing the domino effect. Therefore, project participants must be prudent and cautious about making the decision and considering risks arising from the project financing plan, financial review, solvency, way of guarantee, prospect of the industry, policy background and other steps, so as to guarantee smooth implementation of PPP projects.

ii. Arbitrability of PPP-Related Disputes

The key of operating a PPP project is the PPP contract, namely the contract entered into by and between government capital and social capital, and there are many disputes on the nature of PPP project contracts both in theory and in practice. In practice, the nature of contracts has significant impact on the compliance of basic legal principles, application of concrete rules and methods of dispute resolution.

Internationally, the determination of nature of PPP contracts largely depends on the

corresponding legal system. In the countries adopting the continental legal system, the government acts are strictly constrained by the administrative laws, so PPP contracts to which the governments are the parties shall apply the administrative laws. This is different for the countries adopting the legal regimes of the UK and the US. Taking the UK as an example, it launched the private finance initiative (PFI) projects in 1992 and sorted out problems of the PFI mode in 2012, thereby launching the PF2. The UK Government focuses on the purchase of public services rather than the infrastructure, and generally recognizes the contracts between both parties as the purchase and sale contracts¹⁰. Disputes in connections with PPP contracts in the UK are always resolved through litigation or arbitration. However, the legal regime of France is relatively special, specifying that parties thereof may use the arbitration to resolve disputes arising out of PPP contracts.

China has not formulated the laws about regulating PPP projects yet, and most of the related legal provisions are scattered in administrative regulations and department bylaws. At the legal level, Article 12.11 of the *Administrative Litigation Law of the People's Republic of China (the Administrative Litigation Law)* specifies the determination of nature of PPP contracts, reading "the people's courts shall accept the following suits brought by citizens, legal persons or other organizations: 11. Cases where an administrative organ is considered to have failed to perform in accordance with the law or as agreed or modify or terminate the government concession operation agreements, land or housing expropriation and compensation agreements or other relevant agreements in violation of laws." Article 11 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Administrative Litigation Law of the People's Republic of China* further specifies

¹⁰ See Hu Jiani, *Brief Analysis on the Arbitrability of PPP Contract*, 8 Northern Economy and Trade (2016).

that agreements with the rights and obligations in the sense of administrative law reached by and between administrative organs with citizens, legal persons or other organizations for the purposes of realizing the public interest or administration objectives shall be considered as administrative agreements as stipulated hereof, including government concession agreements. The competent courts for cases for litigation involving the administrative agreements shall be identified in accordance with the *Administrative Litigation Law* and its judicial interpretation.

Both civil legal relationship and administrative legal relationship coexist in the concession between government capital and social capital. Moreover, the current judicial practices are also inconsistent. For example, in the case of Changchun Huijin Co., Ltd. v. Changchun Municipal People's Government, both parties entered into a cooperative agreement for the drainage and sewage disposal of Changchun City, but the project finally failed after years of operation. The Government thus decided to terminate the cooperation, and Huijin Company lodged an administrative lawsuit against the government acts and won the lawsuit. This case is an example that PPP-related dispute thereof was resolved through the administrative lawsuit, and also an litigation case that identifies the concession agreement as the civil and commercial agreement. For another example, the case of "Henan Xinling Roadway Construction Co., Ltd. v. Huixian Municipal People's Government" heard by the Supreme People's Court (SPC)¹¹ indicates that it could not identify the "concession agreement" as an administrative agreement depending on the situation that a party to the agreement is a government body, and comprehensive consideration to specific contents of the agreement is needed, including whether the market entities enjoy the positions equal to that of the government when signing the concession agreement, whether

¹¹ Judgment (MYZZ [2015] No. 244) made by the Supreme People's Court.

the parties thereto enjoy the full autonomy without being forced by the government acts, and whether the execution of the agreement upon the principles of equality, equal value exchange and mutual consultation. For one more example, in the case of confirming the validity of arbitration agreement about the concession agreement on one highway¹², Beijing No. 2 Intermediate People's Court dismissed the ruling made by a local government in Sichuan Province about the invalidity of the arbitration agreement and ascertained that arbitration clauses in the concession agreement on BOT Project of such highway were valid. Through comprehensive consideration of the purpose of agreement, the parties concerned, duties and responsibilities, rights and obligations of both parties, Beijing No. 2 Intermediate People's Court held that the concession agreement had obvious characteristics of civil and commercial legal relationships, thus ruling that the concession agreement has the nature of civil and commercial contract. In addition, Beijing No. 2 Intermediate People's Court stated that because the concession agreement was the civil and commercial agreement, the arbitration clauses thereof fell out of the circumstances of "The agreed matters for arbitration exceed the range of arbitrable matters as specified by law" as stipulated in Article 17.1 of the *Arbitration Law of the People's Republic of China (the Arbitration Law)*, so that the arbitration clauses thereof were valid, but Beijing No. 2 Intermediate People's Court did not rule whether the "government concession agreement" belonging to the "administrative agreement" could be subject to the arbitration.

According to the above judicial cases, it can be tentatively summarized that Article 11 of the concession agreements as stated in the *Interpretation of the Administrative*

¹² See Liu Yuwu et al., *Whether "Concession Agreements" can be Arbitrated?*, published on 16 March 2017, available at: <http://www.kwm.com/zh/cn/knowledge/insights/disputes-over-the-franchise-agreement-can-turn-to-dr-or-not-20170316>.

Litigation Law can be defined as an administrative agreement with "rights and obligations in the sense of administrative law". Therefore, only disputes arising out of the agreements or contractual terms without involving the government supervision, approval, permission and other acts can be resolved through the agreed arbitration.

iii. Advantages of Resolving PPP-Related Disputes through Arbitration

Resolving PPP-related disputes through arbitration has the following advantages:

Firstly, resolving PPP-Related disputes needs professional knowledge and experience. The parties concerned may select the professionals of the PPP industry on their own initiatives to form the arbitral tribunal to rule the cases, thereby guaranteeing fair and efficient resolution of disputes.

Secondly, arbitration institutions are free from hierarchical structure, which assures the neutrality and independence of the arbitral award, and avoids the influence from administrative intervention and local protectionism.

Thirdly, the efficiency of arbitration guarantees that PPP-related disputes can be resolved within a short time, saving the costs of government and social capitals.

Fourthly, the confidentiality of arbitration can protect the information security of government and social capitals to the greatest extent and avoid the expansion of dispute scope and prevent the occurrence of problems from causing social instability.

Fifthly, resolving the PPP-related disputes through arbitration has a favorable effect on "going global" of Chinese enterprises, "inviting in" foreign investment and driving the implementation of the "Belt and Road" Initiative. As the national policy in the

new era of China, the "Belt and Road" Initiative will involve many infrastructure projects undertaken by Chinese enterprises in the countries along the "Belt and Road", so contracts on these projects are all basically the concession agreements. More and more PPP projects engaged by Chinese enterprise will go international. If it is unable to properly resolve the arbitrable problems in the PPP contracts, it will have an adverse impact on the arbitration by Chinese institution as agreed in the international cooperation. In case of any disputes between Chinese enterprises and foreign governments or enterprises, it is very hard for Chinese enterprises to safeguard their due rights and interests through arbitration in local courts or through local administrative proceedings on account of various complex factors. This has already become an undeniable fact. Moreover, many Chinese enterprises use the Washington Convention and the *New York Convention* as legal guarantees for enforcing the ruling, hoping to resolve the disputes through arbitration due to its neutrality, professionalism, independence and other advantages. If the Chinese laws prohibit the disputes in connection with concession agreements (PPP contracts) from being submitted for arbitration, and Article V:2 of the *New York Convention* specifies that one of the reasons for refusal of enforcement of an arbitral award is that the dispute cannot be settled by arbitration, but the standard for a dispute capable of settlement by arbitration is the national standard of the place of arbitration, it will definitely make the arbitral award made by Chinese and foreign arbitration institutions about disputes on the concession agreements relating to the "Belt and Road" become unable to be enforced. Moreover, the requirements of Chinese enterprises for including the arbitration clauses are difficult to be accepted by local governments. China's expectation and hope of resolving the numerous disputes arising out of the concession agreements through the arbitration mechanism to be established under

the ongoing diversified dispute resolution mechanism are difficult to be realized. On the contrary, if the laws and judicial practices of China recognize the arbitrability of PPP-Related disputes, many "going global" Chinese enterprises and "inviting in" foreign enterprises will decidedly select the arbitration because of its advantages mentioned above, providing a legal guarantee for the fulfillment of the "Belt and Road" Initiative. Resolving of the PPP-related disputes is of positive significance from both regards of encouraging the investment and increasing efficiency and effect of dispute resolution.

iv. Service Features and Strengths of the CIETAC PPP Arbitration Center¹³

In the context of pushing the construction of the "Belt and Road" and in response to the demands of transformation and upgrading of national economy and the construction of the "Belt and Road", the CIETAC PPP Arbitration Center (PPP Arbitration Center), the first arbitration center ever established in China to resolve disputes arising from PPP-related projects through arbitration, has been established by CIETAC. The opening ceremony of the PPP Arbitration Center was held on 16 May 2017 in Beijing.

The CIETAC PPP Arbitration Center is of independence, professionalism and efficiency. Also, it has the following features:

Totally independent of administrative organs, the PPP Arbitration Center is free from interference by administrative organs when hearing cases. The PPP Arbitration

¹³ See Sun Haozhe and Yin Shaocheng, *Arbitration is a Sound Mechanism to Resolve PPP-Related Disputes*, Economic Information Daily, published on 7 November 2017 (008).

Center has the same list of CIETAC arbitrators that come from nationwide and worldwide, and arbitrators handling the disputes do not represent any of the parties concerned and must be independent and fair.

Relying upon a team of expert arbitrators with professional quality and capacity, the PPP Arbitration Center can guarantee the professionalism in resolution of disputes in connection with PPP projects. The PPP Arbitration Center currently has nearly 100 expert arbitrators specializing in resolving disputes related to PPP projects, construction and project management, including 24 foreign experts.

The PPP Arbitration Center applies the same *CIETAC Arbitration Rules*. It pushes ahead the proceeding management of cases in high quality and efficiency by virtue of experience and talent of CIETAC through years of resolution of disputes on concession agreements.

IV. Observation on Typical Arbitration Cases Relating to PPP Projects

i. Characteristics of CIETAC Arbitration Cases Involving PPP Projects

CIETAC has accepted a large quantity of BOT, BOOT and other disputes involving PPP projects since the 1990s. According to incomplete statistics, CIETAC has resolved more than 300 disputes, involving an amount of tens of billions of RMB, which covers a wide range including highway construction, tolls, water supply projects, sewage disposal, shanty town reconstruction, environmental treatment, government procurement, disputes on joint venture and partnership of project companies, concession of Olympics venues and other industries. The parties involved

therein are from the governments at various levels (province, city, county, township) and the governmental departments across China.

The CIETAC cases involving PPP projects have the following characteristics:

From the aspect of the parties involved in the cases, it is not only very common to see governments or government departments or PPP project companies as the parties, but also frequent to encounter disputes over joint venture and partnership arising out of the changes in partnership cooperation and China's policy for foreign fund. In the cases of dispute over PPP projects, one cause of dispute may trigger a series of cases involving multiple entities, causing the domino effect. The process of arbitration shall be of independence and confidentiality, and also involve the coordination and consistency of overall handling of cases, which raises very stringent requirements for professional quality and case control capacity of the arbitral tribunal.

From the aspect of the disputes, the dispute amounts are relatively huge, almost all of which are more than RMB100 million. Although the disputes may involve administrative orders or concrete administrative acts, they are actually economic disputes caused by administrative orders or concrete administrative acts, i.e., these disputes are between equal entities over civil and commercial contracts rather than over concrete administrative acts. Some disputes change along with the development in BOT, BOOT, PPP concession mode and policies of China. Diverse types of dispute involving complex legal relationships are found.

ii. Analysis of Typical PPP-Related CIETAC Cases Concluded from 2005 to 2016

Through observation of the 37 sample cases concluded from 2005 to 2016 provided by CIETAC, it can be found that legal disputes arising out of PPP projects mainly center on the following points. The observation results also are in line with the summary of the aforesaid types of disputes relating to PPP projects.

1. Disputes Arising out of Imprecise Contract Design of Series Contracts of PPP Projects

For a PPP project, all parties establish and adjust the right and obligation relationships among them by entering into a series of contracts, including PPP project contract and shareholder agreement, performance contracts (including project contracting contract, operation and service contract, material supply contract, product or service purchase contract, etc.), financing contract and insurance contract, which consists of the contract system of the PPP project. It could be said that project contract and series contracts are the charter of the PPP project, which are the starting point of project implementation and also the approach to resolve disputes arising therefrom, therefore, stable and clear contents thereof are very important. Any confusion, ambiguity and omission in contents and understanding of these contracts, or conflicts between the PPP project contract and other series contracts or between different clauses of the same contract are easy to give rise to legal disputes, and even cause the overall suspension of the PPP project.

Case 1

In the case on "a concession agreement on BOT highway", the Department of Transportation of A (the Claimant), identified that the First Respondent was the builder of two highways (Highway X and Highway Y), in the form of tendering

in 2005. The total investment in such BOT project was about RMB1.03 billion. Afterwards, all parties signed the *X Concession Contract*, agreeing that Hong Kong A Construction Limited, the First Respondent, obtained the right to construct and operate the project in the form of BOT, and B Department of Transportation should be responsible for reporting the project for approval. Also, the *Contract* specifies that the First Respondent shall establish a project company (i.e., the Second Respondent) within the territory of China to take charge of the project operation. The project company shall inject the initial registered capital within 60 days upon receipt of the business license, otherwise, the Claimant shall reserve the right to unilaterally terminate the *Contract*. However, soon after the performance of the *Contract*, the certificate of land use right was not obtained due to the government party's illegal reporting of Project Y, thereby influencing the First Respondents to obtain the bank loans and failing to inject the registered capital to Project X in a timely manner. Afterwards, the Claimant and the First Respondent prepared a *Minutes of Meeting* through mutual negotiation, specifying that the government agrees to give some "grace period" for the capital injection, postponing to 20 May, 2008. However, the Respondent failed to inject sufficient registered capital after the maturity of grace period, so the Claimant exercised its right to unilaterally terminate the *Contract* by issuing a notice on contract termination in accordance with relevant provisions. Both parties had a considerable dispute over the "grace period" as stated in the *Minutes of Meeting*. The First Respondent alleged that the "grace period" was the intention of both parties for updating and amendments to the *Concession Contract*. Assumptions in the *Contract* have changed greatly, therefore, the right enjoyed by the party to unilaterally terminate the *Contract* has been automatically eliminated, which cannot be exercised. However, the Claimant claimed that the core of the *Minutes*

of Meeting was to grant the "grace period", rather than its waiver of the right of unilateral termination. The arbitral tribunal held that the right enjoyed by the party to unilaterally terminate the *Contract* was not deprived due to the execution of the *Minutes of Meeting*.

Case 2

In the case of "Concession Agreement on Operation of Such-and-Such Olympics Venue", X Swimming Co., Ltd.(the Claimant) and Y Science and Trade Co., Ltd. (the Respondent) entered into a *Concession Contract on Operation of Such-and-Such Venue (III)*, specifying that the Claimant will grant the concession to the Respondent for exclusively producing and selling the "Electrolyzed Water System of Such Venue" and also specifying the calculation and payment of concession expenses. However, the Claimant submitted to CIETAC for arbitration of the Respondent's failure to pay the concession expenses during the contract performance.

The Claimant of this case has clear claims and the case facts are relatively clear, so it should be a simple case. However, the parties of this case failed to provide any evidence for the filing of the contract concerned. Trademark license contracts, patent exploitation license contracts and franchise contracts shall be submitted to the relevant authority for filing in accordance with Article 40 of the *Trademark Law of the People's Republic of China*, Article 14 of the *Implementing Rules for the Patent Law of the People's Republic of China* and Article 8 of the *Regulations on the Administration of Commercial Franchises*. Therefore, the arbitral tribunal devoted relatively great efforts to ascertain the nature and effect of the *Concession Contract* concerned, so as to confirm whether the contract remains in force. Out of consideration of the stability

of contracts, though Article 52(5) of the *Contract Law of the People's Republic China* (the Contract Law) reads that "Contracts violating the mandatory provisions of laws and administrative regulations shall be null and void", Article 14 of the *Interpretation II of the Supreme People's Court of Several Issues Concerning the Application of the Contract Law of the People's Republic of China* specifies that "The term 'mandatory provisions' set forth in Article 52(5) of the *Contract Law* refers to the mandatory provisions on validity" . Besides, the *Guiding Opinions on Several Issues Concerning the Trial of Cases of Disputes over Civil and Commercial Contracts in the Current Situations* released by the SPC on 7 July, 2009, stipulate that "The people's courts shall distinguish the mandatory provisions on validity from those on administration in accordance with the provisions. In case any mandatory provisions on validity are violated, the people's courts shall hold the contract invalid; in case any mandatory provisions on administration are violated, the people's courts shall recognize its validity according to specific situations." Therefore, after considering comprehensive factors, the arbitral tribunal thinks that "the said recordation shall center on the administration and aim at regulating the behaviors of participants in the market activities, but without denying the transaction results. Violation of the provisions will not necessarily cause the impairment of the State interest or public interest. Moreover, relevant laws and administrative regulations failed to specify that violation of the provisions will make the contracts invalid." The arbitral tribunal held that the contract involved in this case is valid on the ground of "considering the principles of encouraging the transactions and observing the contracts and the filing of contract falls out of the scope of dispute hereof". In fact, this dispute may be avoidable if the parties gain a clear understanding of the nature of contract and comply with relevant laws and regulations in devising and performing the Contract.

Case 3

The case of "Framework Contract on the Construction with Funds" also involves the dispute on the validity of contract. In this case, a Chinese company (the Claimant), a US Company Y (the First Respondent) and a Chinese Company Z (the Second Respondent) signed the *Framework Contract on General Contracting with Funds of the Construction of Plaza B in Country A* in 2008. The Second Respondent shall assume joint and several guarantee liabilities for the debt borne by the First Respondent, and three parties thus entered into the *Guarantee Contract*. After accepting the dispute case, the arbitral tribunal of CIETAC ascertains that the Second Respondent, as a domestic legal person registered in accordance with the laws of China, provides the guarantee for a corporation registered at abroad, which actually falls within the scope of external guarantee. However, pursuant to the *Regulations of the People's Republic of China on Foreign Exchange Control*, providing of external guaranty must be reported to relevant foreign exchange control organs for approval. Therefore, the execution of the contract involved herein must be registered with relevant foreign exchange control organ. In this case, the Second Respondent failed to report its external guarantee for approval and registration, which violates the laws, administrative regulations and mandatory provisions of validity as stated by the judicial interpretation, so the arbitral tribunal held that the contract involved herein is invalid.

Case 4

In the case involving "Rail Transit Elevator Purchase and Sale Contract", X Elevator Co., Ltd. (the Claimant) and Metro Line Y Investment Co., Ltd.(the Respondent) signed the *Contract on Escalators for Line Z Project*, specifying that the Respondent

will provide the Claimant with escalators. During the contract performance, the Respondent asked the Claimant to pay the annual inspection fee of escalators during the warranty period, but the Claimant disagreed to do so and have the fee deducted from the construction cost receivable. The contract reached by and between both parties did not specify the bearing of annual inspection fee, on which both parties had dispute.

The Claimant claimed that all the contracts it signed with the Respondent on the escalator for Line Z Project had never specified whether the annual inspection fee of escalators during the warranty period (i.e., defect notification period) would be borne by the Claimant. However, the Respondent argued that provisions therein on price, equipment and services rendered by the Claimant, defect notification period, etc. could be deemed that the Claimant had agreed on the payment of annual inspection fee during the warranty period.

After investigation, the arbitral tribunal found that the elevator and escalator contracts and supplementary contracts thereto indeed contained no sentence of "The annual inspection fee during the warranty period shall be borne by the Claimant". The arbitral tribunal thus gave comprehensive consideration of evidence presented by both parties. First of all, the arbitral tribunal held that the "scope of contracting" as stated in the *Contract Agreement* had specified that the Claimant was responsible for rendering such services as maintenance, repairing and defect correction during the defect notification period. Secondly, the Contract has clearly specified that the Claimant should render the service of repairing the facilities, including elevators, during the defect notification period. Finally, the specification of owner requirements set forth in the contractual documents stated that the equipment and services

provided by the Claimant included the payment for obtaining relevant governmental approval (including the certificate of safety inspection). Furthermore, the Special Contractual Terms and Conditions read that "the Claimant shall bear all costs, expenses and taxes generating from the rendering of services during the warranty period (i.e., defect notification period) and the performance of the subject matter herein." Therefore, in the absence of provisions on disputed matters in the master contract and series contracts, the arbitral tribunal ruled that the annual inspection fee generating from the warranty period should be borne by the Claimant.

The said four cases all involve the design of series contracts of PPP projects, and the dispute of Case 1 is highly typical among the PPP projects in practice. Because a PPP project always involves a wide scope and fields, a series of contracts will be executed after the signing of a master contract, or the supplementary contracts or amendments may be signed. Under this circumstance, inconsistency between clauses in these contracts or unclear provisions therein could easily give rise to the disputes. Secondly, three of the said cases involve the nature of contracts. Case 3 is fairly typical. The contracts involved therein specified in detail the project and provided a huge amount of guaranty for the master contract. However, such external guaranty was confirmed to be invalid due to its violation of the national mandatory provisions, delivering a heavy impact on the rights and obligations of the parties. For Case 4, both parties have signed the *Contract on Escalators for Line Z Project*, the *Supplementary Contract*, the *Owner Requirements* and many other contracts, but all of these contractual documents failed to specify the party who should bear the annual inspection fee of elevators during the warranty period, which makes both parties suspend the transaction due to the payment of inspection fee (about RMB80,000). Moreover, the

Claimant claimed that the "the annual inspection fee of elevators shall be borne by the Respondent according to the industry practice". The Claimant should have been exempted from paying the fee if the industry practice is described in words.

2. Disputes Arising out of Illegal Reporting of PPP Projects for Approval, Illegal Tendering and Other Illegal Behaviors of PPP Projects

Some large PPP projects such as those about construction of highway and infrastructure have to go through complex approval formalities. During the implementation of these projects, some factors, like irregular decision-making procedures of the government, inexperience and incapacity of the participants and poor preparation at the early stage and absence of information, could easily cause illegal reporting and tendering of the projects, as well as erroneous decision making and lengthy process, thereby triggering the legal risks and disputes over PPP projects.

Case 1

In the aforesaid case on "a concession agreement on BOT highway", the Respondent's delay in capital injection to Project X has something to do with the approval action of the government to a certain extent. In the case, Hong Kong A Construction Limited, the First Respondent, undertakes Highway X and Highway Y in the form of BOT, and states that they are of "mutual independence and constraint". The First Respondent responded that the government party split Project Y into two sections for reporting without notifying the First Respondent and spent about 6 months in reporting for approval, thereby making its investment of RMB120 million idle away on Project Y for half a year and causing a huge loss to the First Respondent. Meanwhile, the government party failed to obtain the certificate of construction

land use right for Project Y, directly causing the First Respondent's failure to meet the conditions for loan granting and obtain the bank loan. Due to insufficient fund, Project Y has to be suspended under the circumstances of completing 40% of the civil work and investing more than RMB500 million, thereby influencing the overall operation of the Group's fund and delaying the capital injection to the associated Project X. The First Respondent stressed many times that the "government party has been remiss in performance of its duties and obligations for due cooperation".

However, main point of dispute of this case is the First Respondent's delay in injecting the capital to Project X. The fact that the First Respondent's delay in the capital injection is clear, so the arbitral tribunal judged that the First Respondent failed to inject the initial registered capital as scheduled in accordance with the corresponding contract, and the First Respondent shall be deemed to have broken the contract.

Case 2

In the case over "Cooperation of Hebei BK Highway Co., Ltd.", BK Co., Ltd. (the Claimant), as the builder, signed the *Contract on Incorporating a Chinese-Foreign Cooperative Joint Venture Named Hebei BK Highway Co., Ltd. between BK Highway Co., Ltd. and BK Company* with BK Highway Development Co., Ltd. (the Respondent), specifying that both parties shall cooperate in building, operating, managing and maintaining a certain segment of Some Project of Such-and-Such Highway. The total investment amounts up to RMB230 million.

In performing the contract, the Claimant established nine subsidiaries and reached an agreement with the Respondent to divide the highway, the section involved in

the case, into nine segments for reporting, in order to avoid the approval by the NDRC, the Ministry of Commerce and other departments. However, the State Council rigorously investigated the illegal behaviors of reporting by segment for approval later and criticized the wrongful practice of breaking down a large project into smaller ones for approval. The project of this case was forcedly suspended due to illegal reporting. Both parties accordingly had a great many disputes over the capital contribution, handover of the completed work, interpretation of relevant contracts and other matters.

Case 3

In the case of "Subcontracting and Construction Contract of Sufficient and Comprehensive Resource-Oriented Utilization of Residues Project", X Co., Ltd. (the Claimant) and Anhui Y Co., Ltd. (the Respondent) entered into an agreement, whereby the Claimant agreed upon the construction of sufficient and comprehensive resource-oriented utilization of Z residues of the Respondent. The contract price aggregated up to RMB480 million. However, the Claimant was actually ineligible for and incapable of completing the contracting project as a whole. It was deemed to be disqualified for contracting the project by the local construction and administration organ, and ordered to cease the illegal contracting. The Respondent was always aware of the Claimant's disqualification for construction. After the project was terminated, the Claimant went to an arbitration and asked to arbitrate the Respondent to pay the expenses of RMB30 million, including costs of prefabricated houses, office building and dormitory building.

The arbitral tribunal held that X Co., Ltd. did not meet the mandatory provisions

set forth in the Construction Law of the People's Republic of China, i.e., "The unit undertaking a contract for a construction project shall have the legal certificate of qualification and undertake the projects within the scope specified for the qualification grade certificate it holds." Therefore, the contract involved herein was invalid. Nevertheless, because the Claimant contracted the project without due qualification and the Respondent was aware of the Claimant's disqualification, under this circumstances, both parties shall bear the liabilities of contracting fault for the invalidity of the contract, and also the losses so incurred.

The said three cases all incurred illegal tendering and reporting for approval. For PPP projects, credit deficiency, wrong decision, redundant and complicated approval formalities, illegal tendering of the government parties, etc. are common risky factors, which could probably cause the damage to normal construction and operation of the PPP projects, and even cause the termination and failure of the projects. This is a reminder to all of the participants of PPP projects that scrupulous attention shall be paid to the compliance of the entire process of the projects. That is to say, both public sector and private sector shall conduct thorough market survey and market forecast and gain a clear understanding of laws, regulations and policies, so as to create the good investment and financing environment and stable political environment.

3. Disputes Arising out of Unclear Provisions for Establishment, Reporting for Approval, Acceptance Testing and Other Steps of PPP Projects

As stressed above, clear provision shall be specified for establishment, approval, acceptance testing and other key steps of PPP projects due to their particular characteristics. Clear provisions can create stable cooperation environment for and

ensure smooth fulfillment of PPP projects,

Case 1

In the case over "Gold Mine Project Contracting Contract", both parties of the project disputed unclear provisions on delayed completion and standards for acceptance testing.

The Claimant, also the contractor, and the Respondent as the employer signed the *Contract on Installation and Commissioning of Civil Work, Facilities and Process Pipes of Crushing Screening Station of XXX Gold Mine*, involving the construction cost of more than RMB100 million, on 20 June, 2008. But the project was delayed on account of the Respondent, and both parties thus agreed on a new construction period by signing a supplementary agreement. The Claimant completed all the construction work as scheduled on 18 August, 2009 and deemed the completion of construction. However, the Respondent refused to carry out the acceptance testing for various reasons and delayed in the settlement upon completion. The Claimant thus filed arbitration to CIETAC and claimed that the Respondent should pay the construction cost and assume the liabilities for breach. However, the Respondent alleged that the project completion was delayed because the Claimant refused to provide the Application Report on Acceptance testing upon Completion, four sets of completion drawings as stipulated in the contract and other materials for completion. Moreover, the Claimant burned the Respondent's important equipment, refused to go through the procedures for supervision and inspection of special-purpose equipment, was incapable of providing sand gravel, machinery and other materials and committed other serious default behaviors. So the Respondent claimed that the project made by

the Claimant did not meet the "conditions for delivery after acceptance testing upon completion". Both parties conducted several rounds of debates on the completion and standards for acceptance testing and presented lots of evidence.

The project involved therein spans a wide range of construction and diverse types of work, and both parties have a considerable difference in the figures of settlement of construction cost. After giving consideration to the standards for acceptance testing set forth in the contract involved herein and the *Management Specification of Housing Construction Engineering Documentation of the Inner Mongolia Autonomous Region*, citing the clauses thereof and referring to the *Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Dispute over Contracts on Construction Engineering Projects*, the arbitral tribunal finally ascertained the date of completion and standards for acceptance testing, and ruled that "the arbitral tribunal does not uphold the Respondent's claims that the project was not completed and tested for acceptance testing yet on the ground that the project has been completed and the Respondent has it put into operation for more than 5 years".

Case 2

In the case involving "Procurement Contract on Trunk Canal of Taohe River Water Diversion and Supply Project (Phase I)", Joint Z (the Buyer) consisting of X Heavy Machinery Group Co., Ltd. (the Claimant), France XX Company (the Seller), Y Water Conservancy and Hydropower Co. Ltd. (the First Respondent) and Italy YY Company (the Second Respondent) jointly entered into the *Contract on Procurement of Trunk Canal and Tunnel TBM for A Certain Water Diversion and Supply Project (Phase I)*. Pursuant to the said contract, the Seller sold a large-sized complicated TBM

system to the Buyer. "Soundness of the quality and performance of such TBM system mainly depend on the availability rate, and this figure shall be no lower than 90%", as stipulated in the contract.

The Seller held that the availability rate of its TBM system was 92.99% upon its being delivered to the Buyer, which exceeded the agreed figure and satisfied the conditions for acceptance testing as stated in the contract. Therefore, the TBM system complied with the contractual provisions upon its delivery and the Seller has performed its obligation of goods supply. However, the Buyer held that the equipment provided by the Seller was found to have many problems after being put into operation despite that its availability rate met the requirements, which had a strong impact on the tunnel boring. So the Buyer did not sign the Certificate of Final Acceptance testing or make the residual goods payment. The Seller thus went to the arbitration.

Pursuant to the contractual provisions, the arbitral tribunal held that "whether the evaluation indicator used for the boring meets the contractual provisions is the only and one standard to judge if the equipment delivered by the Claimant comes up to the quality standards". Therefore, the arbitral tribunal cannot uphold the Respondent's claim that the equipment involved herein suffers the quality deficiency.

For Case 1 above, the dispute is attributed to the participant's unclear provisions of two key links of the project, i.e., completion and acceptance testing. Such legal dispute may be avoided if both parties can clearly specify the standards for completion and acceptance testing, implementation party and aftermaths in the contract. For Case 2, the Claimant advisably specified the standards for goods

acceptance testing and delivery in advance in a very precise way, specifying that "The only and one standard for inspecting the quality and performance of the TBM system is the availability rate, and this figure shall be no lower than 90%". With such clear provisions in the contract, the arbitral tribunal can hold that the Seller has performed its obligation of goods delivery, though the Buyer claimed that the goods were of poor quality after the delivery and dragged down the construction.

4. Disputes Arising out of Unclear or Extremely Complicated Provisions for Capital Contribution and Ownership during the Construction and Operation of PPP Projects

Through the observation of the CIETAC cases, we can find that some disputes arise from key issues, e.g., facility construction, capital contribution and ownership of PPP projects, apart from illegal and noncompliant behaviors of the participants. In view of balancing the benefits, introducing additional provisions afterwards or for other reasons, participants leave a blank for these key issues or fail to give clear provisions, or devise extremely complicated clauses for the sake of distributing the high yield reasonably and realizing fair setting of rights, which may give rise to disputes in practice.

In the case over "Cooperation in the Construction of Highway", X Roadway Development Co., Ltd. (the Claimant) and Y Co., Ltd. (the Respondent) signed the *Contract on Cooperative Operation of XX Highway Co., Ltd.* and the supplementary contract, specifying a roadway development joint venture called "Z Highway Co., Ltd." will be established in XX. For the joint venture, both parties agreed that "the Claimant subscribes the registered capital of RMB45.585 million, accounting for

44.7% of the total registered capital. The Respondent subscribes the registered capital of RMB56.395 million, occupying 55.3% of the total registered capital. The difference between the total investment and the registered capital will be injected to Company Z in the form of interest-free loan. The Claimant provides the loan totaling up to RMB68.378 million, and the Respondent offers RMB84.592 million". Both the Claimant and the Respondent performed their due obligation of capital contribution and offer of shareholder loans afterwards. On the shareholder loan, Company Z entered into the loan agreement with the Claimant and the Respondent, respectively.

In addition, both parties set up complicated provisions for the repayment of loans and distribution of profits:

In allocating the loan resources (including repayment of loan, distribution of profits or allocation of loan in other forms) to the investors of both parties each time, Company Z must comply with the following principles: Article 42(1) of the contract obviously specifies the three ways of allocating the loan resources to the investors: i.e., ① repaying the loan; ② distributing the profits; and ③ allocating the loan resources in other forms.

Article 42(2) reads that: "i) Before Party B (i.e., the Respondent of the Case, noted by the arbitral tribunal) receives the amount accumulating up to RMB124.2 million from the joint venture, 90% of the distributable amount shall be owned by Party B and 10% shall be possessed by Party A (i.e., the Claimant of the Case, noted by the arbitral tribunal, the same below). During the period commencing from the date when Party B receives an accumulative amount of RMB124.2 million and ending

on the date when Party B receives an accumulative amount of RMB100.37 million from the joint venture, 50% of the distributable amount shall be owned by Party A and Party B, respectively. After then, the distributable amount must be distributed in proportion to the registered capital contributed by each party." Besides, Article 42(2) (ii) reads that: "a) For the amount of repayment of loan that should be received by each party each time, the distributable amount refers to the amount that is distributed to each party in the form of repaying the loan through the Board of Directors. b) For the profit that should be distributed to Party B in each fiscal year, the distributable amount during the 5 years commencing from the first profit-making year means the operating profit after deduction of (1) various funds reserved by the joint venture in accordance with the laws; (2) various compensations payable, liquidated damages, late fee, penalty and fine; and (3) makeup for the loss of the previous years (collectively called the amount deductible). In the coming 5 years thereafter, the distributable amount means the amount that the operating profits from which 9% of the operating profits and other amount deductible are deducted. c) For the profits that should be distributed to Party A in each fiscal year, the distributable amount during the first 10 fiscal years (including the first profit-making year) commencing from the first profit-making year means the amount of the after-tax profit from which the amounts deductible are deducted."

After Company Z repaid the Respondent's shareholder loans in full amount, both parties disputed on the distribution of the amount of the Respondent to Company Z. The Respondent stated that Company Z should distribute the aggregate of after-tax profits and the amount of depreciation according to the proportion as stated in 42(2)(i) of the Contract and then make classification to facilitate proper adjustment,

and distributing the profits to the Respondent shall be deemed as the distribution of profit to the Respondent in the form of debt to the Respondent, i.e., obtaining the distribution of amount of depreciation by Company Z after obtaining the distribution of profits made by Company Z in the given proportion. However, the Claimant had different understanding of the article, stating that Article 42 specified the distributable amount after the repayment of loans and the distribution of profits on the whole. Therefore, the Respondent lost its capacity as the joint venture's creditor when repaying all of the loans, having no right to participate in the distribution of the amount obtained through the repayment of loans. When all of the loans have been paid off, the "distributable amount" would not include the amount of repayment of the loans thereof. Meanwhile, as soon as the Respondent paid off the loans, "50% of the distributable amount shall be owned by Party B" set forth in Article 42(2).i could be restrictively explained that 50% of the distributable profit was occupied by the Respondent. Also, both parties initiated multiple rounds of debates over many details of the articles of the *Contract*.

This complicated case involves a huge amount. After serious survey and analysis of the contracts involved herein and amendments thereto, as well as the approval documents of the Foreign Economic and Trade Department of XX Province for these contracts and amendments, the Loan Agreement signed by and between the Claimant and the Respondent and the joint venture, the Audit Report of the Project, the project proposal and the feasibility study report and many other documents involved herein, the arbitral tribunal held that the aforesaid articles had specified i) the principle of distributing the amount to both parties in different proportions at three different stages, and ii) the distributable amount of the repayment of loans

and the distribution of profit, other than the overall distribution of the amount. Meanwhile, after analyzing the definition of distributable amount and the calculation method, the arbitral tribunal ascertained that the Respondent had the right to obtain the distributable amount (excluding the net cash flow generating from the depreciation of fixed assets of the joint venture) of the distribution of profits by the proportion of 50% as agreed upon in the *Contract* at the second stage after the joint venture paid off the shareholder loans of the Respondent, but had no right to obtain the distribution of amount from the joint venture in the form of repaying the loans. Moreover, the arbitral tribunal did not adjudicate the situation that the joint venture repaid the shareholder loans of the Respondent through the amount of depreciation.

In this case, X Roadway Development Co., Ltd. and Y Co., Ltd. devised extremely complicated clauses for the distribution of profits, repayment of loans and other matters, and the complication of the Contract made both parties have different understanding of these clauses and trigger the unnecessary legal dispute during the performance, which could be avoided provided that both parties can design simple and clear clauses, or sort out these complicated clauses to guarantee consistent understanding of both parties.

V. Conclusion

The PPP mode has been extensively used in the fields of international infrastructure construction and public services. It was first introduced to China in the 1980s, thereby breeding a wide range of PPP projects in the fields of infrastructure and public utilities. After experiencing the stages of exploration and pilot, gradual promotion, adjustment and fluctuations, regulation and development, PPP projects

in China have tended towards the regular and benign development.

Indeed, the development of PPP projects is not all plain sailing due to their characteristics and for many reasons, and is exposed to many risks from deficiency of laws and regulations, unsound and unprofessional contractual terms and conditions. These deficiencies and risks have caught great attention and fierce debates in recent years. This Report attempts to sort out and sum up these deficiencies and risks from the perspective of commercial arbitration, so as to provide thoughts and reference for the resolution of legal disputes over PPP projects.

However, we also understand that summing up the problems is not enough, and a heap of tasks, e.g., accelerating the legislation of the PPP mode, accelerating the regulation and implementation of PPP projects and solving the arbitrability concern of disputes arising out of the PPP-related contracts, need to be completed.

Chapter 3 International Investment Arbitration Practice and Survey

I. Overview of International Investment and Resolution of International Investment Disputes

i. Overview of International Direct Investment

1. Figures of International Direct Investment

Global foreign direct investment (FDI) showed a downward trend in 2017. According to the *World Investment Report 2018* issued by the United Nations Conference on Trade and Development (UNCTAD), the cross-border investment across the globe was depressed in 2017, and the global FDI flows fell by 23% to USD1.43 trillion, which was caused mainly by a 22% decrease in the value of cross-border mergers and acquisitions. The *Report* also indicates that the global average return on foreign investment was at 6.7% in 2017, down from 8.1% in 2012. Apart from the decline in the global return on investment, the value of announced greenfield investment¹ also decreased by 14% in 2017 due to the decrease of significant mergers and acquisitions. According to the *Report*, the decline in the global return on investment may affect the longer-term prospects of cross-border investment².

1 It refers to an enterprise established by a multinational company and other investment subjects in a host country in accordance with laws of such host country and the ownership of all or part of assets thereof is in the possession of foreign investors.

2 Excerpt from the official website of UNCTAD: http://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf, the latest visit on 14 June, 2018.

The US remained as the world largest recipient of FDI in 2017, closely followed by Japan and China. However, outflows from China declined for the first time (down 36% to USD125 billion compared with that in 2016) in recent years. The *Report* states that China remained as the largest recipient and investor of FDI among developing countries. China moved up one place (compared with 2016) to rank 2nd only to the US, in attracting the global FDI in 2017³.

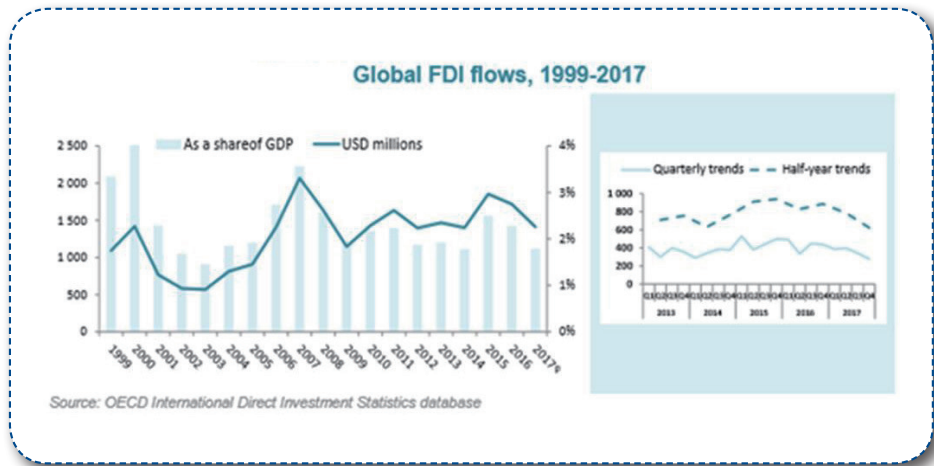
The Report states that projections for cross-border investment in 2018 show fragile growth. Global flows are forecast to grow about 5%, by up to 10%, but remain below the average over the past 10 years⁴.

According to the Organization for Economic Co-operation and Development (OECD)⁵, FDI dropped by 18% in 2017 as corporate mergers and acquisitions reduced. In the fourth quarter of 2017, FDI flows reached their lowest level since 2013 (USD280 billion).

3 Excerpt from the official website of UNCTAD: http://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf, the latest visit on 14 June, 2018.

4 Excerpt from the official website of UNCTAD: http://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf, the latest visit on 14 June, 2018.

5 Excerpt from the official website of OECD: FDI IN FIGURE, April 2018, <http://www.oecd.org/daf/inv/investment-policy/FDI-in-Figures-April-2018.pdf>, the latest visit on 14 June, 2018.



Figures above indicate that global FDI presented a downslide trend and is not expected to improve much in 2018. Generally, investment scale and investment environment supplement each other: a host country could probably adjust its investment policies and strategies amid a sharp decline in the investment scale, which may cause changes in the investment environment and give the long-term impact on foreign investment in turn. *Special Update on Investor-State Dispute Resolution: Facts and Figures of UNCTAD* cited in the following part indicate that the majority of international investment agreements (IIAs) invoked in 2017 date back to the 1990s. Therefore, the evolvement of global FDI and changes so incurred, and investment disputes between investors and host countries are worth great attention.

2. Figures of China's Direct Investment

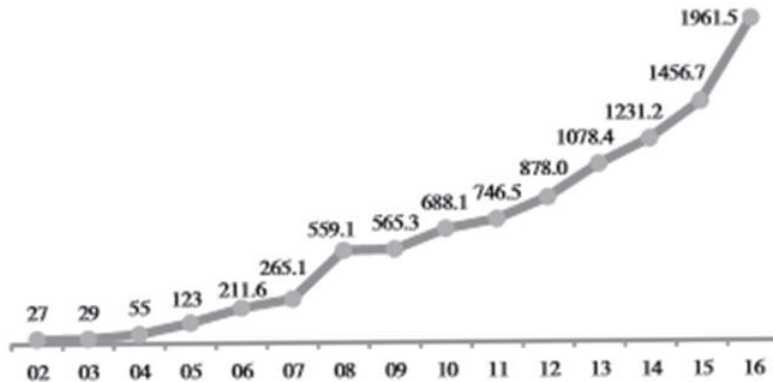
China keeps relatively large overseas investment scale despite that global FDI continues decline. According to the Ministry of Commerce (MOC), China's

domestic investors conducted direct investments amounting to USD120.08 billion in non-financial sectors of 6,236 enterprises in 174 countries and regions around the world. Chinese enterprises concluded a total of 341 mergers and acquisitions in 49 countries and regions throughout 2017, and these mergers and acquisitions involved 18 industries with the total transaction amount of USD96.2 billion, including direct investment of USD21.2 billion accounting for 22% of the total transaction amount, and overseas financing of USD75 billion accounting for the actual transaction amount of 78%⁶.

According to the *China's Foreign Investment Report* published by the National Development and Reform Commission (NDRC) in November 2017: China's foreign investment has maintained a swift growth since the Chinese governmental departments published the figures of foreign investment in 2003, the foreign investments in 2016 surged up to USD1,357.39 billion, and China climbed to the 6th place⁷ in 2016 from the 25th place in 2002 in the FDI stock.

6 Official website of MOC: <http://www.mofcom.gov.cn/article/i/jyj/m/201801/20180102701507.shtml>, the latest visit on 14 June, 2018.

7 Official website of NDRC: <http://www.ndrc.gov.cn/gzdt/201711/W020171130400470019984.pdf>, the latest visit on 15 June, 2018.



Source: Official website of NDRC

China's Direct Investment Flow, 2002 - 2016 (Unit: USD100 million)

By the end of 2016, Chinese domestic investors had established some 37,200 FDI enterprises investing a total of USD5 trillion in 190 countries (regions), covering more than 80% countries (regions). At present, China's foreign investments have covered 18 industries of national economic activities. In addition to leasing and commercial services, wholesale and retail, manufacturing, transportation, warehousing and postal service, financial sector, agriculture, forestry, fishery and husbandry, mining and other traditional industries, scientific research and technical service industry, information transmission and information technology services, education, medical and social public facilities also witnessed a rapid growth of investment, and the structure of foreign investment was thus optimized⁸.

⁸ Official website of NDRC: <http://www.ndrc.gov.cn/gzdt/201711/W020171130400470019984.pdf>, the latest visit on 15 June, 2018.

In the process that China becomes a big capital exporter, investment disputes between Chinese investors and host countries are of great concern of the Chinese government and enterprises.

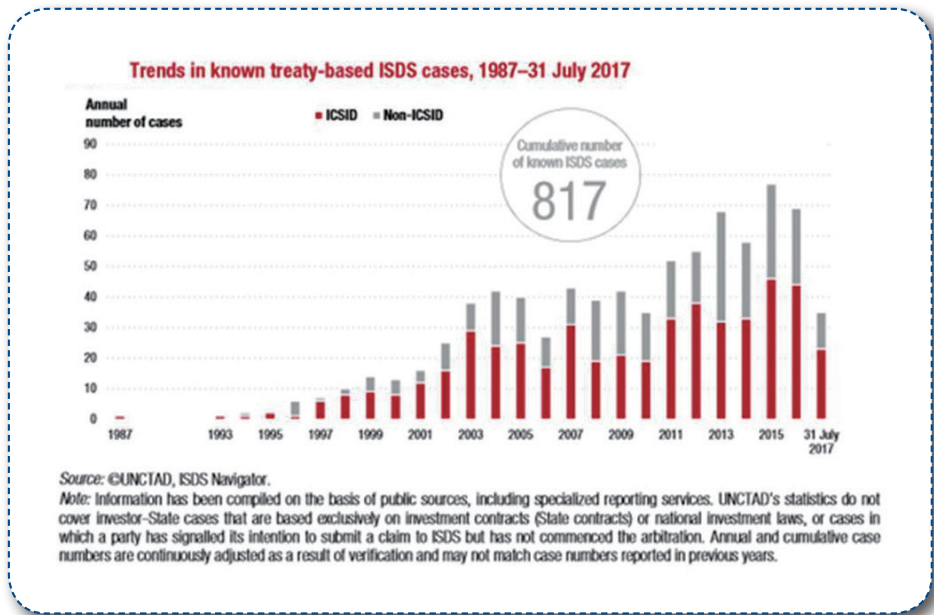
ii. Overview of Resolution of International Investment Disputes

1. Figures of Resolution of Investment Disputes of the United Nations in 2017

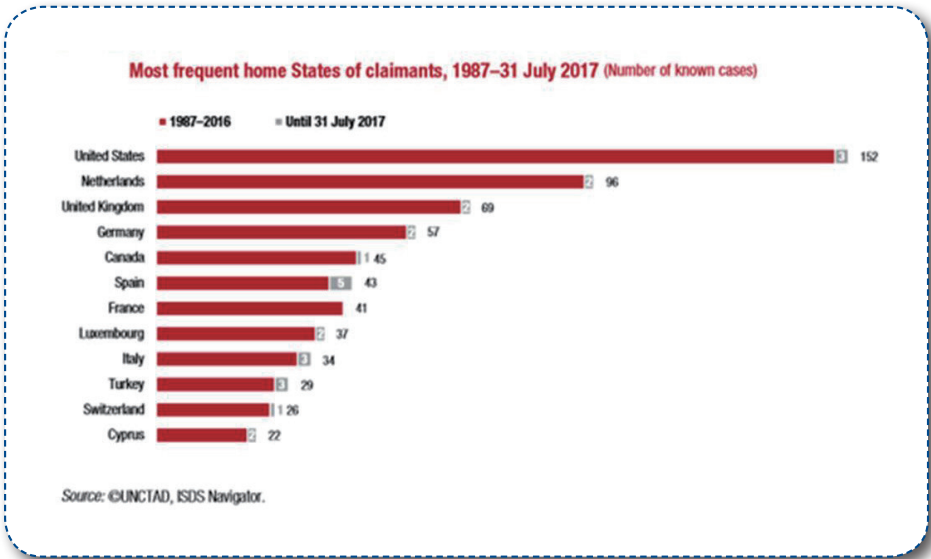
According to the *Special Update on Investor-State Dispute Resolution: Facts and Figures*⁹ published by UNCTAD in November 2017:

During the first 7 months of this year, investors initiated at least 35 treaty-based investor–State dispute resolution (ISDS) cases, bringing the total number of known cases to 817, and 114 countries have been respondents to one or more known ISDS claims. The figure below illustrates trends in known treaty-based ISDS cases from 1987 to 31 July, 2017. 2015 is the year with the highest number of cases filed:

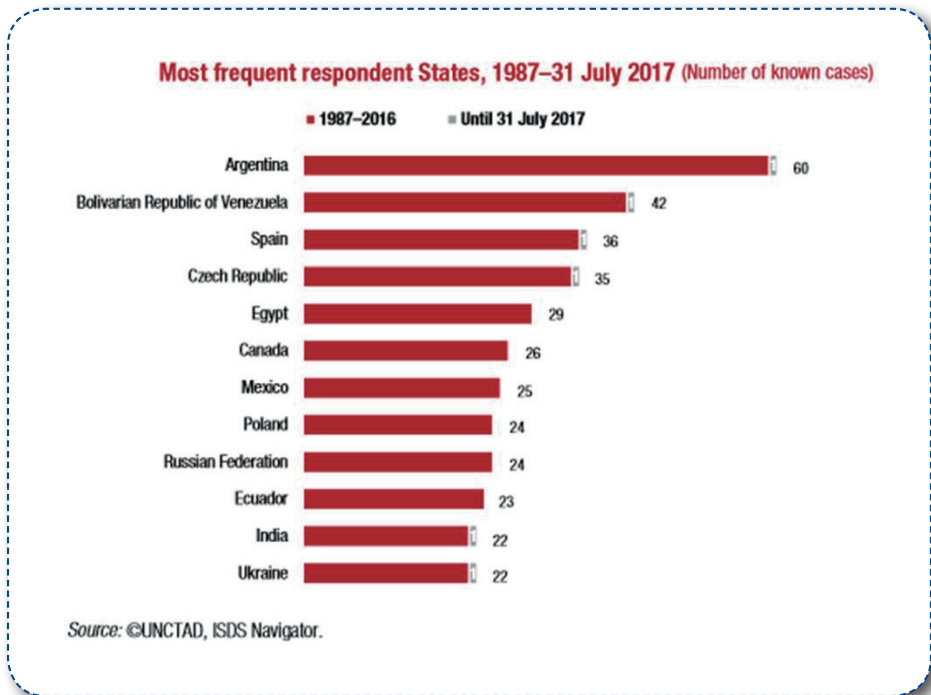
⁹ The following contents, figures and pictures are excerpted from the official website of UNCTAD:http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf, the latest visit on 14 June, 2018.



Developed-country investors brought about two thirds of the 35 known cases in 2017, of which five cases were initiated by investors from Spain, and investors from Italy, Turkey and the US claimed 3 cases each. Overall, the three most frequent home States of claimants were the US, the Netherlands and the UK.



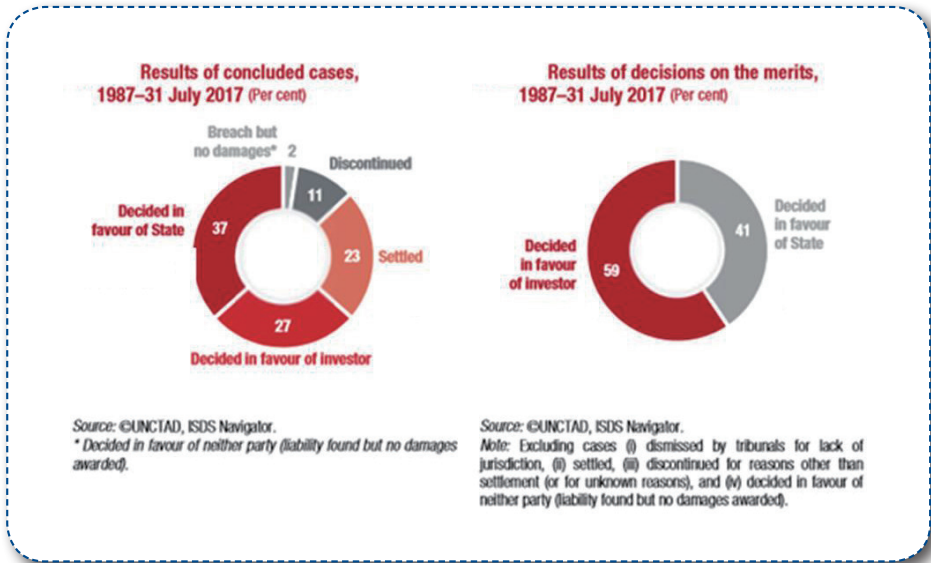
The new ISDS cases in 2017 involved 32 countries. 5 countries and economies, i.e., Bahrain, Benin, Iraq, Kuwait and Taiwan Province of China, faced their first known ISDS claims. With known cases in 2017, Algeria, Chile and Iraq were involved in two cases, respectively. Looking at the overall trend, the three most frequent respondent States were Argentina, Venezuela and Spain.



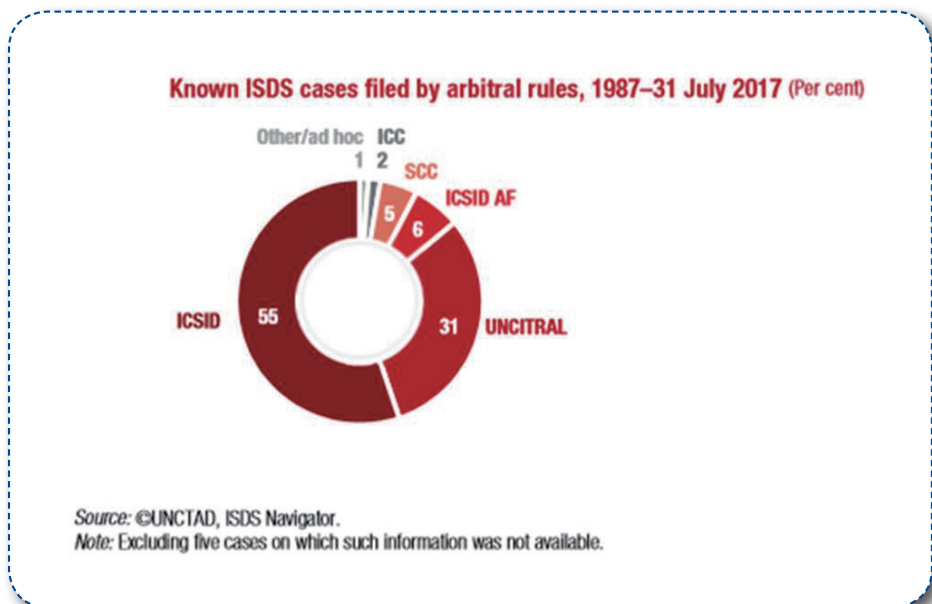
About 80% of investment arbitration in 2017 were brought under bilateral investment treaties (BITs), and the remaining 20% were based on treaties with investment provisions (TIPs). The *Energy Charter Treaty* (ECT) was the most frequently invoked IIAs in 2017 (with three cases).

As at 31 July, 2017, about 530 ISDS proceedings had been concluded. About one third of concluded cases were decided in favor of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about one quarter were decided in favor of the investor. A quarter of cases were settled. In the remaining proceedings, the cases were either discontinued or the tribunal found a treaty breach but did not award monetary compensation. Of the tried cases, about 60% were

decided in favor of the investor and 40% in favor of the State.



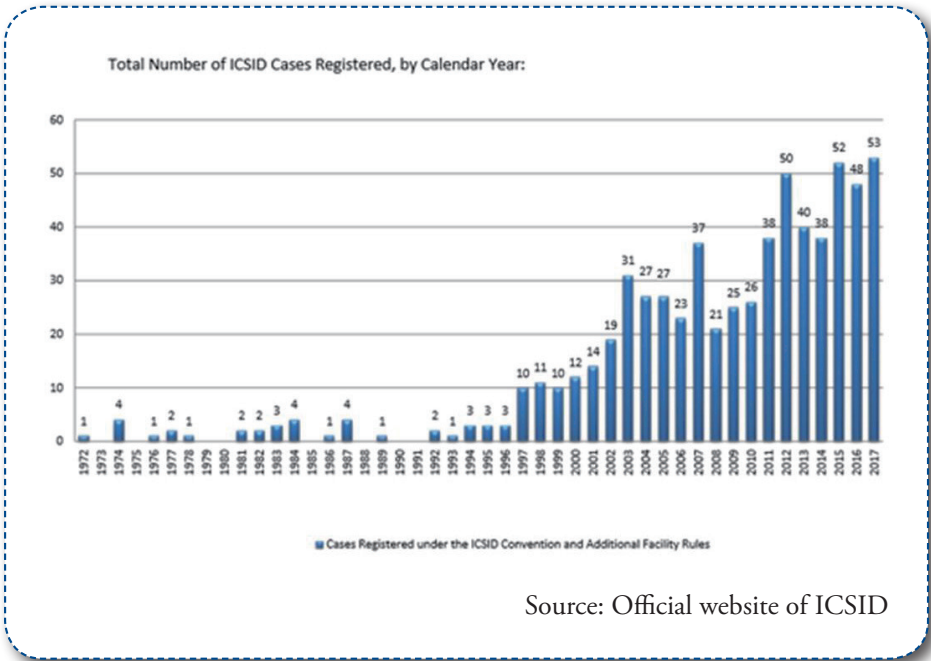
As at 31 July, 2017, 61% of all known cases were filed with the International Centre for Settlement of Investment Disputes (ICSID), either under the *ICSID Convention* or the *ICSID Additional Facility Rules*. The *Arbitration Rules of the United Nations Commission on International Trade Law* (UNCITRAL) were the second most used procedural basis, followed by the *Arbitration Rules of the Stockholm Chamber of Commerce* (SCC) *Arbitration Institute* (SCC).



2. Figures of Resolution of Investment Disputes of ICSID in 2017

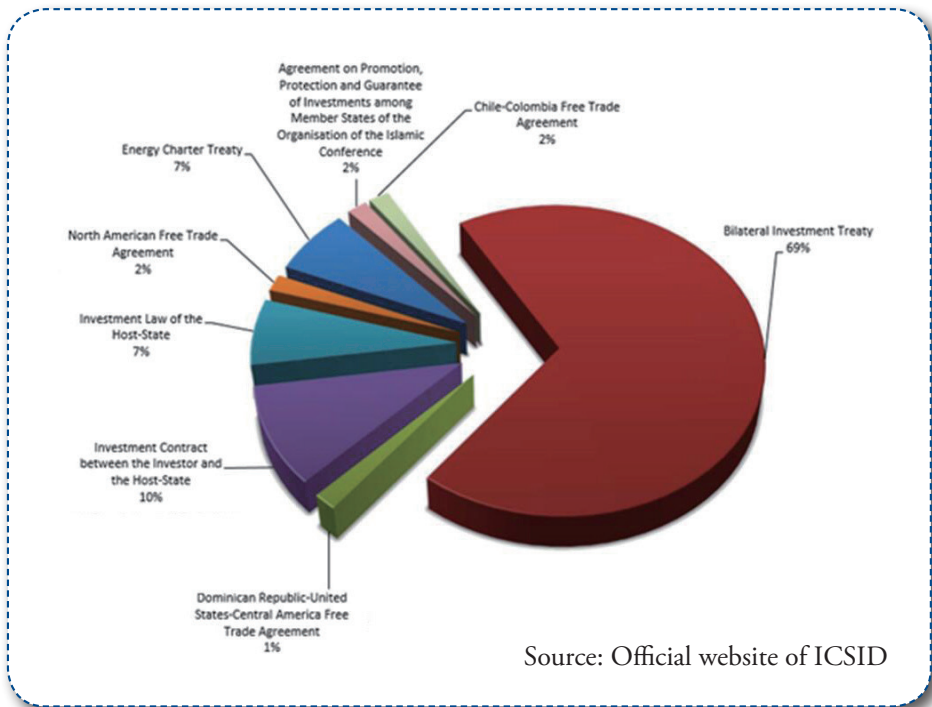
ICSID is an international investment arbitration institution funded by the World Bank Group. ICSID accepted a total of 53 cases involving the investment dispute in 2017. As at 31 December, 2017, ICSID had registered an accumulation of 650 cases¹⁰.

¹⁰ Excerpt from the official website of ICSID: [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf), the latest visit on 15 June, 2018.



Nearly 70% of the cases accepted by ICSID in 2017 derived from the BITs¹¹.

11 Excerpt from the official website of ICSID: [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf#search=State%2DState%20Dispute](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf#search=State%2DState%20Dispute), the latest visit on 20 June, 2018.

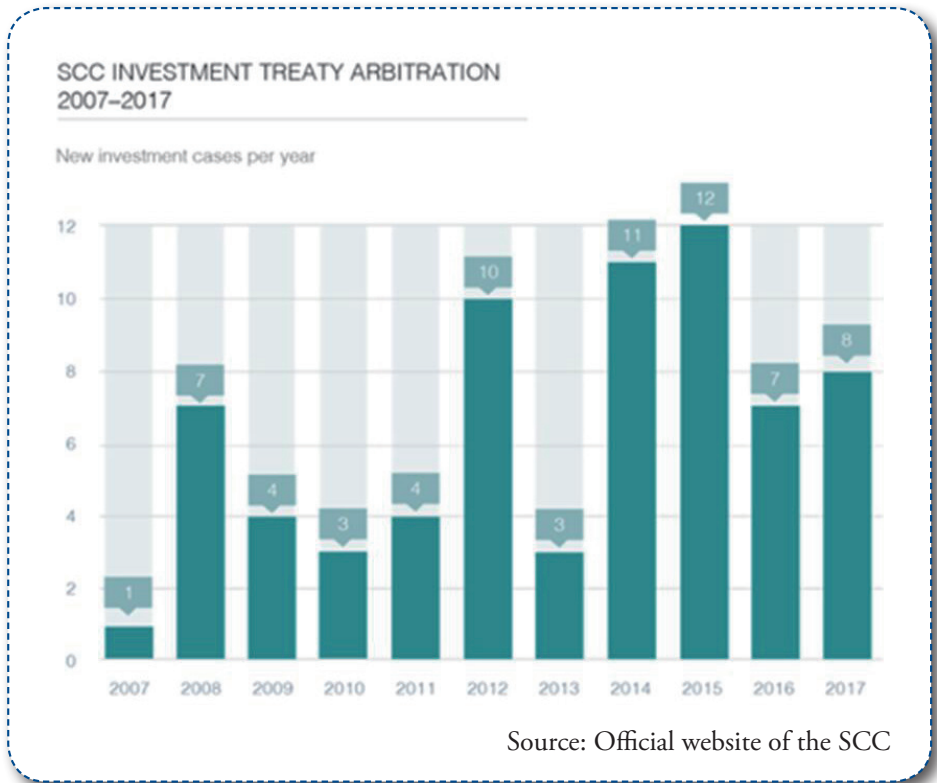


3. Figures of resolution of investment disputes of the SCC in 2017¹²

Established in 1917, the SCC has become the world's second largest institution for investment disputes. In at least 120 of the current BITs, Sweden or the SCC is cited as the forum for resolving disputes between investors and host countries. According to the statistics, the SCC has accepted 100 investment treaty disputes, of which 74% were administered under the *SCC Rules* from 1993 to 2017. Most of these investment disputes arose from the BITs and the *Energy Charter Treaty*. In 2017, the SCC accepted 8 cases involving the investment dispute, 75% of which were administered

¹² Excerpt from the official website of the SCC: <http://www.sccinstitute.com/statistics/investment-disputes-2017/>, the latest visit on 15 June, 2018.

under the *SCC Arbitration Rules*.





4. Figures of Resolution of Investment Disputes of the ICC in 2017

Formally founded in 1920, the ICC serves as the third-party consulting institution of the United Nations and other inter-government organizations and provides global enterprises and associations with commercial services, including the resolution of disputes. The ICC set up the International Court of Arbitration in 1923, and amended the arbitration rules in 2012, specifying the country-related arbitration rules. At present, about 10% of the ICC arbitration involves a state or a state entity, and the cases involving the countries Sub-Saharan Africa, Central and West Asia,

and Central and Eastern Europe account for 80% of the total arbitration of the ICC. About 18% of the BITs allow for the possibility of using the *ICC Rules of Arbitration*¹³.

5. Figures of Cases of Investment Disputes involving China in 2017

Chinese investors have started to lodge the investment disputes with host countries to ICSID since 2007, to seek after the legal remedy. There are 6 cases of investment arbitration claimed by the Chinese investors so far. The typical one is the case of Sanum Investments Limited¹⁴ (a Macao-based company) v. the Lao People's Democratic Republic in 2017 in accordance with the *Agreement Concerning the Encouragement and Reciprocal Protection of Investments entered into by and between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic* in 1993. Sanum alleged that the Lao government revoked the business license and imposed unfair and discriminatory taxes on its hotel, gaming and hospitality complex in Laos and thus commenced the arbitration proceedings. The case is being tried.

¹³ Excerpt from the ICC Commission Report: <https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities.pdf>, the latest visit on 17 June, 2018.

¹⁴ Laos Holdings N.V., funded by the American John Baldwin funded and established in the Netherlands Antilles, incorporated a subsidiary named Sanum Investments Ltd. in Macao in accordance with the laws of Macao Special Administrative Region.

Case No.	Claimant(s)	Respondent(s)	Status
ADHOC/17/1	Sanum Investments Limited	Lao People's Democratic Republic	Pending
ARB/15/41	Standard Chartered Bank (Hong Kong) Limited	United Republic of Tanzania	Pending
ARB/14/30	Beijing Urban Construction Group Co. Ltd.	Republic of Yemen	Pending
ARB/12/29	Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited	Kingdom of Belgium	Concluded
ARB/10/20	Standard Chartered Bank (Hong Kong) Limited	Tanzania Electric Supply Company Limited	Pending
ARB/07/6	Tza Yap Shum	Republic of Peru	Concluded

Statistics of Investment Arbitration Initiated by Chinese Claimants to ICSID¹⁵

II. Legal Framework of Protection of International Investments

i. Overview

At present, investment protection rules for foreign investors mainly consist of: international investment protection conventions, regional investment protection treaties or investment protection clause in the multilateral trading treaties, bilateral investment protection treaties between countries or investment protection provisions in the BITs, investment protection laws of host countries for foreign investors,

¹⁵ International Centre for Settlement of Investment Disputes, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>, 15 April, 2018.

investment agreements between investors and host countries, etc.

Of the aforesaid rules, international conventions, multilateral treaties and bilateral investment protection treaties are the most important investment protection rules. According to UNCTAD, there are a total of 2,963 bilateral investment protection treaties around the globe, 2,369 of them are in force, 380 of them contain the investment provisions and 310 ones are in force¹⁶.

Of the said conventions, treaties or agreements, the following types of investment protection provisions (IPPs) are relatively common and are major bases for the claimants to claim the protection of their rights:

(1) Protection from Expropriation specifies the conditions for host countries to legally expropriate assets of foreign investors.

(2) Fair and Equitable Treatment (FET). Each BIT specifies different FET clause, of which the most investment disputes occurred.

(3) National Treatment. Treatment given by host countries to foreign investors and their investments are no less than that granted to local investors and their investments. Foreign investors thus enjoy competitive opportunities equivalent to those for local citizens and enterprises. Therefore, host countries could neither give differential treatment nor take a position unfavorable to foreign investors when formulating laws and policies.

(4) Most-Favored-Nation Treatment (MFN). Treatment given by host countries to

¹⁶ Official website of UNCTAD: <http://investmentpolicyhub.unctad.org/IIA>, the latest visit on 14 June, 2018.

investors of contracting states and their investments is not less than that granted to investors of other countries and their investments, so that treatment enjoyed by investors of contracting states equals to that to investors of other countries.

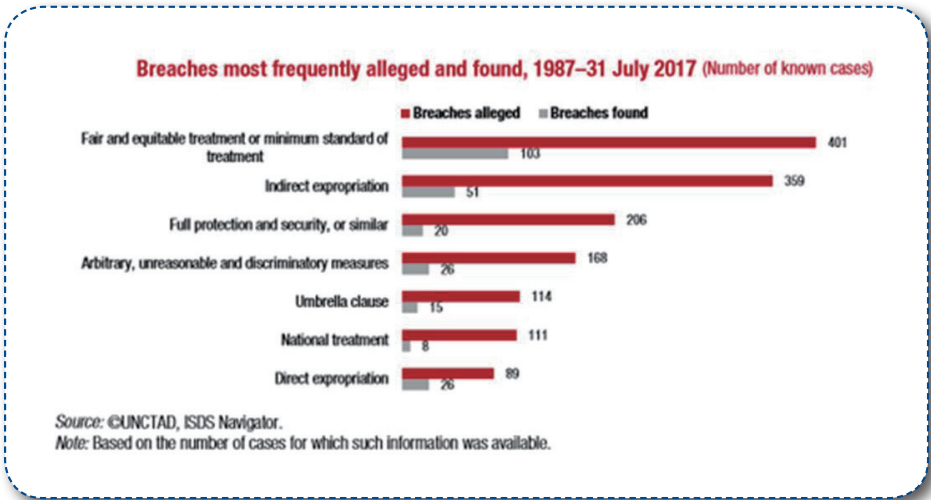
(5) Freedom to Transfer Means and Funds. Investments and returns thereon are allowed for entering and leaving the country freely.

(6) Full Protection and Security. Host countries must provide the security protection service.

(7) Umbrella clause. It refers to the clause of commitments to investors in the investment treaty that contracting parties should abide by.

According to the *Report* of UNCTA¹⁷, claimants alleged breaches of FET in about 80% of ISDS cases for which such information was available, followed by indirect expropriation with 75% as at 31 July, 2017. Those are also the common grounds for the arbitration tribunal to make judgment in favor of investors in investment arbitration.

¹⁷ The following contents, figures and pictures are excerpted from the official website of UNCTAD:http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf, the latest visit on 14 June, 2018.



Besides, the *Mauritius Convention on Transparency*, as a fresh practice, came into force on 18 , 2017, which involves the contracting states of Mauritius, Canada and Switzerland.

ii. Multilateral Investment Conventions

At present, major international investment conventions include the *Convention on the Resolution of Investment Disputes between States and Nationals of Other States (Washington Convention)*, the *Energy Charter Treaty* and the *Convention Establishing the Multilateral Investment Guarantee Agency (Seoul Convention)*.

1. *Washington Convention*

Subject to the *Washington Convention*, ICSID, the world's first arbitration institution that is devoted to the settlement of international investment disputes and provides the arbitration and conciliation services for investment disputes arising between

contracting states and investors of other countries was established. *Washington Convention* now has 154 contracting states and 8 signatory states (162 in total). China is also a contracting state with the reservation clause therein, i.e., the Chinese Government would only consider submitting to the jurisdiction of ICSID disputes over compensation from expropriation and nationalization.

The investment dispute resolution mechanism of ICSID is pertinent to legal disputes arising directly out of investments, and is applicable to the ICSID Rules, and the parties concerned cannot agree to follow other arbitration rules. Where the parties concerned fail to specify the applicable laws, laws of the host country (including conflict rules) and the applicable international laws shall be applied. After an arbitral award rendered by ICSID comes into force, the prevailing investor may apply for compulsory enforcement against the losing country in any member state.

ICSID released the *ICSID Additional Facility Rules* in 1978, specifying that the Secretariat of ICSID enjoys the authorization to administer certain categories of proceedings between States and foreign nationals in accordance with the Rules, these proceedings include: (1) Conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the ICSID because either the state party to the dispute or the state whose national is a party to the dispute is not a contracting state of the *Washington Convention*; (2) Conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the ICSID because they do not arise directly out of an investment, provided that either the state party to the dispute or the state whose national is a party to the dispute is a contracting state of the *Washington Convention*; and (3) Fact-finding proceedings.

The first case of investment dispute against the Chinese government accepted by ICSID is Ekran Berhad v. the People's Republic of China concerning the arts and culture facilities (ARB/11/15) in 2011, and the MOC led representatives of Chinese government to respond. The parties filed a request for the discontinuance of the proceeding in May 2013¹⁸.

On 4 November, 2014, Ansung Housing Co., Ltd., a Korean-incorporated company, filed a request against China to ICSID regarding the real estate development project, and the MOC led representatives of Chinese government to respond (Ansung Housing Co., Ltd. v. the People's Republic of China (ICSID Case No. ARB/14/25)). In an award dated 9 March, 2017, the arbitration tribunal dismissed the request for lack of temporal jurisdiction.

The latest proceeding against the Chinese government was claimed by Hela Schwarz GmbH (ARB/17/19) under the PRC-Germany BIT on 21 June, 2017, and the case is pending.

2. *Energy Charter Treaty*

The *Energy Charter Treaty* (ECT) is a multilateral investment treaty in the energy industry. 53 countries and regions in the Eurasian Continent have signed the ECT.

China became an observer to the energy charter conference in 2001. The ECT

18 A Chinese subsidiary of Ekran Berhad, a Malaysia-based company, entered into the land leasing agreement with Hainan Provincial People's Government, with the leasing term ranging from 1993 to 2063. In 2004, Hainan Provincial People's Government took back the right to use the land of which the construction thereon was not yet started in 2 years in accordance with the *Real Estate Administration Law of the People's Republic of China and the Land Administration Rules of Hainan Province*. Both parties had a dispute about the jurisdiction: Is the jurisdiction of ICSID only pertinent to the amount of compensation or taken as the government's expropriation? Official website of ICSID: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/11/15>, the latest visit on 17 June, 2018.

provides multiple channels for resolution of investment disputes between contracting states and investors, including going to arbitration in accordance with the *ICSID Rules*, the *ICSID Additional Facility Rules*, the *UNCITRAL Rules of Ad hoc Arbitration* and the *SCC Rules*.

3. *Seoul Convention*

Subject to the Seoul Convention, the Multilateral Investment Guarantee Agency (MIGA) was established for the purpose of guaranteeing the investments in developing countries against a loss resulting from expropriation, government default, currency exchange and transfer risk, war and civil disturbance risk and other political risks.

iii. Free Trade Agreements

North American Free Trade Agreement (NAFTA), *Central American Free Trade Agreement*, *ASEAN-Australia-New Zealand Free Trade Agreement*, *ASEAN Comprehensive Investment Agreement*, *Japan-Mexico FTA*, *McGill Preferential Trade Agreements*, *Organization of American States (OAS) BITs*, *Organization of American States (OAS) FTAs*, etc. all bear the clause of investor protection.

China has signed the *Asia-Pacific Trade Agreement*¹⁹, a preferential trade agreement, and 16 bilateral or multilateral free trade agreements²⁰.

19 Previously known as the *Amendment to the First Agreement on Trade Negotiations Among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement)*.

20 According to the official website of MOC, FTZ agreements under negotiation include the Regional Comprehensive Economic Partnership (RCEP), Phase II negotiation on China - GCC, China and Japan and South Korea, China-Sri Lanka, China-Israel, China-Norway, China-Pakistan FTA, negotiations on upgrading the China-Singapore FTA, China-New Zealand, China-Mauritius and China-Moldova.

FTAs under research include: joint research on upgrading the China-Colombia, China -Fiji, China-Nepal,

The *Asia-Pacific Trade Agreement* was jointly formulated by China, Bangladesh, India, Laos, South Korea and Sri Lanka pursuant to decisions contained in the *Kabul Declaration* of the Council of Ministers on Asian Economic Co-operation and the *New Delhi Declaration* adopted at the 31st session of the Economic and Social Commission for Asia and the Pacific. The *Agreement* specifies the principles of overall reciprocity and mutuality of advantages, transparency, National Treatment and MFN, and makes arrangements for negotiations about tariffs, border charges, fees and non-tariff measures and special concessions to the least developed participating states²¹.

16 bilateral or multilateral free trade agreements are²²: *China-Maldives FTA, China-Georgia FTA, China-Australia FTA, China-South Korea FTA, China-Switzerland FTA, China-Iceland FTA, China - Costa Rica FTA, China-Peru FTA, China-Singapore FTA, China-New Zealand FTA, China-Chile FTA, China-Pakistan FTA and relevant agreement, China-ASEAN Framework Agreement on Comprehensive Economic Co-operation and relevant agreements, Closer Economic Partnership Arrangement of Mainland and Hong Kong and Macao, China-ASEAN Free Trade Area(10+1), Amendment to Agreement on Trade in Goods of the Framework Agreement on China-ASEAN Comprehensive Economic Co-operation, the Second Protocol to Agreement on Trade in Goods of the Framework Agreement on China-ASEAN Comprehensive Economic Co-operation and a series of agreements, upgrading the China-Chile FTA (e.g., Supplementary Agreement to China-Chile FTA on Service Trade and Supplementary Agreement to China-Chile FTA on Investment).*

China-Papua New Guinea, China-Canada, China-Bangladesh, China-Panama, China-Palestine and China-Peru FTAs, joint research on upgrading the China-Switzerland FTA.

21 Text of the Asia-Pacific Trade Agreement: <http://fta.mofcom.gov.cn/yatai/xieyiwenben.pdf>, the latest visit on 14 June, 2018.

22 Official website of MOC: <http://fta.mofcom.gov.cn/>, the latest visit on 14 June, 2018.

Some FTAs (e.g., China-Australia FTA, China-South Korea FTA, China-Peru FTA and China-New Zealand FTA) contain the "Investment" and expatiate on National Treatment, MFN, Fair and Equitable Treatment, compensation for expropriation, free transfer, subrogation and other rules, specifying the clause for resolution of disputes between investors and states.

Taking the China–Australia FTA as an example, it reads that, in the event of an investment dispute, after 2 months since the occurrence of the measure or event giving rise to the dispute, the investor may deliver to the contracting state a written request for consultations, and both parties shall first attempt to resolve such dispute through amicable consultations²³. In the event that an investment dispute cannot be settled by consultations within 120 days after the date of receipt of the request for consultations, the investor may submit a claim or request for arbitration in accordance with the *ICSID Convention* and the *ICSID Rules of Procedure for arbitration proceedings*, the *ICSID Additional Facility Rules*, the *UNCITRAL Arbitration Rules* or the arbitration provisions agreed upon by both parties. Except where a claim is submitted to any other arbitration institution, the disputing parties shall request ICSID to provide administrative services for arbitration proceedings. For the arbitral award, the Agreement stipulates that "Within 3 years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 22 of this Chapter in arbitration commenced after any such appellate mechanism is

²³ Measures of a contracting state that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim. The respondent may, within 30 days upon which it receives a request for consultations (as provided for in Paragraph 1), state that it considers that a measure alleged to be in breach of an obligation is of the kind of measures, by delivering to the claimant and to the non-disputing party a notice specifying the basis for its position (a 'public welfare notice'). The dispute resolution procedure shall be automatically suspended for the 90-day period.

established. Any such appellate mechanism would hear the appeals on issues of law".

iv. Bilateral Investment Treaties

Bilateral investment treaties (BITs) are one of the most important measures to protect international investments. According to the official website of MOC, China has signed a total of 104 BITs as at 12 December, 2016²⁴. By the end of 2016, China had signed BITs with 53 countries along the "Belt and Road"²⁵.

Generally, a BIT principally contains the definitions of investment and investor, investment treatment, expropriation and compensation, transfer, performance requirements, dispute resolution mechanism, etc.

However, each agreement specifies different provisions for the scope of arbitrable matters. Bilateral investment agreements concluded by China in the 1980s and 1990s allowed the disputes on the amount of expropriation to be arbitrated. However, the stipulation was used in different cases with different interpretations, e.g., the arbitral tribunal interpreted the clause in a broad sense in the cases of "Tza Yap Shum v. the Republic of Peru", "Sanum Investment v. The Lao People's Democratic Republic" and "Beijing Urban Construction Group v. The Republic of Yemen", and held that the "dispute involving the expropriation of amount of compensation" did pertain to not only the dispute, but also the occurrence of expropriation and whether the dispute is in compliance with the conditions as stipulated in BIT. However, the interpretations

²⁴ Official website of MOC: <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml>, the latest visit on 14 June, 2018.

²⁵ Official website of MOC: Release the *Building the Belt and Road: Concept, Practice and China's Contribution* upon authorization, <http://www.mofcom.gov.cn/article/i/jyj/lj/201705/20170502573538.shtml>, reproduced from Xinhua.net at 17:03 on 11 May, 2017, the latest visit on 14 June, 2018.

were not used and upheld in subsequent cases. In the case of China Heilongjiang International Economic and Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. ("the Claimant) v. the Mongolian People's Republic (International Economic and Technical Cooperative Corp. and others v. Republic of Mongolia) concerning the dispute of mineral dispute, the Claimant applied for establishing the *ad hoc* arbitral tribunal in accordance with the *UNCITRAL Rules*, and alleged that the cancellation of mining license by Mongolia had violated the *Agreement between the Government of the People's Republic of China and the Government of the Mongolian People's Republic Concerning the Encouragement and Reciprocal Protection of Investments (China-Mongolia Investment Treaty)* executed in 1991 and other foreign investment laws. In June 2017, the arbitral tribunal interpreted the restrictive clauses in the *China-Mongolia Investment Treaty* in a narrow sense, and held that Mongolian People's Republic agreed to lodge the "dispute involving the expropriation of amount of compensation" for arbitration, therefore, the dispute on whether the host country expropriated the amount illegally should be heard by the court of the host country, and the arbitral tribunal enjoyed no jurisdiction over the case and dismissed all claims of the Chinese investors²⁶.

Because early BITs do not conform to the international development trend and trigger many disputes, China has expanded the scope of investment as from the 1980s to 2008, e.g., free repatriation of investment and return on investment, allowing disputes between the host countries and investors of other countries to be filed for arbitration.

26 Official website of UNCTAD: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu>, 14 June, 2018.

Moreover, the new-generation BITs have introduced some additional restrictions since 2008, e.g., keeping the clause of MFN from being used as the basis of arbitration, narrowing the scope of investment, and refusing to provide the profit under the BIT for investor(s) having no entity in the host country.

Early BITs of China agreed to take *ad hoc* arbitration as the major way to resolve disputes. After China joined in the *Washington Convention* in 1993, the majority of BITs stated that investors could submit the disputes to ICSID for arbitration.

III. Practice and Exploration of International Investment Disputes

UNCTAD has launched its *Reform Package for the International Investment Regime* since 2017. The Package reflects latest developments in investment treaty practice and recent debates on the reform of the IIA regime²⁷. In the current international investment arbitration practice, some hotspot issues, like *Amicus Curiae*, annulment and court review of awards, identification of loss, arbitration of third-party funding, taxation and clause of regulatory stability, environment litigation, have attracted extensive attention and discussion. Some of them are briefly introduced as follows:

i. *Amicus Curiae*

As a particular litigation system of the legal regimes of the UK and the US, *Amicus Curiae* interventions mean individuals or entities in the litigation case having no direct legal relationship actively request to provide the written report, or to do so upon the request of the court for the purpose of stating the facts to the court or

27 <https://mailchi.mp/italaw/foreign-investment-arbitration-weekly-news-wrap-14-november-2603069>.

clarify the intent of legislation, and helping the court make a ruling. At present, most of the arbitration institutions have introduced the Amicus Curiae.

For example, Article 37(2) of the *ICSID Arbitration Rules (2006 Version)* reads: After consulting both parties, the Tribunal may allow a person or an entity that is not a party to the dispute to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider the following factors greatly: (1) the non-disputing party could assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (2) the non-disputing party could address a matter within the scope of the dispute; and (3) the non-disputing party has a significant interest in the proceeding²⁸.

ii. Annulment and Court Review of Awards

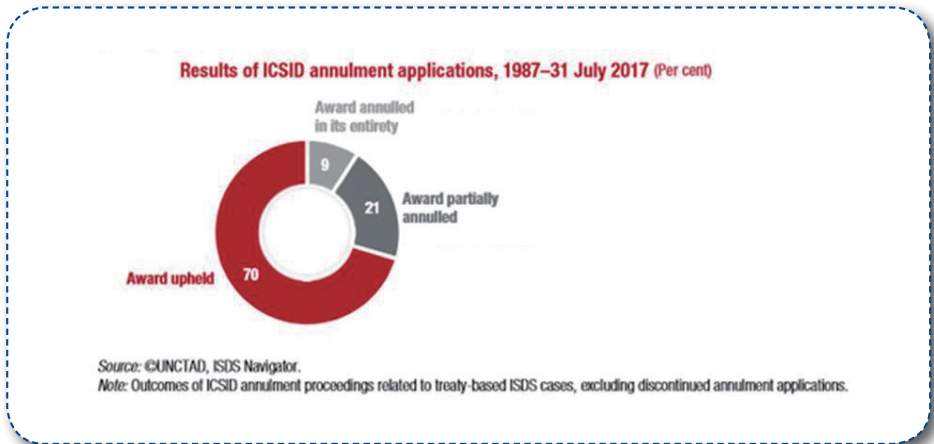
In the international investment arbitration area, annulment and court review of awards are subject to the applicable arbitration rules and provisions of arbitration institutions. In some *ad hoc* arbitration cases, investors applied for review and annulment of awards to courts.

For example, ICSID does not set a standing appellate body. However, Article 51(1) of the *Washington Convention* specifies the system of award annulment, i.e., either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (1) that the Tribunal was not properly constituted; (2) that the Tribunal has manifestly exceeded its powers;

28 <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partF-chap04.htm/>.

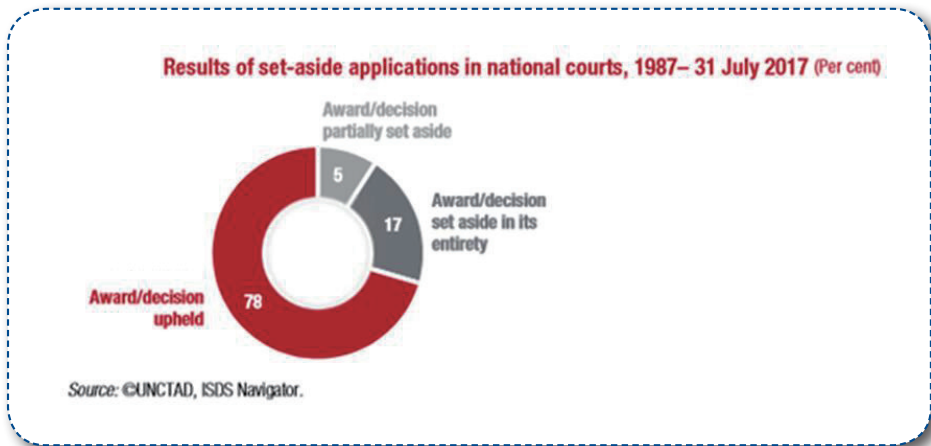
(3) that a member of the Tribunal has any corruption behavior ; (4) that there has been a serious violation of the fundamental rule of procedure; or (5) that the award has failed to state the reasons on which it is based.

According to the *Report of UNCTAD*²⁹, disputing parties initiated annulment proceedings in about 45% of concluded ISDS cases under the *ICSID Convention* (82 cases) as at 31 July, 2017. About 25% of the annulment proceedings are currently pending, while another 25% were discontinued. In the remaining 44 proceedings, the annulment committee rendered a decision and upheld the original award in the majority of these cases. Outcome of decisions on these 44 proceedings made by the annulment committee is illustrated as follows:



Disputing parties initiated domestic set-aside proceedings in non-ICSID Convention cases in which one decision or award was rendered (71 cases). The original decisions or awards of 78% of the cases were upheld.

²⁹ The following contents, figures and pictures are excerpted from the official website of UNCTAD:http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf, the latest visit on 14 June, 2018.



On 14 August, 2017, Singapore High Court (SGHC) set aside the final jurisdiction and merits award of the case of Kingdom of Lesotho (Lesotho) v. Swissbrough Diamond Mines (Pty) Limited and others, becoming the latest case that arbitral award of investment dispute was annulled. This is the first case in which the SGHC has set aside the final jurisdiction and merits award involving the international arbitration.

In this case, investors obtained the mining lease. Later, Lesotho alleged that the mining lease was illegal because there had been no consultation with the local chiefs, and Lesotho thus enacted the legislation to take back the mines. Investors commenced an *ad hoc* arbitration in accordance with appendixes to the *South African Development Community Tribunal Treaty*, and the *ad hoc* arbitration tribunal supported the request of investors. After the award was rendered, Lesotho requested to the SGHC for setting aside the award. Following an exhaustive *de novo* review, the SGHC held that the dispute involved therein exceeded the scope of the arbitration

agreement, so the arbitral award shall be set aside³⁰

iii. Identification of Loss

According to the *Report* of UNCTAD³¹, the average amount claimed in the cases decided in favor of the investor was USD1.35 billion as at July 31, 2017. On average, a successful claimant was awarded the amount of USD522 million, equivalent to about 40% of the amount claimed.

In December 2017, PWC updated its *International Arbitration Damages Research* (PWC Research). PWC Research reviewed 116 publicly available awards. Relevant findings are: Arbitral tribunals awarded on average 36% of the value of damages calculated by claimants' experts; Respondents' experts on average assess a loss at 12% of the value calculated by claimants' experts; In situations where respondents' assessment result move closer to the claim value calculated by claimants' experts, the arbitral tribunal's award does the same³².

iv. Third-Party Funding

Third-party Funding has become a mode in recent years and also a hot topic in the international arbitration area. In third-party funded arbitration, a third party offers the funds to the parties of arbitration case, and receives the profit in a certain

30 Singapore Law Blog, Developing Singaporean Jurisprudence on Reviewing Investor-State Arbitral Awards: Kingdom of Lesotho v Swissbrough Diamond Mines (Pty) Limited and others [2017] SGHC 195, <http://www.singaporelawblog.sg/blog/article/196>, the latest visit on 18 June, 2016.

31 The following contents and figures are excerpted from the official website of UNCTAD:http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf, the latest visit on 14 June, 2018.

32 Felipe Sperandio (Clyde & Co. LLP), Arbitrating Fast and Slow: Strategy Behind Damages Valuations? <http://arbitrationblog.kluwerarbitration.com/2018/02/28/booked-2/>, the latest visit on 18 June, 2018.

proportion from a favorable judgment³³.

At present, the international arbitration community passes different judgments on the third-party funding arbitration: "on one side, the commercial-oriented risk investment can help more parties 'approach the Justice'. On the other side, the impact of third-party funding on the original legal services and arbitration proceedings prompts many worries³⁴." Main doubts of the third-party funding include that the third-party funding could probably breed the abuse of litigations, affect the impartial arbitration, impede effective resolution of the disputes, etc. However, from the perspective of practice, the third-party funding embraces the vast market demand: Through research on cases after 2013, Global Arbitration Review (GAR) makes an empirical study and publishes an article, specifying that the costs of arbitration keep rising, the average cost of claimants is USD7.41 million and the cost of respondents is USD5.19 million on average. Before 2013, claimants spent USD4.43 million and respondents spent USD4.6 million on average for arbitration cases, jumping by 68% and 13%, respectively. The latest data in the research report indicates that claimants always need to bear more costs and expenses than those of respondents, principally because the claimants assume heavier burdens of proof than those of respondents and the respondents select the cost-driven practice³⁵.

33 China Council for the Promotion of International Trade: *Third-Party Funding: Gamblers' Nirvana or Investors Promising Land?*, http://www.ccpit.org/Contents/Channel_4131/2017/1228/939060/content_939060.htm, the latest visit on 18 June, 2018.

34 China Council for the Promotion of International Trade: *Third-Party Funding: Gamblers' Nirvana or Investors Promising Land?*, http://www.ccpit.org/Contents/Channel_4131/2017/1228/939060/content_939060.htm, the latest visit on 18 June, 2018.

35 Excerpt from *Claimants Bear Heavy Burdens of Investment Arbitration, Third-Party Funding Plays a Big Role*: http://www.ccpit.org/Contents/Channel_3466/2018/0112/948807/content_948807.htm published by China Council for the Promotion of International Trade, the latest visit on 18 June, 2018.

On 11 January, 2017, the Parliament of Singapore allowed the third-party funding by adopting the Amendment to *Civil Law Act*, helping the claimants bear the expenses and share the compensation generating from favorable judgement. The Paris Bar came to a conclusion on the third-party funding in May 2017, and thought that the third-party funding did not violate the laws of France. On 14 June, 2017, HKSAR adopted the laws to allow the third-party funding for cases arbitrated and mediated in Hong Kong³⁶.

When giving sufficient attention to the third-party funding, countries and major international institutions supervise the third-party funding to varying extent. Pursuant to the *Civil Law (Third-Party Funding) Regulations 2017* of Singapore, the Third Party Funder has a paid up share capital of not less than SGD5 million. Besides, the *Legal Profession (Professional Conduct) (Amendment) Rules 2017* also stipulate that the existence of any third party funding and the identity of any Third Party Funder must be disclosed to the court or arbitral tribunal. Different from this, the Legislative Council of HKSAR takes the "directive self-regulation" and other soft regulation modes to address the challenges caused by the third-party funding³⁷.

On 1 September, 2017, CIETAC Hong Kong Arbitration Center published the *Guidelines for Third-Party Funding for Arbitration*. The third-party funding attracted attention of arbitration institutions and practitioners in mainland China³⁸.

³⁶ China Council for the Promotion of International Trade: *Third-Party Funding: Gamblers' Nirvana or Investors Promising Land?*, http://www.ccpit.org/Contents/Channel_4131/2017/1228/939060/content_939060.htm, the latest visit on 18 June, 2018.

³⁷ China Council for the Promotion of International Trade: *Third-Party Funding: Gamblers' Nirvana or Investors Promising Land?*, http://www.ccpit.org/Contents/Channel_4131/2017/1228/939060/content_939060.htm, the latest visit on 18 June, 2018.

³⁸ China Council for the Promotion of International Trade: *Third-Party Funding: Gamblers' Nirvana or Investors Promising Land?*, http://www.ccpit.org/Contents/Channel_4131/2017/1228/939060/content_939060.htm.

v. State-to-State Dispute Settlement (SSDS)

It is worth mentioning that the disputes arising out of the investment treaty between countries, apart from the traditional investment disputes between investors and countries, gradually come into the view of international arbitration circle.

SSDS provisions are relatively common in the bilateral or multilateral FTAs and BITs, and most of the disputes are resolved through the *ad hoc* arbitral tribunals. Moreover, *ad hoc* arbitral tribunals may formulate the applicable procedures on their own initiatives. Some BITs stipulate that the *UNCITRAL Rules*, the *SCC Rules* or others shall be followed. For the composition of an arbitral tribunal, each of the parties shall select an arbitrator, and the selected arbitrators will jointly nominate a presiding arbitrator from a third country. Provisions on the applicability of substantive law are different. The most common is that "The arbitral tribunal shall adjudicate in accordance with laws of the contracting state to the dispute accepting the investment (including its rules on the conflict of laws), the provisions of this Agreement as well as the generally recognized principle of international law accepted by both contracting states."

For example, Chapter 15 *Dispute Resolution of the China-Australia FTA* stipulates that³⁹: Unless otherwise provided in this Agreement, this Chapter shall apply to the resolution of disputes between the Parties regarding the implementation, interpretation and application of this Agreement or wherever a Party considers that: The arbitral tribunal shall construe the treaty according to the practice of explaining international conventions, including the practice as stipulated in the *Vienna*

htm, the latest visit on 18 June, 2018.

39 http://fta.mofcom.gov.cn/Australia/annex/xdwb_15_cn.pdf.

Convention on the Law of Treaties that was published on 23 May, 1969. The arbitral tribunal shall also consider the explanation on ruling and recommendations given by the Dispute Resolution Body of WTO.

For another example, Article 15 of the *China-Canada FIPA* provides for the disputes between both contracting parties: Any dispute between the contracting parties concerning the interpretation or application of this *Agreement* shall, as far as possible, be settled by consultation through diplomatic channels. If a dispute cannot thus be settled within 6 months, it shall, upon the request of either Contracting Party, be submitted to an *ad hoc* arbitral tribunal.

In spite of the aforesaid provisions, there are not many SSDS cases. In recent years, cases mentioned included Peru v. Chile in 2007, Italy v. Cuba in 2008 (*ad hoc* arbitral tribunal), Ecuador v. the US in 2012 (Permanent Court of Arbitration), Southern Bluefin Tuna Case of Australia, and New Zealand v. Japan (ICSID) and the US v. Canada in 2006 in accordance with the *Softwood Lumber Agreement* (ICSID).

In view of the trend that countries participate in the arbitration as parties, the ICC added and updated some clauses in the *2012 ICC Rules* and took into account the particularities of the ICC arbitration involving state entities, e.g., amending "provide the service of resolution of commercial disputes" to be "provide the service of resolution of disputes", thus covering the arbitration of disputes involving the investment treaty. Besides, the *2012 ICC Rules* stipulate that the emergency arbitrator system is inapplicable to the investment disputes involving state entities. For further details, please refer to the ICC Commission Report⁴⁰.

⁴⁰ <https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities.pdf>, the latest visit on 17 June, 2018.

IV. New Development of International Investment Arbitration in China

i. Overview

China has carried out many new attempts in the field of arbitration in recent years. The most typical example is that the *China International Economic and Trade Arbitration Commission CIETAC International Investment Arbitration Rules (For Trial Implementation)* published by CIETAC in 2017 fills up a gap in the international investment arbitration area of China.

ii. CIETAC International Investment Arbitration Rules⁴¹

1. Background Information

CIETAC published the *China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation)* (the *CIETAC International Investment Arbitration Rules*) in 2017, which came into force as from 1 October, 2017.

The *CIETAC International Investment Arbitration Rules* summed up the experience of ICSID, the ICC and the SCC in international investment, carefully researched the investment treaties of the US and the EU, conducted extensive survey of BIT practice in China, fully absorbed and drew on the practices in procedure design, public hearing, panel of arbitrators, place of arbitration, jurisdiction of arbitral tribunals, consolidated arbitration, third-party funding and transparency of

⁴¹ Contents of this section are excerpted from the *Explanation on and Text of Investment Arbitration Rules of CIETAC*, official website of China Council for the Promotion of International Trade: http://www.ccpit.org/Contents/Channel_4132/2017/0926/883777/content_883777.htm, the latest visit on 17 June, 2018.

arbitration proceedings, and learned through abundant experience in arbitration of China, e.g., absorbing the Eastern wisdom of CIETAC in combining arbitration with conciliation, following up traditional practice of China in establishing the list of arbitrators and the professional panel of arbitrators system, thereby making the Rules have the features of openness, inclusiveness and mutual learning, representing not only the feature of internationalization but also meeting the actual demand of investment arbitration in China.

The *CIETAC International Investment Arbitration Rules* reflect the flexibility and efficiency of arbitration through the procedure design, e.g., flexibility of autonomy of the parties concerned and way determined by the arbitral tribunal on its own initiative to hear a case. Moreover, the *CIETAC International Investment Arbitration Rules* specify the period of arbitration proceedings, and stipulate that the arbitral tribunal shall render an arbitral award within 6 months from the date on which the proceedings are declared to be closed, the institution shall appoint a case secretary to help the arbitral tribunal administer the arbitration proceedings, which shows the efficiency of arbitration proceedings under the *CIETAC International Investment Arbitration Rules*. The parties bear less costs of arbitration while enjoying convenient and efficient arbitration services. Compared with other international arbitration institutions, CIETAC charges less, separates the administrative fee from fees and expenses of arbitrators and specifies reasonable, public and transparent charge standards, thereby reducing the costs of arbitration on the whole, stimulating the enthusiasm of arbitrators and showing the advantage of professional arbitration institution services.

2. Introduction of the *CIETAC International Investment Arbitration Rules*

The *CIETAC International Investment Arbitration Rules* consist of the text and appendixes. Specifically, the text contains 58 articles under 6 chapters. 2 appendixes are *CIETAC International Investment Arbitration Fees Schedule* (the *Fees Schedule*) and *CIETAC Emergency Arbitrator Procedures* (the *Emergency Arbitrator Procedures*), respectively. Main contents are as follows:

First, the scope and basis of jurisdiction. The *CIETAC International Investment Arbitration Rules* vary from the *CIETAC Arbitration Rules* in the scope of accepted cases. According to the *CIETAC International Investment Arbitration Rules*, CIETAC, subject to the arbitration agreement between the parties, accepts cases involving international investment disputes arising out of contracts, treaties, laws and regulations, or other instruments between an investor and a State, an intergovernmental organization, any other organ, agency or entity authorized by the government or any other organ, agency or entity of which the conducts are attributable to a State. The basis of jurisdiction is an arbitration agreement which may be stipulated in a contract, a treaty, a statute of law or regulation, or other instruments. An arbitration agreement shall be deemed to have been reached if one party manifests its intention to lodge the dispute to CIETAC or to settle the dispute by arbitration in accordance with the *CIETAC International Investment Arbitration Rules* through a contract, a treaty, a statute of law or regulation, or other instruments, and the other party manifests its consent, either by commencing an arbitration or by other means.

Second, the structure and duties of CIETAC. The *CIETAC International Investment Arbitration Rules* specify that CIETAC Beijing Investment Dispute Settlement Center (IDSC) and CIETAC Hong Kong Arbitration Center shall be responsible for

handling the international investment arbitration disputes and other daily matters. Where the parties agree to refer an international investment dispute to CIETAC for arbitration, the IDSC Beijing shall accept the arbitration application and administer the case. Where the parties agree to designate Hong Kong as the place of arbitration, or to refer an international investment dispute to the CIETAC Hong Kong Arbitration Center, the CIETAC Hong Kong Arbitration Center shall accept the arbitration application and administer the case. Where the agreement is ambiguous, the IDSC shall accept the arbitration application and administer the case. In case of any dispute, CIETAC shall make a decision.

Third, matters on commencement of arbitration. A party applying for arbitration shall submit a request for arbitration to the IDSC or CIETAC Hong Kong Arbitration Center that administers the case and send a carbon copy of the request to the respondent, and pay the registration fee in accordance with relevant provisions. The arbitration proceedings shall commence on the day when the IDSC or CIETAC Hong Kong Arbitration Center administering the case receives the request for arbitration.

Fourth, response to the request for arbitration and counterclaim. Within 30 days upon receipt of the request for arbitration, the Respondent shall give a written response to the IDSC or CIETAC Hong Kong Arbitration Center administering the case, and send a carbon copy to the claimant. The response may include the contents of counterclaim.

Fifth, composition of the arbitral tribunal. On the basis of fully respecting the autonomy of the parties concerned, the *CIETAC International Investment Arbitration*

Rules read that the parties may agree that the arbitral tribunal shall be composed of one, three or any other odd number of arbitrators. If the parties reach no agreement, the arbitral tribunal shall be composed of three arbitrators. Moreover, the *CIETAC International Investment Arbitration Rules* specify the scope of selecting arbitrators, i.e., the parties shall nominate arbitrators from the *Panel of Arbitrators for International Investment Disputes* provided by CIETAC. The parties may agree to nominate arbitrators from outside the said Panel of Arbitrators, subject to the confirmation by the Chairman of CIETAC.

Both parties shall nominate or entrust the Chairman of CIETAC to nominate a presiding arbitrator/sole arbitrator. If doing so, the Chairman of CIETAC shall nominate at least five candidates and provide them to the parties for selection. The *CIETAC International Investment Arbitration Rules* also specify the disclosure of, challenge to and replacement of arbitrators.

Sixth, objection to jurisdiction and its ruling. A party having justifiable doubts about the existence or validity of the arbitration agreement, or the applicability of the *CIETAC International Investment Arbitration Rules* may challenge that arbitrator in writing, and the arbitral tribunal shall have the power to rule on its own jurisdiction. If any objection to jurisdiction is raised before constitution of the arbitral tribunal, CIETAC may make a decision on the jurisdictional issues based on prima facie evidence.

Seventh, early dismissal. A party may apply to the arbitral tribunal in writing for early dismissal of a claim or counterclaim in whole or in part on the ground that such a claim or a counterclaim is manifestly without legal merit, or manifestly goes beyond

the jurisdiction of the arbitral tribunal. The arbitral tribunal shall have the power to decide on whether to accept the said application after consulting the parties. In case of deciding to accept the application, the arbitral tribunal shall make a ruling and state the reasons.

Eighth, third-party funding. For the purpose of the *CIETAC International Investment Arbitration Rules*, "third-party funding" means the situation where a natural person or an entity, who is not a party to the dispute, provides funds to a party of arbitration to cover all or part of that party's costs for the arbitration proceedings, through an agreement with the party accepting the funding. The party accepting the funding shall be obligated to make disclosure and the arbitral tribunal shall be also entitled to order such party to disclose relevant information of the third party funding arrangement. When making a ruling on the costs of arbitration and other fees, the arbitral tribunal may take into account the existence of any third party funding arrangement, and the actuality about whether the party concerned performs the obligation of disclosure.

Ninth, the place of arbitration. The place of arbitration is of important significance to the arbitration of IIAs. Pursuant to the *CIETAC International Investment Arbitration Rules*, the arbitral award shall be deemed as having been made at the place of arbitration. Where the parties have agreed on the place of arbitration, the parties' agreement shall prevail. Where the parties have not agreed on the place of arbitration, the place of arbitration shall be the domicile of the IDSC or CIETAC Hong Kong Arbitration Center that administers the case. The arbitral tribunal may also choose another location as the place of arbitration having regard to the circumstances of the case, provided that such place is within the territory of a contracting member state to

the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

Tenth, interim measures. To safeguard legitimate rights and interest of the parties and smooth enforcement of arbitral awards in a timely manner, the parties may apply for the emergency arbitrator procedures and apply to the arbitral tribunal for interim measures. A party may apply to the IDSC or CIETAC Hong Kong Arbitration Center that administers the case for emergency relief pursuant to the *CIETAC Emergency Arbitrator Procedures*. The emergency arbitrator may decide to order or award necessary or appropriate emergency interim measures. Any decision made by the emergency arbitrator is binding on both parties. Upon the request of a party, the arbitral tribunal may decide to take interim measures it deems necessary or appropriate. In doing so, the arbitral tribunal has the power to require the party concerned to provide appropriate security. The said procedures are not prejudiced to the parties' right to apply to any competent court to order interim measures.

Eleventh, combination of conciliation with arbitration. Where both parties wish to conciliate, the arbitral tribunal may conciliate the dispute during the arbitration proceedings. Where the parties have reached a resolution agreement through conciliation by the arbitral tribunal or by themselves, they may withdraw their claim or counterclaim, or request the arbitral tribunal to render an arbitral award in accordance with terms and conditions of the resolution agreement.

Twelfth, non-disputing contracting party and its written submissions. In the arbitration cases raised on the basis of an investment treaty, a contracting party to the investment treaty other than the disputing parties (Non-disputing Contracting Party), may make written submissions to the arbitral tribunal on interpretation

of the investment treaty relevant to the dispute. The arbitral tribunal may also, after considering the circumstances of the case, invite written submissions from a Non-disputing Contracting Party on the said matters. A person or an entity who is neither a party to the arbitration nor a Non-disputing Contracting Party to the investment treaty (Non-disputing Party), may make written submissions on matters within the scope of the dispute. The arbitral tribunal may also, after considering the circumstances of the case, invite written submissions from a Non-disputing Contracting Party or a Non-disputing Party on the said matters. The arbitral tribunal may refer to or rely on written submissions by a Non-disputing Contracting Party or Non-disputing Party in issuing orders, decisions or awards.

Thirteenth, awards. The arbitral tribunal shall render an arbitral award within 6 months from the date on which the proceedings are declared to be closed. The said time period may be extended. The arbitral tribunal shall submit its draft award to CIETAC for scrutiny. Given without affecting the arbitral tribunal's independence in rendering the award, CIETAC may bring to the attention of the arbitral tribunal issues addressed in the award. The award shall be made in writing and shall state the reasons upon which it is based, and state the date on which and the place in which the award is made. The arbitral tribunal may first render a partial award on part of the claim before rendering the final award. The arbitral tribunal shall be entitled to make correction, interpretation and additional award to an arbitral award.

Fourteenth, costs of arbitration. Costs of arbitration include fees and expenses of the arbitral tribunal; fees and expenses of emergency arbitrators; costs of any expert appointed by the arbitral tribunal and of any other assistance reasonably required by the arbitral tribunal; and registration fee of case, administrative fee and other

expenses. Given the circumstances of a case, CIETAC may determine the amount of advance payment of costs of arbitration. The claimant and the respondent shall respectively pay 50% of the advance payment of the costs of arbitration in accordance with relevant provisions. The arbitral tribunal shall specify in the award the total amount of costs of arbitration and determine the percentage of the costs of arbitration each party shall assume.

Fifteenth, appendixes to the *CIETAC International Investment Arbitration Rules*. Appendix 1 *Fees Schedule* specifies the matters about the way of charge and charge standards of registration fee of arbitration case, administrative fee, fees and expenses of arbitrators. All fees and expenses shall be denominated in RMB. Where both parties reach a written agreement that fees and expenses of arbitrators are charged each hour, the parties' agreement shall prevail. The fee rate per hour shall be published on the official website of CIETAC in a real-time manner. The *Fees Schedule* applies to the IDSC and CIETAC Hong Kong Arbitration Center. The *Fees Schedule* also specifies matters about other expenses.

Appendix 2 *Emergency Arbitrator Procedures* specify the application and acceptance of emergency arbitrator procedures, appointment, disclosure of and challenge to, decision of emergency arbitrators, as well as payment of fees, etc.

3. Comparison with Other Rules

Compared with other investment arbitration rules, the *CIETAC International Investment Arbitration Rules* have the following characteristics:

First, they are particular and professional in terms of application. The *CIETAC*

International Investment Arbitration Rules specify that international investment disputes arising out of contracts, treaties, laws and regulations, or other instruments between investors and states or governmental organizations or entities. The *CIETAC International Investment Arbitration Rules* specify that the applicability of the Rules shall not impede the applicable mandatory laws and regulations.

Second, the panel of arbitrators and stricter requirements of arbitrators are specified. Arbitration is as good as arbitrators. To guarantee high quality of arbitrators, the *CIETAC International Investment Arbitration Rules* set up the Panel of Arbitrators for resolving the international investment disputes, and specify that arbitrators shall be morally upright and have recognized competence in such professional fields as law and investment, and they are proficient in exercising independent judgement, without being subject to any administrative interventions. The parties may nominate arbitrators from outside the said Panel of Arbitrators, subject to the confirmation by the Chairman of CIETAC.

Third, public hearing of arbitration cases is specified. Because investment arbitration usually involves the measures taken by host countries for safeguarding the public interest, the public is increasingly worried about the handling of such significant issues by private arbitral tribunal, which triggers the "legitimation crisis" of international investment arbitration system. To respond to the public's doubt about the privacy of arbitration proceedings, lots of recent investment treaties specify public hearing of arbitration cases. The *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* signed by China in 2012 recognizes the practice. In the meantime, China takes the initiative in participating in the formulation of the *United*

Nations Convention on Transparency in Treaty-based Investor-State Arbitration. In view of the above, the *CIETAC International Investment Arbitration Rules* stipulate that the hearing shall be conducted in public, unless otherwise agreed by the parties or decided by the arbitral tribunal. Besides, the *CIETAC International Investment Arbitration Rules* permit the disclosure of arbitration materials by introducing the written opinions submitted by the non-disputing party and the disputing contracting party, thereby making the arbitration proceedings more transparent. The aforesaid provisions actively respond to the international community's query on the investment arbitration system, and help the *CIETAC International Investment Arbitration Rules* be extensively accepted by the international community.

Fourth, the third-party funding is specified. The research of the International Council for Commercial Arbitration indicates that 60% of the ICSID cases involve the third-party funding. Because the third party will definitely share the benefit of the arbitration result if the third-party funding is introduced, which may have an impact on the arbitration proceedings, and the *CIETAC International Investment Arbitration Rules* thus specify the obligation of the funded party for disclosure, contents and objects of disclosure, time of disclosure, etc. In determining the costs of arbitration and other relevant expenses, the arbitral tribunal shall consider whether there is the third-party funding and whether the parties comply with relevant obligations.

V. Conclusion

As Chinese investment in foreign countries keeps growing, investment disputes between investors and host countries in other fields than the traditional commercial arbitration increase accordingly, the understanding and apprehension of international

conventions, FTAs and bilateral or multilateral investment treaties become very important. Both policymakers and investors face some problems that cannot be ignored, e.g., how to introduce terms and conditions about protection of investors and resolution of disputes in the bilateral or multilateral treaty in the future, and how to make full and effective use of the existing investment dispute resolution mechanism.

The release of the *CIETAC International Investment Arbitration Rules* by CIETAC is a proactive measure to refine the legal construction of arbitration in China, fills up a gap in the international investment arbitration area of China and also provides the system guarantee for Chinese enterprises to resolve the investment disputes between host countries, which deserve reference and use.

Appendixes¹

i. Bilateral Investment Treaties Signed by China

No.	Partners	Status	Date of signature	Date of entry into force	Text
1	Albania	In force	13 February, 1993	1 September, 1995	Full text: en
2	Algeria	In force	17 October, 1996	28 January, 2003	Full text: fr
3	Argentina	In force	5 November, 1992	1 August, 1994	Full text: en
4	Armenia	In force	4 July, 1992	18 March, 1995	Full text: zh
5	Australia	In force	11 July, 1988	11 July, 1988	Full text: en
6	Austria	In force	12 September, 1985	11 October, 1986	Full text: de
7	Azerbaijan	In force	8 March, 1994	1 April, 1995	Full text: en
8	Bahamas	Signed (not in force)	4 September, 2009		
9	Bahrain	In force	17 June, 1999	27 April, 2000	Full text: en
10	Bangladesh	In force	12 September, 1996	25 March, 1997	
11	Barbados	In force	20 July, 1998	1 October, 1999	Full text: en
12	Belarus	In force	11 January, 1993	14 January, 1995	Full text: zh

¹ Some forms are sourced from the official website of UNCITRAL: <http://investmentpolicyhub.unctad.org/IIA>.

13	Benin	Signed (not in force)	18 February, 2004		Full text: en
14	BLEU (Belgium-Luxembourg Economic Union)	Terminated	4 June, 1984	5 October, 1986	Full text: en fr
15	BLEU (Belgium-Luxembourg Economic Union)	In force	6 June, 2005	1 December, 2009	Full text: en fr
16	Bolivia, Plurinational State of	In force	8 May, 1992	1 September, 1996	Full text: en
17	Bosnia and Herzegovina	In force	26 June, 2002	1 January, 2005	Full text: en
18	Botswana	Signed (not in force)	12 June, 2000		Full text: en
19	Brunei Darussalam	Signed (not in force)	17 November, 2000		Full text: en
20	Bulgaria	In force	27 June, 1989	21 August, 1994	Full text: en
21	Cabo Verde	In force	21 April, 1998	1 January, 2001	Full text: en
22	Cambodia	In force	19 July, 1996	1 February, 2000	Full text: en
23	Cameroon	In force	10 September, 1997	24 July, 2014	
24	Canada	In force	September 9, 2012	1 October, 2014	Full text: en
25	Chad	Signed (not in force)	April 26, 2010		
26	Chile	In force	23 March, 1994	1 August, 1995	Full text: en

27	Colombia	In force	22 November, 2008	2 July, 2013	Full text: en
28	Congo, Democratic Republic of the	Signed (not in force)	18 December, 1997		
29	Congo, Democratic Republic of the	Signed (not in force)	11 August, 2011		
30	Congo	In force	20 March, 2000	1 July, 2015	Full text: fr
31	Costa Rica	Signed (not in force)	24 October, 2007		
32	Côte d'Ivoire	Signed (not in force)	30 September, 2002		Full text: en
33	Croatia	In force	7 June, 1993	1 July, 1994	Full text: en
34	Cuba	In force	24 April, 1995	1 August, 1996	Full text: en
35	Cyprus	In force	15 January, 2001	29 April, 2002	Full text: en
36	Czech Republic	Terminated	4 December, 1991	1 December, 1992	Full text: en
37	Czech Republic	In force	8 December, 2005	1 September, 2009	Full text: en
38	Denmark	In force	29 April, 1985	29 April, 1985	Full text: en
39	Djibouti	Signed (not in force)	28 August, 2003		Full text: en
40	Ecuador	In force	21 March, 1994	1 July, 1997	Full text: es
41	Egypt	In force	21 April, 1994	1 April, 1996	Full text: en
42	Equatorial Guinea	In force	20 October, 2005	15 November, 2006	

43	Estonia	In force	2 September, 1993	1 June, 1994	Full text: en
44	Ethiopia	In force	11 May, 1998	1 May, 2000	Full text: en
45	Finland	In force	15 November, 2004	15 November, 2006	Full text: en
46	Finland	Terminated	4 September, 1984	26 January, 1986	Full text: en fr
47	France	Terminated	30 May, 1984	19 March, 1985	Full text: fr
48	France	In force	26 November, 2007	20 August, 2010	Full text: fr
49	Gabon	In force	9 May, 1997	16 February, 2009	
50	Georgia	In force	3 June, 1993	1 March, 1995	Full text: en
51	Germany	In force	1 December, 2003	11 November, 2005	Full text: en
52	Germany	Terminated	7 October, 1983	18 March, 1985	Full text: de zh
53	Ghana	In force	12 October, 1989	22 November, 1990	Full text: en
54	Greece	In force	25 June, 1992	12 December, 1993	Full text: en
55	Guinea	Signed (not in force)	18 November, 2005		
56	Guyana	In force	27 March, 2003	26 October, 2004	Full text: en
57	Hungary	In force	29 May, 1991	1 April, 1993	Full text: en
58	Iceland	In force	13, March 1994	1 March, 1997	Full text: en
59	India	Terminated	21 November, 2006	1 August, 2007	Full text: en

60	Indonesia	Terminated	18 November, 1994	1 April, 1995	Full text: en
61	Iran, Islamic Republic of	In force	1 June 2000	1 July, 2005	Full text: en
62	Israel	In force	10 April, 1995	13 January, 2009	Full text: en
63	Italy	In force	28 January, 1985	28 August, 1987	Full text: en
64	Jamaica	In force	26 October, 1994	1 April, 1996	Full text: en
65	Japan	In force	27 August, 1988	14 May, 1989	Full text: en
66	Jordan	Signed (not in force)	15 November, 2001		Full text: en ar
67	Kazakhstan	In force	10 August, 1992	13 August, 1994	Full text: ru
68	Kenya	Signed (not in force)	16 July, 2001		Full text: en
69	Korea, Dem. People's Rep. of	In force	22 March, 2005	1 October, 2014	Full text: en
70	Korea, Republic of	Terminated	30 September, 1992	4 December, 1992	Full text: en
71	Korea, Republic of	In force	7 September, 2007	1 December, 2007	Full text: en
72	Kuwait	In force	23 November, 1985	24 December, 1986	Full text: en
73	Kyrgyzstan	In force	14 May, 1992	8 September, 1995	Full text: ru

74	Lao People's Democratic Republic	In force	31 January, 1993	1 June, 1993	Full text: en
75	Latvia	In force	15 April, 2004	1 February, 2006	Full text: en
76	Lebanon	In force	13 June, 1996	10 July, 1997	Full text: en
77	Libya	Signed (not in force)	4 August, 2010		
78	Lithuania	In force	8 November, 1993	1 June 1, 1994	Full text: en
79	Macedonia, The former Yugoslav Republic of	In force	9 June, 1997	1 November, 1997	Full text: en zh
80	Madagascar	In force	21 November, 2005	1 July, 2007	Full text: fr
81	Malaysia	In force	21 November, 1988	31 March, 1990	Full text: en
82	Mali	In force	12 February, 2009	16 July, 2009	Full text: zh fr
83	Malta	In force	22 February, 2009	1 April, 2009	Full text: en
84	Mauritius	In force	4 May, 1996	8 June, 1997	Full text: en
85	Mexico	In force	11 July, 2008	6 June, 2009	Full text: en
86	Moldova, Republic of	In force	6, November 1992	1 March, 1995	
87	Mongolia	In force	25, August 1991	1 November, 1993	Full text: en zh

88	Morocco	In force	27 March, 1995	27 November, 1999	Full text: fr
89	Mozambique	In force	10 July, 2001	26 February, 2002	
90	Myanmar	In force	12 December, 2012	12 May, 2002	Full text: en
91	Namibia	Signed (not in force)	17 November, 2005		
92	Netherlands	In force	26 November, 2001	1 August, 2004	Full text: en
93	Netherlands	Terminated	17 June, 1985	February, 1987	Full text: en
94	New Zealand	In force	22 November, 1988	25 March, 1989	Full text: en
95	Nigeria	Terminated	12 May, 1997		
96	Nigeria	In force	27 August, 2001	18 February, 2010	Full text: en
97	Norway	In force	21 November, 1984	10 July, 1985	Full text: en
98	Oman	In force	18 March, 1995	1 August, 1995	Full text: en ar
99	Pakistan	In force	12 February, 1989	30 September, 1990	Full text: en
100	Papua New Guinea	In force	12 April, 1991	12 February, 1993	Full text: en
101	Peru	In force	9 June, 1994	1 February, 1995	Full text: en es

102	Philippines	In force	20 July, 1992	8 September, 1995	Full text: en
103	Poland	In force	7 June, 1988	8 January, 1989	Full text: en
104	Portugal	Terminated	3 February, 1992	1 December, 1992	Full text: en
105	Portugal	In force	9 December, 2005	26 July, 2008	Full text: pt en
106	Qatar	In force	9 April, 1999	1 April, 2000	Full text: en
107	Romania	In force	12 July, 1994	1 September, 1995	Full text: en
108	Russian Federation	Terminated	21 July, 1990	26 July, 1991	
109	Russian Federation	In force	9 November, 2006	1 May, 2009	Full text: en ru
110	Saudi Arabia	In force	29 February, 1996	1 May, 1997	Full text: en
111	Serbia	In force	18 December, 1995	12 September, 1996	Full text: en
112	Seychelles	Signed (not in force)	10 February, 2007		
113	Sierra Leone	Signed (not in force)	16 May, 2001		
114	Singapore	In force	21 November, 1985	7 February, 1986	Full text: en fr zh
115	Slovakia	In force	4 December, 1991	1 December, 1992	Full text: en

116	Slovenia	In force	13 September, 1993	1 January, 1995	Full text: en
117	South Africa	In force	30 December, 1997	1 April, 1998	Full text: en
118	Spain	Terminated	6 February, 1992	1 May, 1993	Full text: es
119	Spain	In force	14 November, 2005	1 July, 2008	Full text: en
120	Sri Lanka	In force	14 March 14, 1986	25 March, 1987	Full text: en
121	Sudan	In force	30 May, 1997	1 July, 1998	
122	Sweden	In force	29 March, 1982	29 March, 1982	Full text: en
123	Switzerland	Terminated	12 November, 1986	18 March, 1987	Full text: fr
124	Switzerland	In force	27 January, 2009	13 April, 2010	Full text: fr en
125	Syrian Arab Republic	In force	9 December, 1996	11 November, 2001	Full text: en
126	Tajikistan	In force	9 March, 1993	20 January, 1994	
127	Tanzania, United Republic of	In force	24 March, 2013	17 April, 2014	Full text: en
128	Thailand	In force	12 March, 1985	13 December, 1985	Full text: en
129	Trinidad and Tobago	In force	22 July, 2002	7 December, 2004	Full text: en

130	Tunisia	In force	21 June, 2004	1 July, 2006	Full text: en
131	Turkey	In force	13 November, 1990	20 August, 1994	Full text: en zh tr
132	Turkey	Signed (not in force)	29 July, 2015		
133	Turkmenistan	In force	12 November, 1992	4 June, 1994	
134	Uganda	Signed (not in force)	27 May, 2004		Full text: en
135	Ukraine	In force	31 October, 1992	29 May, 1993	
136	United Arab Emirates	In force	1 July, 1993	28 September, 1994	Full text: en ar
137	United Kingdom	In force	15 May, 1986	15 May, 1986	Full text: en
138	Uruguay	In force	2 December, 1993	1 December, 1997	Full text: en
139	Uzbekistan	Terminated	13 March, 1992	12 April, 1994	
140	Uzbekistan	In force	19 April, 2011	1 September, 2011	Full text: en
141	Vanuatu	Signed (not in force)	7 April, 2006		
142	Viet Nam	In force	2 December, 1992	1 September, 1995	Full text: en
143	Yemen	In force	16 February, 1998	10 April, 2002	
144	Zambia	Signed (not in force)	21 June, 1996		
145	Zimbabwe	In force	21 May, 1996	1 March, 1998	Full text: en

ii. Free Trade Agreements of China

No.	Short title	Parties	Date of signature	Date of entry into force	Text
1	China - Hong Kong CEPA Investment Agreement (2017)	Hong Kong, China SAR	28 June, 2017	28 June, 2017	Full text: en zh
2	China-Georgia FTA	Georgia	13 May, 2017		Investment ch.: en
3	China - Macao Agreement on Trade in Services (2015)	Macao, China SAR	28 November, 2015		Full text: en
4	Australia - China FTA (2015)	Australia	17 June, 2015	20 December, 2015	Full text: en Investment ch.: en
5	China - Korea, Republic of FTA (2015)	Korea, Republic of	1 June, 2015	20 December, 2015	Full text: en Investment ch.: en
6	China - Switzerland FTA (2013)	Switzerland	6 July, 2013	1 July, 2014	Full text: en
7	China - Iceland FTA (2013)	Iceland	15 April, 2013	1 July, 2014	Full text: en

8	China - Japan - Korea, Republic of Trilateral Investment Agreement (2012)	Japan, Korea, Republic of	13 May, 2012	17 July, 2014	Full text: en
9	China - Taiwan Province of China Framework Agreement (2010)	Taiwan Province of China	29 June, 2010	1 September, 2010	Full text: en
10	China-Costa Rica FTA	Costa Rica	1 April, 2010	1 August, 2011	Full text: en Investment ch.: en
11	APTA Investment Agreement (2009)	Bangladesh, Korea, Republic of, Lao People's Democratic Republic, Sri Lanka	15 December, 2009		Full text: en
12	ASEAN-China Investment Agreement	ASEAN (Association of South-East Asian Nations)	15 August, 2009	1 January, 2010	Full text: en
13	China-Peru FTA	Peru	28 April, 2009	1 March, 2010	Full text: en es Investment ch.: en es

14	China-Singapore FTA	Singapore	23 October, 2008	1 January, 2009	Investment ch.: en
15	China-New Zealand FTA	New Zealand	7 April, 2008	1 October, 2008	Full text: en Investment ch.: en
16	China-Pakistan FTA	Pakistan	24 November, 2006	1 July, 2007	Full text: en
17	Chile-China FTA	Chile	November 18, 2005	1 October, 2006	Full text: en
18	Australia-China Framework Agreement	Australia	24 October, 2003	24 October, 2003	Full text: en
19	China-Macao Partnership Agreement	Macao, China SAR	17 October, 2003	1 January, 2004	Full text: en
20	China - Hong Kong CEPA (2003)	Hong Kong, China SAR	29 June, 2003	29 June, 2003	Full text: en
21	ASEAN-China Framework Agreement	ASEAN (Association of South-East Asian Nations)	4 November, 2002	1 July, 2003	

22	China-EC Trade and Cooperation Agreement	EU (European Union)	12 May, 1985	22 September, 1985	Full text: en
23	RCEP	ASEAN (Association of South-East Asian Nations), Australia, India, Japan, Korea, Republic of, New Zealand			

iii. Investment-Related International Conventions Participated in by China

No.	Short title	Date of adoption	Level	Type	Files
1	Fifth Protocol to GATS	1997	Multilateral	Intergovernmental agreements	Full text: en fr es
2	Fourth Protocol to GATS	1997	Multilateral	Intergovernmental agreements	Full text: en fr es
3	TRIPS	1994	Multilateral	Intergovernmental agreements	Full text: en fr es
4	TRIMS	1994	Multilateral	Intergovernmental agreements	Full text: en fr es
5	GATS	1994	Multilateral	Intergovernmental agreements	Full text: en fr es
6	MIGA Convention	1985	Multilateral	Intergovernmental agreements	Full text: en fr es
7	ICSID Convention	1965	Multilateral	Intergovernmental agreements	Full text: en fr es

8	New York Convention	1958	Multilateral	Intergovernmental agreements	Full text: en fr es
9	UN Code of Conduct on Transnational Corporations	1983	Multilateral	Draft instruments	Full text: en fr es
10	UN Guiding Principles on Business and Human Rights	2011	Multilateral	Guidelines, principles, resolutions and similar	Full text: en
11	ILO Tripartite Declaration on Multinational Enterprises	2006	Multilateral	Guidelines, principles, resolutions and similar	Full text: en
12	Doha Declaration	2001	Multilateral	Guidelines, principles, resolutions and similar	Full text: en fr es
13	ILO Tripartite Declaration on Multinational Enterprises	2000	Multilateral	Guidelines, principles, resolutions and similar	Full text: en

14	Singapore Ministerial Declaration	1996	Multilateral	Guidelines, principles, resolutions and similar	Full text: en fr es
15	Pacific Basin Investment Charter	1995	Non-governmental	Guidelines, principles, resolutions and similar	Full text: en
16	APEC Non-Binding Investment Principles	1994	Regional/Plurilateral	Guidelines, principles, resolutions and similar	Full text: en
17	World Bank Investment Guidelines	1992	Multilateral	Guidelines, principles, resolutions and similar	Full text: en
18	ILO Tripartite Declaration on Multinational Enterprises	1977	Multilateral	Guidelines, principles, resolutions and similar	Full text: en fr es
19	New International Economic Order UN Resolution	1974	Multilateral	Guidelines, principles, resolutions and similar	Full text: en fr es

20	Charter of Economic Rights and Duties of States	1974	Multilateral	Guidelines, principles, resolutions and similar	Full text: en fr es
21	Permanent Sovereignty UN Resolution	1962	Multilateral	Guidelines, principles, resolutions and similar	

Chapter 4 Judicial Review of International Commercial Arbitration in China

Through a survey of judgments published on *China Judgements Online*, the Replies of the Civil Adjudication Tribunal No. 4 of the Supreme People's Court (SPC) included in the *Guide on Foreign-related Commercial and Maritime Trial* and other data from the Internet, this Chapter makes comprehensive analysis of and comments on legal issues of the cases involving judicial review of China's international commercial arbitration or arbitration relating to foreign countries, Hong Kong, Macao and Taiwan (foreign-related and HMT-related).

I. Confirmation of Validity of Foreign-Related and HMT-Related Arbitration Agreements

i. Interpretation of Arbitration Institutions Agreed in Arbitration Clauses

Regarding the application for confirming the validity of a HK-related arbitration agreement in the case¹ of Dalien International Limited (the Claimant or Dalien Limited) v. Hangzhou Madigeluo Garments Co., Ltd. (the Respondent or Madigeluo Company), Dalien Limited alleged that there were "Shenzhen Arbitration Commission" and "Shenzhen Court of International Arbitration" (also known as "South China International Economic and Trade Arbitration Commission) in

¹ *Civil Judgment* (Y03 MC [2017] No. 877) issued by Shenzhen Intermediate People's Court on 27 September, 2017.

Shenzhen, but not "Shenzhen Municipal Arbitration Commission". Article 13 of the Contract entered into by and between both parties stipulates that "Disputes shall be submitted to Shenzhen Municipal Arbitration Commission for arbitration in Shenzhen in line with its then current arbitration rules", which is precisely the circumstance that no or unclear provisions concerning the arbitration commission were specified as stated in Article 18 of the *Arbitration Law of the People's Republic of China* (the *Arbitration Law*). Article 3 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China* specifies that "If the name of the arbitration institution agreed upon in an arbitration agreement is not described in an accurate way, but the specific arbitration institution is determinable, it shall be deemed that the arbitration institution has been selected and identified". Thus, the court held that "Shenzhen Municipal Arbitration Commission" differs from "Shenzhen Arbitration Commission" in a mere word, but is distinct from South China International Economic and Trade Arbitration Commission (Shenzhen Court of International Arbitration). Although "Shenzhen Municipal Arbitration Commission" stated in the agreement thereof is not very accurate, Shenzhen Arbitration Commission is determinable, therefore, it shall be deemed that both parties have selected Shenzhen Arbitration Commission as the arbitration institution, and Dalien Limited had no sufficient factual or legal grounds for its application to claim the arbitration agreement is invalid.

Regarding the application for confirming the validity of a foreign-related arbitration agreement in the case² of Hebei Poshing Electronic Technology Co., Ltd. (the *2 Reply of the Supreme People's Court to the Request Raised by Hebei High People's Court for Instructions on Application for Confirming the Validity of an Arbitration Agreement in the Case of Hebei Poshing Electronic Technology Co., Ltd. v. CSD Epitaxy Asia Ltd.* (ZGFMT [2017] No. 70) issued on 13 September, 2017.

Claimant or Poshing Company) v. CSD Epitaxy Asia Ltd. (the Respondent or CSD Limited), Poshing Company requested for confirming the invalidity of the arbitration agreement involved therein on the ground of ambiguous definition of an arbitration institution. Upon reporting of the High People's Court of Hebei Province, the SPC gave a reply, ascertaining that Article 3 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China* specifies that "If the name of the arbitration institution agreed upon in an arbitration agreement is not described in an accurate way, but the specific arbitration institution is determinable, it shall be deemed that the arbitration institution has been selected and identified". Both parties involved therein agreed in the arbitration agreement that arbitration arising therefrom shall be submitted to the Foreign Trade Arbitration Commission under China Council for the Promotion of International Trade, which was the former name of China International Economy and Trade Arbitration Commission, and it shall be thus deemed that both parties have selected China International Economy and Trade Arbitration Commission as the arbitration institution.

ii. Decision on Validity by Arbitration or Court

Regarding the application for confirming the validity of a foreign-related arbitration agreement in the case³ of Da Tang International (Hong Kong) Limited (the Claimant or Da Tang International) v. Sinosteel Group Shanxi Co., Ltd. (the Respondent or Sinosteel Shanxi), Da Tang International alleged that it had raised objection to jurisdiction and claimed the nonexistence of an arbitration agreement between them after China International Economy and Trade Arbitration Commission

³ *Civil Judgment* (J04 MT [2017] No. 21) issued by Beijing Municipal No. 4 Intermediate People's Court on 24 October, 2017.

(CIETAC) accepted the case. But the arbitration tribunal has not yet ascertained the validity of the arbitration agreement, thus it appealed to the court for identifying and ascertaining the validity of the arbitration agreement. Article 20.1 of the *Arbitration Law* reads that "If a party to an arbitration agreement challenges the validity of the arbitration agreement, he/she may request the arbitration commission to make a decision or apply to the people's court for a ruling. If one party requests the arbitration commission to make a decision but the other party applies to the people's court for a ruling, the people's court shall give a ruling." Therefore, the court held that, regarding a case involving the challenge of the validity of the arbitration agreement, a party concerned may request the arbitration commission to make a decision or may apply for the people's court for a ruling alternatively, which is an irreversible choice. Because Da Tang International has raised objection to jurisdiction to CIETAC, which has, in turn, authorized the arbitration tribunal to make a decision on jurisdiction, under this circumstances, Da Tang cannot request the same to the court.

iii. Matters about the Scope of Judicial Review of Arbitration

Regarding the application for confirming the validity of a foreign-related arbitration agreement in the case⁴ of Sil-Metropole Organisation Ltd. (the Claimant or Sil-Metropole Organisation) v. Empower CICC Investment Management Co., Ltd. (the Respondent or Empower CICC Company), Sil-Metropole Organisation claimed that the arbitration clause involved therein was invalid and the stipulations therein of arbitration institution and resolution of disputes were not its true intention, and it was suspicious of stamps and signatures of the contract. According to the court, Sil-

⁴ *Civil Judgment* (J04 MT [2017] No. 38) issued by Beijing Municipal No. 4 Intermediate People's Court on 22 November, 2017.

Metropole Organisation alleged that the stipulations therein of arbitration institution and resolution of disputes were not its true intention and it was suspicious of stamps and signatures of the contract, which falls out of the circumstances of invalid arbitration agreement as stated in Article 17 of the *Arbitration Law*. Moreover, ascertaining the existence of an arbitration agreement went beyond the jurisdiction of people's courts for reviewing and confirming the validity of arbitration agreements. Furthermore, all the arbitration clauses as stipulated in five contracts, including the Cooperation Framework Agreement, involved therein, expressed the intention to apply for arbitration and contained the matters for arbitration and a designated arbitration commission, etc., so these contracts satisfied the requirements for arbitration agreements as stated in Article 16 of the *Arbitration Law* in the form and elements.

iv. Whether to be Bound by the Arbitration Clauses

In the case involving the dispute over contract of Wacai Internet Technology Co., Ltd. and Hangzhou Wacai Internet Finance Service Co., Ltd. v. Miao Lei and Wacai Holding Co., Ltd.⁵, Miao Lei lodged a legal action to Hangzhou West Lake District People's Court, and the Court reviewed the case to ascertain whether it was bound by the arbitration clause. Upon request of Zhejiang High People's Court, the SPC gave a reply and ascertained that two pieces of the *Certificate of Stock Options of Wacai Holding Co., Ltd.* involved therein contained no arbitration clause. Moreover, the *Notice on Option Award (2015 Stock Option Incentive Plan)* takes *Appendix 1 Option Agreement* and *Appendix 2 2015 Stock Option Incentive Plan* thereto as its integral

⁵ *Reply of the Supreme People's Court to the Request for Instructions on Wacai Internet Technology Co., Ltd. and Hangzhou Wacai Internet Finance Service Co., Ltd. v Miao Lei and Wacai Holding Co., Ltd.* (ZGFMT [2017] No. 116) issued on 17 November, 2017.

part. *Appendix 2 2015 Stock Option Incentive Plan* contains the arbitration clause, on which, however, Miao Lei did not sign. Existing evidence could not prove that Miao Lei has been aware of the arbitration clause in the *2015 Stock Option Incentive Plan* and was bound by the arbitration clause. Thus, the arbitration clause in the *2015 Stock Option Incentive Plan* had no binding force on Miao Lei. Because the people's court in the place where two pieces of the *Certificate of Stock Options of Wacai Holding Co., Ltd.* were signed, Hangzhou West Lake District People's Court had the jurisdiction.

Regarding the application for confirming the validity of a foreign-related arbitration agreement For the case of Guangzhou Huashangmao Real Estate Development Co., Ltd. (Guangzhou Huashangmao Company) v. Harvest Trade Investments Limited (Harvest Limited) , the SPC, upon request of Beijing Municipal High People's Court, gave a reply⁶ and ascertained that Guangzhou Huashangmao, Huashunda Real Estate Co., Ltd. and Harvest Limited had entered into the *Agreement on Amendments to Loan Contract* (Agreement No.: Z(W)Z No. 25042005, the "*2005 Agreement*) , specifying that three parties agree to submit the disputes on loan matters to CIETAC for arbitration. Guangzhou Huashangmao Company challenged the authenticity of arbitration clause in the *2005 Agreement*, but failed to provide prima facie evidence proving that the *2005 Agreement* was faked or the *2005 Agreement* was invalid in accordance with Article 17 and Article 18 of the Arbitration Law, from which we could not conclude that the *2005 Agreement* contained no arbitration clause or the arbitration clause therein was invalid. After the *2005 Agreement* was

⁶ *Reply of the Supreme People's Court to the Request of Beijing Municipal High People's Court for Instructions on Application for Confirming the Validity of an Arbitration Agreement in the Case of Guangzhou Huashangmao Real Estate Development Co., Ltd. v. Harvest Trade Investments Limited* (ZGFMT [2017] No. 78) issued on 17 November, 2017.

executed, Guangzhou Huashangmao Company and Harvest Limited entered into the *Agreement on Amendments to Loan Contract (2)* (Agreement No.: Z (Z) No. 001, the "2006 Agreement"), specifying that disputes between both parties shall be submitted to Guangzhou Arbitration Commission for arbitration. Therefore, Guangzhou Huashangmao Company and Harvest Limited have reached a consensus on the arbitration institution for resolving disputes arising therefrom, though the 2005 Agreement really exists. Because the arbitration clause in the 2005 Agreement has been replaced by that in the 2006 Agreement, it had no binding force on both parties. Thereafter, Beijing Municipal No. 4 Intermediate People's Court ruled and affirmed that the arbitration clause in the *Agreement on Amendments to Loan Contract* signed on 26 April, 2005 had no binding force on Guangzhou Huashangmao Company and Harvest Limited⁷.

v. The Issue of Agency

Regarding the application for confirming the validity of an arbitration agreement in the case⁸ of Yantai Moon Co., Ltd. (the Claimant or Yantai Moon Company) v. Super Food Specialists (M) SDN BHD (the Respondent or Super Food BHD) and Moon (Hong Kong) Limited (the Third Party or Hong Kong Moon Limited), Yantai Moon Company applied to the court for confirming that the arbitration clause in the contract involved therein had no binding force upon it on the ground of nonexistence of an arbitration agreement between it and Super Food Company. The court held that parties to the *System and Service Purchase Contract* (No. 2011MY-

⁷ *Civil Judgment* (J04 MT [2016] No. 39) issued by Beijing Municipal No. 4 Intermediate People's Court on 29 January, 2018.

⁸ *Civil Judgment* (YMSCZ [2015] No. 39) issued by Yantai Intermediate People's Court of Shandong Province on 24 July, 2017.

LJR-03A) were Hong Kong Moon Limited and Super Food BHD, Yantai Moon Company was not a party thereto, moreover, there was no evidence proving that Hong Kong Moon Limited had transferred its rights and obligations therein to Yantai Moon Company and both of them did recognize the existence of agency relationship. Therefore, existing evidence were unable to prove that Yantai Moon Company was the agent of Hong Kong Moon Limited. According to the aforesaid facts, the court affirmed that the arbitration clause in the contract involved therein had no binding force upon Yantai Moon Company, and both parties involved therein did not have a valid arbitration agreement.

In the case⁹ of Zhang Yongnian and Guan Qiwen (collectively the Claimant) v. Pan Zanyi, Guangzhou Yufeng Consultants Co., Ltd. (Yufeng Company) and Ou Zhihang (collectively called the Respondent), Zhang Yongnian and Guan Qiwen applied for confirming the invalidity of arbitration clauses set forth in the *Stock Housing Purchase and Sale Contract* (Contract No.: 70587) entered into by and between them (in the name of Ou Zhihang) and Pan Zanyi and Yufeng Company. The court held that Article 16 of the Stock Housing Purchase and Sale Contract read that "Any dispute arising out of the performance of this Contract shall be settled by both Parties through negotiation. Where such negotiation fails, both Parties agreed to submit the dispute to Guangzhou Arbitration Commission for arbitration". The contract was signed by and between Ou Zhihang in the name of Zhang Yongnian and Guan Qiwen, and Pan Zanyi and Yufeng Company. However, Ou Zhihang failed to obtain general or special authorization for signing the arbitration clauses set forth in the housing purchase and sale contract. After the contract was signed, neither

⁹ *Civil Judgment* (SZFZYZ [2013] No. 50) issued by Guangzhou Intermediate People's Court of Guangdong Province on 4 July, 2017.

Zhang Yongnian nor Guan Qiwen further recognized the right of Ou Zhihang to go to the arbitration on his or her behalf. Moreover, according to the words and expressions of the *Agreement and Receipt of Payment*, neither Zhang Yongnian nor Guan Qiwen made further verification of the right to Ou Zhihang to go to an arbitration of disputes arising out of the contract on his or her behalf. According to the signing situation of the contract concerned, there was no evidence proving the existence of circumstance where Pan Zanyi had relied on to believe Ou Zhihang's power of agency. Thus, Zhang Yongnian and Guan Qiwen were not the parties of the arbitration clauses thereof and these clauses had no binding force on them. The SPC particularly noted in its reply that the case apparently involved the judgment of the validity of arbitration clauses set forth in the contract. When judging the validity of arbitration clauses, the court shall avoid making judgment of binding force of the corresponding contract, so as to further avoid substantial handling of the case at the stage of dispute over jurisdiction. Therefore, the analysis of binding force of the arbitration clauses shall be limited to judging whether Ou Zhihang enjoyed the right to file an arbitration of relevant disputes on an agency basis¹⁰.

vi. Validity of Arbitration Clauses in the Bill of Lading

In the case of China Animal Husbandry Industry Co., Ltd. (CAH Company) v. Palmer Shipping Co., Ltd. (Palmer Company) concerning the dispute over marine cargo contract¹¹, Palmer Company alleged that arbitration clauses and choice of law clauses on the back side of the bill of lading were binding upon the assignee, and the

¹⁰ *Reply of the Supreme People's Court to the Request for Instructions on Application for Confirming the Validity of an Arbitration Agreement* by Zhang Yongnian and Guan Qiwen (ZGFMT [2017] No. 36) issued on 23 May, 2017.

¹¹ *Civil Judgment* (YMX [2017] No. 857) issued by the High People's Court of Guangdong Province on 30 January, 2018.

court enjoyed no jurisdiction over the case. The court held that the contents set forth in the bill of lading could not prove that the charter contract signed on 11 March, 2015 in the standard terms in accordance with the *North American Grain Charterparty 1973* claimed by Palmer Company has been included in the bill of lading involved therein. Moreover, Palmer Company failed to present evidence proving that the whole set of originals of the bill of lading contained the charter contract. Thus, the claim raised by Palmer Company that the charter contract has been included into the bill of lading, and all terms and conditions of the charter contract and the appendixes thereto were applicable to the cargo involved therein, lacked factual grounds. Article 8 of the bill of lading concerned reads that: "(a) New York. Any dispute arising out of the Contract shall be governed by the laws of the US and shall be arbitrated in New York. (b) London. Any dispute arising out of the Contract shall be governed by the laws of the UK and shall be arbitrated in London. Either (a) or (b) may be deleted on an as-needed basis." The provisions above indicated that this clause is optional and alternative. The bill of lading made no specification for the choice of the place of arbitration and the governing law as stated by the said article. Moreover, Palmer Company failed to provide evidence proving that the parties of the bill of lading had reached an agreement on the selection of the choice of the place of arbitration and the governing law mentioned above. Based on the findings, it could be judged that the bill of lading involved herein specified neither the place of arbitration nor the governing law. As analyzed above, the charter contract alleged by Palmer Company was not effectively included into the bill of lading concerned, therefore, the claims that the clauses of charter contract and the clauses on the back side thereof sufficed to confirm that the dispute over cargo should be governed by the laws of the UK and arbitrated in London, were untenable. Pursuant to Article 16 of the *Interpretation*

of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China, the law of China shall be applied for confirming the validity of arbitration clauses set forth in the bill of lading. Pursuant to Article 5 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China*, the arbitration clauses on the back side of the bill of lading shall be deemed invalid because the parties concerned failed to have agreed upon an arbitration institution.

vii. Conclusion

Cases of confirming the validity of foreign-related and HMT-related arbitration agreements in 2017 present the characteristics as follows:

Firstly, the interpretation of arbitration institutions as agreed upon in the arbitration clauses remains a frequent problem. Courts can basically apply Article 3 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China*, i.e., "If the name of the arbitration institution agreed upon in an arbitration agreement is not described in an accurate way, but the specific arbitration institution is determinable, it shall be deemed that the arbitration institution has been selected and identified", in an accurate way. Also, courts take a comprehensive approach, rather than depend on the words and expressions of the arbitration clauses, to identify the arbitration institution and reasonably explain the parties' true intention of selecting an arbitration institution. However, from the perspective of preventing the legal risk, this reminds the parties to accurately describe the name of arbitration institution and other matters when setting up the arbitration clauses, so as to avoid the dispute arising

therefrom in the future and cause extra cost.

Secondly, whether the arbitration clauses have the binding force on the parties is a focus for the courts to hear the cases. According to the existing cases, whether the parties have signed the legal instruments bearing the arbitration clauses and whether the preceding arbitration clauses have been superseded by new ones are important factors. Meanwhile, the burden of proof constitutes another key factor of such cases.

Thirdly, the standards for judging the validity of the arbitration clauses in the bill of lading tend to be unified. Of the related cases, all the parties claim that the arbitration clauses on the back side of the bill of lading are binding upon the assignee thereof, but the courts always focus on whether the arbitration clauses set forth in the bill of lading have been included into the charter contract and whether the assignee of the bill of lading is aware of the clauses. If the existing evidence cannot prove this, it could not judge that the arbitration clause set forth in the bill of lading is binding on the assignee.

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

i. Scope of Judicial Review of Arbitration

For the case of Jinyingfeng Equity Investment Fund (Shenzhen) Co., Ltd (the Claimant or Jinyingfeng Company) v. Tishman Speyer China Fund (Barbados) SRL (the Respondent or Tishman Company)¹² concerning the application for annulment of foreign-related arbitral award, Jinfengying Company claimed that the arbitral

¹² *Civil Judgment* (J04 MT [2016] No. 52) issued by Beijing Municipal No. 4 Intermediate People's Court on 22 May 22, 2017.

award went against the facts and legal provisions. The court stated that its review would be limited to particular matters explicitly stipulated by the laws regarding the setting-aside of foreign-related arbitral award. Other matters go beyond the scope of powers and responsibilities of the court, so the court had no right to review. The cause that Jinfengying Company claimed that the arbitral award rendered by the arbitral tribunal went against the facts and legal provisions was not the legal cause for a people's court to set aside the foreign-related arbitral awards, therefore, the cause presented by Jinyingfeng Company for setting aside the arbitral award was untenable.

In the case of *Stabilo Corporation (the Claimant) v. Wuxi Delin Marine & Ocean Technology Co., Ltd. (the Respondent or Delin Company)* concerning the application for setting aside the foreign-related arbitral award¹³, the Respondent raised a defense to refuse to enforce the arbitral award. The court held that the people's court, for refusal to enforce the foreign-related arbitral awards, could be entitled to review the arbitration jurisdiction flaw, error in arbitration proceedings and other procedural problems, rather than whether the foreign-related arbitral awards suffered any error or other substantive issues, let alone whether the subject matter of the enforcement of foreign-related arbitral awards should be offset against the creditor's rights. That is to say, the review proceedings of refusal to enforce the foreign-related arbitral awards aim at ascertaining whether the enforcement proceedings of the arbitral awards could be initiated, rather than the enforcement itself of arbitral awards after the enforcement proceedings were initiated. Therefore, claims raised by Delin Company were out of the scope of legal grounds mentioned above, so the court should not touch upon these claims.

¹³ *Civil Judgment* (S02 MT [2017] No. 105) issued by Wuxi Intermediate People's Court on 14 September, 2017.

For the case of Henan Songyue Carbon Co., Ltd. (the Claimant or Songyue Company) v. Awot Global Express (HK) Limited (the Respondent or Awot Limited) concerning the application for setting-aside of arbitral award¹⁴, the court held that the claim of Songyue Company of nonexistence of an arbitration agreement between it and Awot Limited lacked factual grounds and the cause of such claim was untenable. The court stated that the subject qualification of parties were the premise for ascertaining whether the arbitration clauses existed between the parties of this case, which, in turn, was the legal circumstance to judge whether the arbitral award was legal. Awot Limited accordingly thought that the ascertainment of subject qualification was merits of this case, rather than the legal ground for Songyue Company to apply for setting aside the arbitral award was untenable. On this basis, reviewing the subject qualification of the parties and ascertaining whether the contracting parties have agreed upon the arbitration clauses did not fall out of the jurisdiction of the court.

ii. Problems about Arbitration Proceedings

1. Inconsistency between Arbitration Proceedings and Arbitration Rules

For the case of Li Binglin and Han Yongtian (collectively called "the Claimant") v. Jilin Jidian Real Estate Development Co., Ltd. (the Respondent) concerning the application for setting aside the Macao-related arbitral award¹⁵, the court ascertained that Li Binglin was a permanent resident of Macao Special Administrative Region, and the special provisions on foreign-related commercial arbitration shall be used as

¹⁴ *Civil Judgment* (J72 MT [2016] No. 32) issued by Tianjin Maritime Court on 13 March, 2017.

¹⁵ *Civil Judgment* (J01 MT [2017] No. 12) issued by Changchun Intermediate People's Court on 23 November, 2017.

the arbitration rules for this case. But Chapter 8 *Special Provisions on International (Foreign-Related) Commercial Arbitration of the Arbitration Rules of Changchun Arbitration Commission* specified general rules for the composition of arbitral tribunal, notice of hearing, governing laws, etc. different from commercial arbitration without foreign elements. Nevertheless, the tribunal did not try the arbitration case (CZCZ [2016] No. 334) according to the proceedings set forth in Chapter 8 thereof, thus affecting due right of Li Binglin. The arbitration proceedings was illegal. Besides, the arbitral award indicated that Han Yongtian acted as the authorized agent of Li Binglin, and stated that three agents authorized by Han Yongtian served as the re-authorized agents of Li Binglin, but neither the information of the re-authorized agents nor the record of the procedures for re-authorization was referred in the arbitral award. Moreover, the two claimants both denied that Li Binglin authorized the agents or Han Yongtian entrusted the re-authorized agents to appear in hearing during the arbitration, and no procedure of authorization for agency was available, so the court held the arbitration proceedings illegal. Therefore, the arbitral award shall be set aside.

2. Whether "The Other Party has Concealed Evidence that is Sufficient to Affect the Impartiality of the Award"

In the case of Cai Qunli (the Claimant) v. Hainan Lianhua Real Estate Development Co., Ltd. (the Respondent or Lianhua Company) concerning the application for setting aside the arbitral award¹⁶, the Claimant claimed that Lianhua Company had concealed evidence that were sufficient to affect the impartiality of the award, i.e., evidence that whether Liu Xiaobai served as the General Manager of Lianhua
16 Civil Judgment ([2017]Q01 MT No. 34) issued by Haikou Municipal Intermediate People's Court of Hainan Province on 20 September, 2017.

Company and whether Liu Xiaobai had the right to collect the housing purchase amount on behalf of Lianhua Company, and whether his acts were the duties of position. The investigation revealed that Lianhua Company had employed Liu Xiaobai to serve as the General Manager on 18, May 2010 and notified all departments. However, Lianhua Company concealed not only the fact and also evidence that are sufficient to ascertain the fact during the arbitration. The court held that Liu Xiaobai's capacity in Lianhua Company was key fact to ascertain the case and played a critical role for ascertainment of main facts. The act of Lianhua Company concealed the evidence that Liu Xiaobai was its General Manager was sufficient to affect the impartiality of the award rendered by Hainan Arbitration Commission. The court set aside the arbitral award (HZZ [2016] No. 976) rendered by Hainan Arbitration Commission in accordance with Article 58.1(5) of the *Arbitration Law*.

3. Relationship between Extended Arbitration Trial and Arbitration Proceedings

For the case of Zhu Qianhong (the Claimant) v. Shenzhen Lianma Property Management Co., Ltd. (the Respondent or Lianma Property Company) concerning the application for setting aside the arbitral award¹⁷, the court ascertained that the arbitration exceeded the time limit as stated in the *Arbitration Rules*, but no evidence proving that the late award could influence correct ruling. Therefore, the arbitration proceeding did not violate the legal procedures. The court did not accept the ground that the Claimant applied for setting aside the arbitral award.

iii. Whether the Parties Can Apply for Setting Aside the Arbitral

¹⁷ *Civil Judgment* (Y03 MC [2017] No. 624) issued by Shenzhen Intermediate People's Court on 22 December, 2017.

Awards on the Ground of "Wrong Application of Laws"

ADM Asia-Pacific Trading Pte. Ltd. (the Claimant or ADM Limited" applied for annulling the arbitral award (ZGMZJCZ [2016] No. 0517) rendered by CIETAC on 6 May, 2016¹⁸ on the grounds that: 1) the arbitral award failed to apply the correct law; 2) ADM Company failed to express its opinions fully during the arbitration and the arbitral award failed to give full consideration to all opinions expressed by ADM Company. Through investigation, the court held that "Others" in the *Purchase and Sale Contract* were governed by the laws of the UK as agreed upon by both parties. Other articles of the *Purchase and Sale Contract* shall be governed by the laws of China, because both parties did not reach an agreement on the governing laws and their places of operation were China and Singapore, which were both the contracting member state of the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), so the CISG shall be applied. The laws of China shall be the governing laws upon the doctrine of most significant relationship. The above concerned the governing law to confirm the rights and obligations of the parties of arbitration, which was not the ground for setting aside the foreign-related arbitral awards as stipulated in Article 70 of the *Arbitration Law*, Article 274 of the *Civil Procedure Law of the People's Republic of China (2012 Revision)* (the *Civil Procedure Law*) , so the court would not rule on these claims. For the claims that ADM Company failed to express its opinions fully during the arbitration, the arbitral award failed to give full consideration to all opinions expressed by ADM Company, the arbitral tribunal did not treat both parties equally, and the court held that the arbitral tribunal's decision not to adopt the parties' opinions did not fall into the

18 *Civil Judgment* (J04 MT [2016] No. 58) issued by Beijing Municipal No. 4 Intermediate People's Court on 3 January, 2017.

circumstance of Article 274 of the *Civil Procedure Law*, i.e., "the respondent was unable to state his opinions due to reasons for which he is not responsible." It was the power of an arbitral tribunal to decide to adopt or not to adopt the parties' opinions and render the arbitral awards according to the opinions of the majority of arbitrators based on the facts, contractual provisions and governing laws. It cannot determine that the arbitral tribunal's decision not to adopt the opinions of a party could be deemed that the party failed to express its opinions fully or the party was deprived of fully expressing its opinions, and it could not rule that the arbitral tribunal did not treat both parties equally. In this case, both parties selected the arbitrators and presented the evidence, as well as exchanged the cross-examination opinions before the hearing, participated in the hearing and submitted the supplementary opinions after the hearing, thus, the situation that "the respondent was unable to state his opinions due to reasons for which he is not responsible" did not exist.

iv. Conclusion

Setting-aside and non-enforcement of arbitral awards relating to foreign countries, Hong Kong, Macao and Taiwan in 2017 reveal that the arbitration procedure against arbitration rules that other common issues remain key grounds in the application of setting-aside and non-enforcement of arbitral awards.

Apart from the traditional problems relating to the arbitration proceedings, such as whether the composition of arbitral tribunal is fair and equal, some new matters, like relationship between arbitration time limit and arbitration procedure, and whether the parties fully expressed their opinions, emerged. For the problem whether the arbitration exceeding the given period violates the arbitration proceedings, the court

identified the standards for correct judgment, i.e., the arbitration is later than the time limit as stated in the Arbitration Rules, but there is no evidence proving that the late award could influence correct ruling, thus the arbitration procedure is not in violation of legal procedure.

For the problem whether the parties have fully expressed their opinions, the court stated that "the respondent was unable to state his opinions due to reasons for which he is not responsible" did not contain the arbitral tribunal's decision not to adopt the parties' opinions. The arbitral tribunal's decision not to adopt the opinions of a party could not be deemed that the party failed to express its opinions fully or the party was deprived of fully expressing its opinions, and it could not rule that the arbitral tribunal did not treat both parties equally, which could be actually concrete interpretation for Article 274 of the *Civil Procedure Law*. It is worthy of paying attention to new review standards raised by the court for the said problems.

Besides, for the scope of judicial review of arbitration, the court held that qualification of subject of parties were the premise for ascertaining whether the arbitration clauses existed between the parties, which were the legal circumstances to judge whether the arbitral award was legal. On this basis, reviewing the subject qualification of parties and ascertaining whether the contracting parties have agreed upon the arbitration clauses did not fall out of court's jurisdiction.

III. Recognition and Enforcement of Foreign-Related and HMT-Related Arbitral Awards

i. About the Jurisdiction

For the case of S.M. Entertainment (the Claimant) v. Huang Zitao (the Respondent) concerning the confirmation of the validity of contract, the SPC stated in the reply¹⁹ that the arbitration agreement involved therein stipulated that "any dispute that cannot be resolved through mutual negotiation may be filed for arbitration to the competent court in accordance with the *Civil Procedure Law of the Republic of Korea* and other relevant laws, or filed to the Korean Commercial Arbitration Board in accordance with the *Arbitration Law*. Both parties disputed on whether the *Arbitration Law* referred to the *Arbitration Law of the People's Republic of China* or the *Arbitration Law of the Republic of Korea*, which could, however, refer to the *Arbitration Law of the Republic of Korea* according to the context, so the validity of the arbitration agreement should be confirmed in accordance with the *Arbitration Law of the Republic of Korea*. Pursuant to the applicable laws of South Korea, both parties' agreement on the arbitration clauses and clauses of competent court shall be deemed that the parties enjoyed the right of choice, however, "any dispute may be filed for arbitration to the competent court in accordance with the *Civil Procedure Law of the Republic of Korea* and other relevant laws" could be explained that both parties agreed upon the jurisdiction enjoyed by the courts in South Korea, excluding the jurisdiction of Chinese courts on the dispute.

ii. About the Validity of Arbitration Clauses

For the case of Louis Dreyfus Commodities Suisse S.A. (the Claimant or Louis Dreyfus Company) v. Ningbo Future Import & Export Co., Ltd. (the Respondent or Future Company) concerning the application for recognizing and enforcing the foreign arbitral awards, the SPC, upon request of Zhejiang High People's Court,

¹⁹ Reply of the Supreme People's Court to the Request for Instructions on Confirming the Validity of a Contract in the Case of S.M. Entertainment v. Huang Zitao (ZGFMT [2017] No. 123) issued on 18 December, 2017.

gave a reply²⁰. According to the application of Louis Dreyfus Company, the Cotton Council International (CCI) arbitrated 22 raw cotton sale contracts under dispute. Based on the consultation between both parties on the said 22 contracts, Louis Dreyfus Company sent a "letter for terminating the contracts" to Future Company on 8 October, 2012, and attached the list of contract numbers, including those of 22 raw cotton sale contracts thereto. Future Company raised no objection to the execution of these 22 contracts in the reply given on 26 October, but just asked for further consultation on its difficulty to perform these contracts. The reply of Future Company did not only indicate the execution of the 22 contracts, but also proved that both parties had reached an agreement on the arbitration clauses contained therein. Moreover, Future Company consulted with Louis Dreyfus Company about the security deposit for 40,000 tons of raw cotton as stated in *Contracts S1043, 1044 and 1045*, but there was no evidence proving that both parties had reached an agreement. In addition, the security deposit agreement was a single agreement on the performance of security deposit as stated in the raw cotton sale contracts, which was independent of the raw cotton sale contracts, and the clauses of competent court therein, assuming it is valid, could only provide for the repayment of the security deposit, and would not affect the validity of arbitration clauses set forth in the raw cotton sale contracts. This case did not involve the situations as stated in Article V:1(c) of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*. Therefore, the case had no ground of refusing the arbitral awards rendered by the CCI. Afterwards, Ningbo Intermediate People's Court judged that the arbitral awards (No. A01/2012/222) rendered by the CCI on

20 Reply of the Supreme People's Court to the Request Raised by Zhejiang High People's Court for Instructions on Recognizing and Enforcing a Foreign Arbitral Award in the Case of *Louis Dreyfus Commodities Suisse S.A. v. Ningbo Future Import and Export Co., Ltd.* (ZGFMT [2017] No. 96) issued on 19 December, 2017.

28 October, 2014 could be recognized and enforced²¹.

For the case of Praxair Cotton Co., Ltd. (the Claimant or Praxair Company) v. Jiangsu Jinfang Industry Co., Ltd. (the Respondent or Jinfang Company) concerning the application for recognizing and enforcing the arbitral awards (ICA Reference AO1/2013/04) rendered by CCI²², Jinfang Company claimed that the arbitral awards involved therein could be refused to be recognized and enforced on the ground that it did not enter into an arbitration agreement with Praxair Company. The court held that the establishment of an arbitration agreement was the premise to judge whether it was valid and fell into the scope of validity review. The invalidity of an arbitration agreement set forth in Article V of the *New York Convention* included the circumstances of non-establishment of the agreement. Thus, the court shall adjudicate whether this case involved the situations as stated in Article V:1(a) of the *New York Convention*. Both parties did not agree upon the proper law for confirming the validity of the arbitration agreement, so it should refer to the law of the place of arbitration i.e. the UK to decide whether the concerned arbitration agreement had been established. The fact that the contract has been executed could not suffice to judge that Jinfang Company and Praxair Company had reached a consensus on the arbitration agreement. Pursuant to the laws of the UK, both parties' consensus on filing the disputes for arbitration was an element for the arbitration agreement to be entered into. Jinfang Company and Praxair Company failed to enter into an arbitration agreement, so this case involved the situation as stated in Article V:1(a) of the *New York Convention*, i.e., refusing to recognize and enforce the arbitral awards.

21 *Civil Judgment* (ZYZZ [2015] No. 5) issued by Ningbo Intermediate People's Court on 28 January, 2018.

22 *Civil Judgment* (YSWZSZ [2014] No. 00001) issued by Yancheng Intermediate People's Court of Jiangsu Province on 29 June, 2017.

iii. About the Scope of Courts' Review

For the case of Huaxia Life Insurance Co., Ltd. (the Claimant or Huaxia Insurance) v. American International Group, *et al* (the Respondent or AIG) concerning the application for recognizing and enforcing the arbitral award (No. 20025/RD(c.20026/RD)) rendered by the International Court of Arbitration of International Chamber of Commerce (ICC Court) in Hong Kong Special Administrative Region (HKSAR)²³, the court held that arbitral award involved therein had clearly stated that Huaxia Insurance should be entitled to recover the fund under the custody in accordance with the *Fund Custody Agreement*. In fact, Huaxia Insurance was unable to do so through negotiation with the custody bank, which simply proved that it was very necessary to enforce the arbitral award. Moreover, the arbitral award stated that AIG and AIG Capital were obligated to cooperate with Huaxia Insurance, take all necessary measures and immediately enforce the final award, including any other possible necessary instructions requiring the custody bank to refund the fund under the custody to Huaxia Insurance, which did not hinder the custody bank from making refund to Huaxia Insurance. The arbitral awards also specified the obligations of AIG and AIG Capital for actions and non-actions and stated specific contents of enforcement, so non-enforcement of the arbitral award would definitely damage the rights and interest that should be obtained by Huaxia Insurance through the arbitral award. Whether it could be objectively enforced fell out of the scope of courts' review. If a refusal of enforcement was granted on such ground, it actually exempted the enforcee's due obligation and went against the principles of honesty and equality.

For the case of MASPAL Investment Co., Ltd. (the Claimant or MASPAL Company)

²³ *Civil Judgment* (J04 RG [2016] No. 1) issued by Beijing Municipal No. 4 Intermediate People's Court on 9 May, 2017.

v. Dongfang Huacheng (Group) Co., Ltd. (Dongfang Company) and Taizhou Zhixing Co., Ltd. (Taizhou Company" or collectively "the Respondent) concerning the application for recognizing and enforcing the arbitral award, the SPC, upon request of Zhejiang High People's Court, gave a reply²⁴: Article IV of the *New York Convention* stipulates that the parties can apply for recognizing and enforcing an arbitral award by submitting the arbitration agreement, however, the parties of this case failed to do so, which did not constitute the situation of non-recognition and non-enforcement as stated in Article V of the *New York Convention*. The parties failed to submit the arbitration agreement in accordance with Article IV of the *New York Convention*, and the people's court should dismiss the application, rather than ruled the non-recognition and non-enforcement of the arbitral award. Moreover, the people's court should conduct the *pro forma* review of the arbitration agreement in accordance with the said article. Pursuant to Article V:1 of the *New York Convention*, the people's court has the right to ascertain the recognition and enforcement of the arbitral award when the party applies for neither recognizing nor enforcing the arbitral award. The people's court could not conduct the review on its own initiative. Moreover, the party's application for recognizing and enforcing the foreign arbitral award that has exceeded the legal period could be not the ground of non-recognition and non-enforcement as stated in Article V of the *New York Convention*, either. Afterwards, Ningbo Maritime Court adjudicated and affirmed the validity of the arbitral award rendered by the arbitral tribunal consisting of Michael Baker-Harber, Ian Kinnell and Christopher John William Moss on 6 January, 2014 for the

²⁴ Reply of the Supreme People's Court to the Request Raised by Zhejiang High People's Court for Instructions on Recognizing and Enforcing the Foreign Arbitral Award in the Case of MASPAL Investment Co., Ltd. v. Dongfang Huacheng (Group) Co., Ltd. and Taizhou Zhixing Co., Ltd. (ZGFMT [2017] No. 67) issued on 20 December, 2017.

case of MASPAL Investment Co., Ltd. v. Dongfang Huacheng (Group) Co., Ltd. and Taizhou Zhixing Co., Ltd. concerning the dispute over ship purchase and sale contract²⁵.

iv. About the Notice on Arbitration

For the case of Royal Foods Import Corp. (the Claimant) v. Suqian Canned Food Co, Ltd. (the Respondent) concerning the application for recognizing and enforcing the arbitral award (No. 2590) rendered by Association of Food Industries, Inc.(AFI)²⁶, the Respondent alleged that it had not undertaken to use the email box of Guo Wei, Business Manager of the Respondent, as the eligible mailbox to receive the notice of arbitration and relevant documentation served by the arbitral tribunal, therefore, the arbitration proceedings violated relevant provisions of the *New York Convention*. The court held that both parties agreed to designate AFI as the arbitration institution for resolution of disputes, which should be deemed as the acceptance of the *AFI Arbitration Rules*. Section 13 of the *AFI Arbitration Rules* reads: the arbitral tribunal may use the reasonable ways to send any arbitral instruments, including the notice of arbitration, notice of selecting the arbitrators and arbitral award, to the party's last known address, and the reasonable ways mentioned herein include sending by mail. Although the Claimant and the Respondent did not agree upon using the email box of Guo Wei as the address to receive the arbitral instruments, Guo Wei signed the contracts involved in this case as the Respondent's representative and the Respondent used the mailbox of Guo Wei to keep business correspondence with the Claimant, it could be ascertained that the mailbox of Guo Wei was the Respondent's last known

²⁵ *Civil Judgment* (Z72 XWR [2016] No. 5) issued by Ningbo Maritime Court on 20 March, 2018.

²⁶ *Civil Judgment* (S13 XWR [2016] No. 1) issued by Suqian Intermediate People's Court on 8 February, 2017.

address, and the notice of arbitration, notice of selecting the arbitrators, arbitral award and other arbitral instruments sent to the mailbox should be deemed to have been served upon the Respondent.

For the case that Hailong Yacht Project (China) Co., Ltd. applied for recognizing and enforcing an arbitral award made in the UK, the SPC, upon request of Shandong High People's Court, gave a reply²⁷: Article 13 "Disputes and Arbitration" of the contract involved therein was the agreement between both parties on the arbitration proceedings, so the court should identify the consistency between arbitration proceedings and arbitration agreement according to this article. About the "notice of award", the said article specified that: Any notice of award shall be immediately sent to the address of both parties by facsimile or email address that has been confirmed in a written form. The arbitrator had sent the notice of award to shang email on 9 January, 2104, sent the unsigned arbitral award to dragon email and also sent a carbon copy to shang email and cheng email on 21 January, 2014. Based on the findings above, it could be deemed that the arbitrator had sent the notice of award in accordance with agreement of both parties on the arbitration proceedings. This case incurred no inconsistency between arbitration proceedings and arbitration agreement. Article 17 of the contract involved in this case specified the delivery of notices between both parties, rather than the arbitration proceedings, which was inapplicable to the circumstances of sending the arbitral award during the arbitration proceedings.

v. About the Composition of the Arbitral Tribunal

²⁷ Reply of the Supreme People's Court to the Request Raised by Shandong High People's Court for Instructions on the Application of Hailong Yacht Project (China) Co., Ltd. for Recognizing and Enforcing an Arbitral Award Made in the UK (ZGFMT [2017] No. 114) issued on 26 December, 2017.

For the case of Bright Morning Limited (the Claimant or BM Company) and Yixing Lucky Textile Group Limited (the Respondent) concerning the application for recognizing and enforcing the arbitral award ([2011] No. 130 ARB130/11/MJL) rendered by the SIAC²⁸, the Respondent claimed that the tribunal had failed to uphold the independence, neutrality and fairness firmly, resulting in many material error in the final award. Moreover, the arbitral tribunal apparently showed favor to the Claimant. The court asked the Respondent to assume the burden of proof for its claim that the composition of the arbitral tribunal was inconsistent with the arbitration rules. Firstly, the proof presented by the Respondent could not prove that the two arbitrators of this case failed to disclose relevant circumstances or made disclosure in an accurate way. Secondly, Article 2 and Article 4 of the *SIAC Arbitration Rules* specified the requirements for independence or neutrality of arbitrators. The Respondent claimed that the two arbitrators were not independent or neutral on the grounds that arbitrators of this case concurrently served as arbitrators of other cases, and the law firm of one of the arbitrators maintained the long-term business relationship with MWE Law Firm, the arbitration agent of BM Company. Such claim lacked sufficient grounds. Thirdly, the Respondent claimed that the said two arbitrators had violated the obligation of disclosure set forth in the *Guidelines on Conflicts*, no matter whether these two arbitrators must perform the obligation of disclosure in accordance with the *Guidelines on Conflicts*, which were not the mandatory regulations in fact. Moreover, violating the *Guidelines on Conflicts* could not necessarily go against the *SIAC Arbitration Rules*. Finally, all the claims that the arbitral tribunal violated the *SIAC Arbitration Rules* raised by the the Respondent to the court had been presented to the arbitral tribunal during the arbitration, and the

28 *Civil Judgment* ([2016]S02 XWR No. 1) issued by Wuxi Intermediate People's Court on 31 August, 2017.

SIAC had adjudicated in accordance with its *Arbitration Rules* and made the decision on the composition of the arbitral tribunal after asking BM Company to give a response. To conclude, the aforesaid pleading opinions raised by the Respondent shall be deemed inadmissible by the court.

vi. Which One Shall Prevail in Case of Inconsistency between Arbitration Clauses and Arbitration Rules

For the case of Noble Resources International Pte Ltd. (the Claimant or Noble Limited) v. Shanghai Xintai International Trade Co., Ltd. (the Respondent or Xintai Company) concerning the application for recognizing and enforcing the foreign arbitral award, the SPC, upon request of Shanghai High People's Court, gave a reply²⁹ that the *Iron Ore Purchase and Sale Contract* entered into by and between both parties agreed upon the quoting of terms and conditions under Section 2 of L2.4 set forth in the *Standard Protocol*, which actually contained the arbitration clauses. These arbitration clauses were thus effectively incorporated to the *Iron Ore Purchase and Sale Contract*, and both parties had reached valid written arbitration clauses. Article 16.1 of the arbitration clauses specified that: Any dispute and compensation shall be submitted to the SIAC for arbitration in Singapore in accordance with the then-current effective *SIAC Arbitration Rules*. The arbitral tribunal shall be composed of three arbitrators. Therefore, both the arbitration proceedings the composition of the arbitral tribunal of this case complied with the arbitration clauses agreed upon by both parties.

²⁹ *Reply of the Supreme People's Court to the Request for Instructions on Recognizing and Enforcing the Foreign Arbitral Award in the Case of Noble Resources International Pte Ltd. v. Shanghai Xintai International Trade Co., Ltd.* (ZGFMT [2017] No. 50) issued on 26 June, 2017.

Besides, the SPC gave a reply to the problem about whether the expedited arbitration procedure was applied for this case was consistent with the agreement of both parties. The dispute of this case was arbitrated in accordance with the then effective *SIAC Arbitration Rules* (5th Edition, 2013) (*the Arbitration Rules (2013 Edition)*), Article 5 of which provided for the expedited procedure, and the amount in dispute of this case did not exceed SGD5 million and both parties did not exclude the application of "expedited procedure", so the SIAC conducted the arbitration through the "expedited procedure" upon the request of Noble Limited, which complied with the *Arbitration Rules (2013 Edition)* and did not violate the agreement concluded between both parties.

Also, the SPC gave a reply to the problem about whether the composition of the arbitral tribunal was consistent with the agreement of both parties. Pursuant to Article 5.2 of the *Arbitration Rules (2013 Edition)*, other ways of the composition of the arbitral tribunal applicable to the expedited procedure were not excluded therefrom. Moreover, the *Arbitration Rules (2013 Edition)* did not specify that the President of the SIAC could enjoy the right of discretion to apply the provisions for sole arbitrator set forth in Article 5.2(2) thereof when the parties concerned have agreed differently on the composition of the arbitral tribunal. The party autonomy was the foundation stone of the operation of arbitration system, and the composition of the arbitral tribunal is actually the basic rule of arbitration proceedings, therefore, "unless the President determines otherwise" as stated in Article 5.2(2) of the *Arbitration Rules (2013 Edition)* could not be explained that the President of the SIAC had the right of discretion to determine the way of composing the arbitral tribunal. On the contrary, the President should fully respect the parties' intention of the composition of the

arbitral tribunal when exercising his/her right to make decisions, so as to guarantee the party autonomy. Both parties of this case have agreed that the arbitral tribunal should consist of three arbitrators, and did not exclude the application of "expedited procedure" for the way of composition. Therefore, the application of "expedited procedure" did not influence the parties' basic procedural right to have the disputes arbitrated by the arbitral tribunal consisting of three arbitrators in accordance with the arbitration clauses.

The SIAC appointed a sole arbitrator to form the arbitral tribunal in accordance with Article 5.2(2) of the *Arbitration Rules (2013 Edition)* despite that the arbitration clauses had specified that the arbitral tribunal should be composed of three arbitrators, and Xintai Company clearly opposed the sole arbitrator, which violated the arbitration clauses and coincided with the situation that "The composition of the arbitral authority was not in accordance with the agreement of the parties" as stipulated in Article V:1(d) of the *New York Convention*.

vii. About the Awards beyond the Scope of Arbitration Agreement

For the case of Chen Co Chemical Engineering and Consulting GMBH (the Claimant or Chen Co Company) v. Do-Fluoride Chemicals Co., Ltd. (the Respondent or DFD Company) concerning the application for recognizing and enforcing the foreign arbitral award³⁰, the Respondent argued that the arbitral award of this case suffered such problems as award beyond the scope of arbitration agreement, unclear matters of arbitration and violation of the arbitration proceedings, it thus requested the people's court to disallow the recognition and

³⁰ *Civil Judgment* (XZMSZCZ [2015] No. 53) issued by Xinxiang Intermediate People's Court of Henan Province on 5 May, 2017.

enforcement of the arbitral award. The court held that Chen Co Company claimed that DFD Company should stop using the unauthorized technology and pay the liquidated damages for the unauthorized use, however, the ICC Court had rendered the *Final Award* for the arbitration case (No. 18046/JHN/GFG) in Zurich in the Switzerland, with Paragraph (414) reading that "DFD Company shall pay the penalty of EUR0.1 million on the 23th day each month if only DFD Company continues to use the technology of Chen Co Company", Paragraph (415) specifying that "DFD Company cannot use the technology of Chen Co Company until it pays off all the expenses as stated in Paragraph (414) of the Final Award." Concrete details of the award above did not stress the authorized technology, and also referred to the authorized technology, showing the situation of going beyond the request of Chen Co Company. In addition, Paragraph (417) thereof specified that "The default interest shall be accrued at the rate of 5% of the annual interest rate for the penalty that becomes expired each month until all the expenses are paid off", echoing the situation of award beyond the scope of arbitration agreement set forth in Paragraph (414). Therefore, the recognition and enforcement of contents of the award beyond the scope of arbitration agreement should be disallowed. Also, the court also ascertained whether the matters of arbitration in the Final Award were definite and enforceable. It should review whether the arbitral award of this case should be recognized and enforced in accordance with the *New York Convention*, if the arbitral award was uncertain but not under the circumstances of non-recognition and non-enforcement as stated in the *New York Convention*. On this basis, it should not disallow the recognition and enforcement of the arbitral award for the reason of uncertain award. Regarding whether the arbitral award coincided with the situation that "The composition of the arbitral authority was not in accordance with the

agreement of the parties" set forth in Article V:1(d) of the *New York Convention*: Firstly, it involved the language and expressions of Proof C-46. Although both parties agreed that the arbitration proceedings should be made in English, Chen Co Company did not provide the proof in English, to which DFD raised no objection during the arbitration, and gave the cross-examination opinions on the said proof. Besides, Article 33 of the ICC Arbitration Rules, applicable to this case, stipulates that "A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object." Therefore, the failure of Chen Co Company to provide the said proof in English was not the situation as stated in Article V:1(d) of the *New York Convention*. Secondly, it involved the problem about whether the proper law selected by the arbitral tribunal, the *Swiss Civil Code*, violated the arbitration proceedings. Whether the arbitral tribunal's decision went against the basic chemical principles actually was a matter of merits, which went beyond the scope of review of the people's court for recognizing and enforcing a foreign arbitral award.

For the case of Raffles International Corp. (the Claimant or Raffles Corporation) v. HNA Tianjin Center Development Co., Ltd. (the Respondent or HNA Tianjin) concerning the application for recognizing and enforcing an arbitral award made in Hong Kong, the SPC, upon request of Tianjin High People's Court, gave a reply³¹: Raffles Company filed the dispute over the performance of *License Contract* for

31 Reply of the Supreme People's Court to the Request for Instructions on the Application of Raffles International Corp. for Recognizing and Enforcing the Award Made in the Hong Kong (ZGFMT [2017] No. 16) issued on 28 March, 2017.

arbitration, and the arbitral award was also made over the claims concerning the dispute thereof. Therefore, the dispute arbitrated therein fell into the scope of matters as agreed upon by both parties in the arbitration agreement. The *License Contract* was closely associated with the *Hotel Management Contract*, and the arbitral award also referred to the contents of the *Hotel Management Contract* in ascertaining facts and demonstrating grounds, but did not make specific award for the dispute over the Hotel Management Contract. Therefore, the arbitral award neither handled the dispute over the Hotel Management Contract, nor incurred the situation that the award went beyond the scope of arbitration agreement. Afterwards, Tianjin Municipal No. 1 Intermediate People's Court ruled that³² the arbitral award should be recognized and enforced, and Raffles Corporation and HNA Tianjin reached a compromise during the enforcement.

viii. About the Identification of Recognition or Enforcement of Arbitral Awards Contrary to the Public Policies

1. Relationship between the Principles of Honesty and Credibility and Public Policies

For the case of Xinghe Maritime Co., Ltd. (the Claimant or Xinghe Company) v. Sinwa Ship Material Supply Co., Ltd. (Dalian Sinwa Company) and Gao Desheng (collectively "the Respondent) concerning the application for recognizing and enforcing an arbitral award made abroad³³, Gao Desheng, Board Chairman of the Respondent, alleged that he had not been aware of the arbitration clauses when signing the agreement and recognizing the arbitral award could go against the

³² *Civil Judgment* (J04 RG [2016] No. 1) issued by Tianjin Municipal No. 4 Intermediate People's Court on 18 May, 2017.

³³ *Civil Judgment* (L02 XWR [2016] No. 2) issued by Dalian Intermediate People's Court on 24 February, 2017.

principles of honesty and credibility set forth in the *General Principles of the Civil Law of the People's Republic of China (the General Principles of the Civil Law)* .

The court held that "The recognition or enforcement of the award would be contrary to the public policy of that country" as stipulated in Article V:2(b) of the *New York Convention* should be explained that recognition or enforcement of a foreign arbitral award would seriously violate basic legal principles of China, infringe upon the sovereignty of China, impair the social public security, go against good custom and jeopardize fundamental social and public interests. Article 4 of the *General Principles of the Civil Law* specifies that: "In civil activities, the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed." Honesty and credibility are basic principles of the civil law, which requires the people to be honest and keep faith, exercise rights and perform obligations duly in civil activities. As the Board Chairman of Dalian Sinwa Company, Gao Desheng has been engaged in the international trade for many years, and should read through an agreement without the Chinese version, ask the counterparty to provide the Chinese version and perform the duty of care and prudence. Moreover, after signing the agreement, Gao Desheng had the agreement performed. Nevertheless, he claimed that he had been never aware of the arbitration clauses therein when disputes arising out of the agreement were submitted for arbitration, which could be against the principle of honesty and credibility. Performing the agreement and complying with the contractual provisions simply reflect the principles of honesty and credibility.

For the claim raised by the Respondent that the arbitral award was unenforceable, the court determined that: pursuant to Article 4 of the *Notice on Implementation of New York Convention*, if a people's court does not think the application contains

the conditions as stated in Articles V:1 and V:2 of the *New York Convention* after carrying through examination and investigation to the recognition and enforcement of an arbitral award, the people's court shall recognize the validity and recognize the arbitral award in accordance with the enforcement procedures set forth in the *Civil Procedure Law*. Therefore, adjudicating whether an arbitral award was enforceable in accordance with the laws and regulations of China was not a ground for refusal of the recognition as stipulated by the *New York Convention*.

The court also reviewed the claim raised by the Respondent for unenforceable arbitral award due to unclear enforcee and contents of payment. The trademark involved herein was registered in the name of Dalian Sinwa Company, but Gao Desheng, as its legal representative, should be obligated to prepare, present and sign documents required for deregistering the trademark or transferring the ownership of such trademark upon the request of Xinhe Company. Thus, the enforcee and contents of payment of the arbitral award were clear and enforceable and the Respondent's allegation was untenable.

2. Relationship between Mandatory Provisions Set Forth in Administrative Regulations and Department Bylaws and Public Policies

For the case of China Aviation Oil (Singapore) Corporation Ltd. (the Claimant or CAOSCO) v. Chengdu Xinhua Chemical and Industrial Materials Co., Ltd. (the Respondent or Xinhua Chemical Company) concerning the application for recognizing and enforcing the arbitral award (No. 2016/091) rendered by the SIAC³⁴, the Respondent alleged that the contract involved in the arbitral award was a false contract upon

³⁴ *Civil Judgment* (C03 [2017] XWR No. 1) issued by Chengdu Intermediate People's Court on 23 June, 2017.

which no goods were delivered, violating the foreign exchange control laws and regulations of China and being contrary to the public policy of China, so the arbitral award made thereupon could not be recognized and enforced.

The court ascertained that CAOSCA and Xinhua Company carried out the reversing trade and made the settlement of differences by signing the purchase and sale contract, which was actually the futures trading. Conducting the overseas futures trading without obtaining the permission was contrary to the foreign exchange administration policies of China and trading the methyl benzene without reporting for recordation violated the *Foreign Trade Law of the People's Republic of China*, nevertheless, violation of mandatory provisions set forth in administrative regulations and department bylaws could not necessarily violate the public policies of China. Recognition and enforcement of the arbitral award could not violate basic legal principles, impair the social public security and jeopardize fundamental social and public interests of China. Based on the findings above, the arbitral award involved in this case did not constitute the situation as stipulated in Article V:2(b) of the *New York Convention*.

3. Influence of the Relationship between Arbitral Award and Civil Judgment on Public Interest

For the case of Chi Shing (Hong Kong) Limited (the Claimant or Chi Shing Company) v. Guangzhou Mingsheng Real Estate Development Co, Ltd. concerning the application for recognizing and enforcing the arbitral award (No. HKIAC/A12021) rendered by Hong Kong International Arbitration Centre (HKIAC)³⁵,

³⁵ *Civil Judgment* (SZFSSCZ [] No. 110) issued by Guangzhou Intermediate People's Court on 14 March, 2017.

the Respondent alleged that the facts ascertained by the HKIAC were contradictory to those in effective judgment made by the court in mainland China, which thus impaired the judicial sovereignty in mainland China, violated the social public interests and went against public order and good custom of the society. The Respondent accordingly requested the court to disallow the recognition and enforcement of the arbitral award.

The court held that the civil judgment involved therein had ruled that the payment of housing money by Chi Shing Company lacked strong grounds and dismissed the counterclaim of Chi Shing Company for asking Mingsheng Company to pay the liquidated damages for overdue delivery of housing. After Chi Shing Company produced the additional proof, the arbitral tribunal upheld its claims. The subject housing involved in the litigation was not that involved in the arbitration, the findings ascertained in the arbitral award that Chi Cheng Company had paid the housing payment and taxes and deeds did not deny the fact that Chi Shing Company failed to make the payment of another housing as adjudicated by the civil judgment, and the results of arbitral award did not deny the judgment results of the said civil judgment. The allegation of Mingsheng Company that the arbitral award involved in this case violated the social public interests, public order and good custom of the society in mainland China lacked factual ground, so the court did not uphold the allegation.

ix. Application of the Expedited Procedure Rules

For the case of Hyundai Glovis Co., Ltd. (the Claimant or Hyundai Company) v. Zhejiang Qiyong Energy Chemicals Co., Ltd. (The Respondent or Qiyong Company)

concerning the application for recognizing and enforcing the arbitral award ([2015] No. 004) (No. 004 Award) rendered by the SIAC³⁶, the Respondent requested the court to disallow No. 004 Award on the grounds that: 1) it failed to receive any notice about the arbitration; 2) the arbitration clauses agreed by both parties were invalid; and (3) the arbitration proceedings were contrary to the arbitration clauses, failing to comply with the *SIAC rules*.

Regarding the problem about whether the arbitration proceedings went against the agreement of both parties, the court held that the arbitration rules as stated through the arbitration rules in the *Purchase and Sale Agreement* were unavailable, because both parties clearly agreed that disputes in connection with the agreement would be submitted to the SIAC for arbitration, and the SIAC had properly notified Qiying Company of the application of the SIAC rules and the trail of the dispute through the expedited procedure after accepting the arbitration request raised by Hyundai Company, to which Hyundai Company raised no objection. On the premise that the arbitration rules as had been agreed upon by both parties were unavailable, it was not inappropriate that the SIAC used the SIAC rules to hear the case. Thus, the allegations of Qiying Company were untenable.

Regarding the problem about whether the composition of the arbitral tribunal was contrary to the agreement of both parties and the SIAC rules, the court ascertained that amount in dispute of this case complied with the standards for expedited procedures of the SIAC rules. Upon the request of Hyundai Company, the SIAC decided to apply the expedited procedures to hear the case and notified both parties to jointly nominate an arbitrator, otherwise, the President of the SIAC could appoint

³⁶ *Civil Judgment (ZYZQZ [2015] No. 3)* issued by Ningbo Intermediate People's Court on 13 January, 2017.

a sole arbitrator. However, Qiying Company disagreed with the arbitrator nominated by Hyundai Company by sending an email via its actually used mailbox, and asked the President of the SIAC to designate a sole arbitrator. Based on the facts above, it could be judged that Qiying Company agreed to change the number of arbitrators from three to be one. The President of the SIAC designated Tao Jingzhou to serve as a sole arbitrator and notify Qiying Company of the designation, to which Qiying Company raised no objection. Therefore, the composition of the arbitral tribunal did not go against the will of Qiyign Company, and Qiying Company failed to present any evidence to prove the hearing by a sole arbitrator affected the fairness of the case. To conclude, the allegations of Qiying Company were not upheld.

x. Interpretation of "Disputes Incapable of Being Resolved through Arbitration"

Pursuant to the *Arrangement of the Supreme People's Court on Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region*, the party against whom an application is filed may, after receiving the notice of an arbitral award made in HKSAR, adduce evidence to show the dispute involving the arbitral award cannot be resolved through arbitration, then the court may refuse to enforce the award through verification. For the case of Zhongyi'ou International Investment Group Co., Ltd. (the Claimant or Zhongyi'ou Company) v. Wuxi Franke GMKP Energy Limited (the Respondent) concerning the application for enforcing the arbitral award made in HKSAR³⁷, the court ascertained that the Zhongyi'ou Company filed the dispute on joint venture for arbitration in accordance with the arbitration clauses set forth in the *Joint Venture Contract*, although Zhongyi'ou

³⁷ *Civil Judgment* (XSWZSZ [2015] No. 2) issued by Wuxi Intermediate People's Court on 22 February, 2017.

Company did not request for discharging the *Joint Venture Contract*, the legal precondition of dissolving the joint venture and making the liquidation of the joint venture must be the discharge of the *Joint Venture Contract*. Item (b) of the arbitral award involved herein was the dispute arising out of the performance of the *Joint Venture Contract*, rather than the "disputes incapable of being resolved through arbitration." Item (c) of the arbitral award involved herein did not mean that the liquidation matters of the joint venture should be conducted by the arbitral tribunal, which simply meant that the joint venture should enter the procedure of liquidation upon the termination of the *Joint Venture Contract*. Based on the findings above, it could not judge that Items (b) and (c) of the arbitral award involved herein fell into the circumstances of going beyond the arbitral jurisdiction or "disputes incapable of being resolved through arbitration" as stipulated by the *Arrangement of the Supreme People's Court on Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region*.

xi. Conclusion

Summarizing the courts' decisions on recognition and enforcement of foreign or HMT related arbitral awards in 2017, key issues include whether the notice of arbitration has been served effectively, whether the composition of arbitration tribunal complies with the arbitration rules, whether arbitral awards violate the public policies of China, etc. New trends worthy of great attention include the following:

Firstly, the court specified the standards to deduce the address to which the arbitral instruments will be served if both parties fail to specify such address. For the cases mentioned above, the address to which the arbitral instruments will be served is

the correspondence address used in daily operation, which meets general cognition of normal commercial practice, and delivering documents to such address shall be deemed the "reasonable ways for delivery" as stipulated in the arbitration rules.

Secondly, the court specified the standards to judge whether arbitrators are not neutral. For the cases mentioned above, the court pointed out the standards for judging the neutrality or independence of arbitrators were that arbitrator failed to disclose relevant circumstances or made disclosure in an accurate way during the arbitration, which can be proved by firm evidence.

Thirdly, the court specified the sequence of application of the arbitration clauses and the arbitration rules in case of conflicts between them. For the cases mentioned above, the court stated that the party autonomy was the foundation stone of the operation of arbitration system, and the principal of an arbitration institution should fully respect the parties' intention when exercising his/her right to make decisions, without making decisions at his/her own initiative.

Fourthly, the court specified the relationship between mandatory provisions set forth in administrative regulations and department bylaws and public policies. For the cases mentioned above, the court stated that violating basic legal principles of China as stipulated in the *New York Convention* did not violate mandatory provisions set forth in administrative regulations and department bylaws, which could not definitely violate the public policies of China. Overall consideration should be given to other factors to make a judgment.

Fifthly, the court specified the concrete meaning of "disputes incapable of being resolved through arbitration" as stipulated in the *Arrangement of the Supreme People's*

Court on Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region. For the cases mentioned above, the court stated that the matter was not under the circumstances of "disputes incapable of being resolved through arbitration", as the necessary precondition for the disputes involved therein, despite that the claimant raised no concrete request.

Summary of the Year

The world is undergoing major developments, transformation and adjustments, but peace and development remain the themes of the times, and the economic globalization has become an irreversible trend of the times.

With continuous growth of economic, trade and investment activities among countries, Chinese and foreign enterprises are facing increasing legal risks arising from the said activities and raising more and higher demands for resolution of disputes. This year marks the 40th anniversary of China's reform and opening-up. CIETAC has enjoyed extensive compliments both at home and abroad with its independent, impartial and efficient arbitration services and made positive contributions to the development of China's international commercial arbitration. As the leader and driver of China's foreign-related arbitration, CIETAC has witnessed and practiced the integrative development of China's arbitration and international arbitration.

In retrospect of the year 2017, developments of China's international commercial arbitration are mainly evidenced by the following four aspects:

First of all, compared with the previous year, changes in the arbitration legal system in 2017 focus more on judicial supervision, as well as the positive role of arbitration in the implementation of the "Belt and Road" Initiative from the perspective of the alternative dispute resolution. To be specific, the legislature made amendments to qualificatory conditions of arbitrators through the *Arbitration Law of the People's Republic of China (Arbitration Law)* that was implemented in 1995, and the SPC vigorously supported arbitration as usual and released multiple important judicial

interpretations, including centralized management of arbitration cases under judicial review, reporting and verification system for arbitration cases under judicial review, improvement of arbitration judicial review rules and reform of the arbitration awards rules. It is worth special noticing that courts at various levels will establish the centralized information management platform for arbitration cases under judicial review, so as to strengthen the information-based management and data analysis of relevant arbitration cases under judicial review and guarantee the accuracy of applicable laws and the consistency of judgment criteria. Furthermore, after the SPC released the *Opinions on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones*, the arbitration circle in China tried the specialized arbitration or *ad hoc* arbitration. From the perspective of rules, *ad hoc* arbitration has made a figure in mainland China. As time goes on, these measures will have a profound impact on China's international commercial arbitration.

Secondly, the Chinese government encourages and supports extensive application of the PPP mode in the fields of infrastructure construction and public services, and arbitration has the advantage in resolving the disputes in connection with PPP projects. Disputes relating to PPP contracts involve multiple types and complex legal relationships, the dispute amount is significant, and the dispute usually involves a series of parties. To resolve PPP-related disputes by arbitration can effectively guarantee the independence, professionalism and efficiency of cases and also shoulder some of the burden of the courts in trialing of onerous cases. Continuous increase of PPP projects will offer a vast market for arbitration institutions. The legislation of PPP projects will be gradually improved in the future, therefore, policies and regulations, and even laws, will be formulated to respond to many questions such as

whether disputes arising out of PPP contracts can be resolved through arbitration and how PPP projects will be managed, etc.

Thirdly, positive efforts shall be devoted to implement the "Belt and Road" Initiative and build up the platform for investment dispute resolution in China. As China's outbound investments keeps growing, investment disputes between investors and host states in other fields than the traditional commercial arbitration will increase accordingly, both policymakers and investors face important questions such as how to introduce terms and conditions to protect investors and resolve disputes into the bilateral or multilateral treaty in the future, and how to make full use of the existing investment dispute resolution mechanism in an effective way. To adapt to the changing situation and resolve international investment disputes independently and fairly, CIETAC formulated the *International Investment Arbitration Rules* in September 2017 by referring to international arbitration conventions and practices. The Rules are another set of investment arbitration rules following investment arbitration rules of International Centre for Settlement of Investment Disputes (ICSID) of the World Bank and the SIAC, which fills up a gap in China, provides an important platform and approach for Chinese enterprises to resolve the investment disputes with host countries and becomes a proactive measure to build up an internationalized, law-based, and business-friendly business environment through the "Belt and Road" Initiative.

Fourthly, courts in China recognize and enforce the foreign-related and HMT-related arbitral awards and reflect and practice the basic judicial concept of "supporting arbitration" throughout judicial review. The situation about revocation and non-enforcement of foreign-related and HMT-related arbitral awards in 2017 reveals

that arbitration procedure against arbitration rules, awards beyond the scope of arbitration and other common issues remain as key grounds for the application of such revocation and non-enforcement. Moreover, practices also produced some new issues, e.g. whether arbitrators actually engaged in the arbitration, and whether the parties concerned fully presented their opinions. The courts thus came up with new review standards, which are worth attention. According to the courts' recognition and enforcement of arbitral awards made in foreign countries, Hong Kong, Macao and Taiwan in 2017, key issues include whether the notice of arbitration has been served effectively, whether the formation of the arbitration tribunal complies with the arbitration rules, whether arbitral awards violate public policies of China, etc. New issues needing concern include the business relationship between the law firm of an arbitrator and the law firm of a party involved therein could not be considered as the ground to challenge the arbitrator's impartiality or independence; violating the compulsory provisions of administrative regulations or departmental regulations does not necessarily constitute the violation of China's public policies.

In the *Report* delivered at the 19th National Congress of the CPC, General Secretary Xi Jinping stated that the trends of global multi-polarity, economic globalization, society informationization and cultural diversity were surging forward, and changes in the global governance system and the international order were speeding up. China would adhere to the fundamental national policy of opening up and pursue development with its doors open. China would actively promote international cooperation through the "Belt and Road" Initiative. In doing so, we hope to achieve policy communication, infrastructure connection, trade development, financial exchange, and people-to-people connection and thus build a new platform for

international cooperation to create fresh drivers of joint development. China would support multilateral trade regimes and work to facilitate the establishment of free trade zones and build an open world economy.

With smooth implementation and continuous progress of the "Belt and Road" Initiative, CIETAC will strive to play a more active role in building the alternative dispute resolution mechanism along the "Belt and Road". To facilitate the integrative development of China's arbitration and international arbitration and allow the international commercial parties enjoy CIETAC's arbitration services in a more convenient manner, CIETAC held the landing ceremony of CIETAC North America Arbitration Center (the Center) in this July in Vancouver, Canada, marking the official establishment of the Center. This will help CIETAC to draw on advanced theories and practices of international arbitration, and further enhance the internationalization of its arbitration services. In the meantime, the Center will become a window for arbitration and legal professionals in North America to gain a better understanding of China's arbitration, and also a fresh platform for extensive interactions and common development for Chinese and foreign arbitration and legal communities. CIETAC will make full use of the development opportunities for dispute resolution under current international situation and promote international economic and trade cooperation and development with efficient, independent and impartial arbitration services.

