

# Annual Report on International Commercial

## Arbitration in China

2015

中国仲裁法学研究会

CHINA ACADEMY OF ARBITRATION LAW

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中国仲裁法学研究会

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## Introduction

China's international commercial arbitration, since the establishment of the China International Economic and Trade Arbitration Commission (the CIETAC), formerly known as the Foreign Trade Arbitration Commission, under the China Council for the Promotion of International Trade in 1956, has undergone sixty-year development. China, with the deepening of reform and opening up and the rapid growth of foreign trade and investment, has improved international commercial arbitration in China to a new level with the booming of arbitration. International commercial arbitration in China is now being provided with the best opportunities along with the transformation of China from a trader of quantity to a trader of quality and the steady advancement of the Belt and Road Initiative. However, China's international commercial arbitration is also facing great challenge with improvement needed comparing with international practice due to the globalization of the international commercial arbitration market and the fierce competition among major international commercial arbitration institutions.

On 22 September 2015, China Academy of Arbitration Law released the 2014 Annual Report on International Commercial Arbitration in China. This is the first annual report on the development of international commercial arbitration in China which is normally called the foreign-related arbitration in China. The 2014 Annual Report has attracted extensive attention in China's arbitration community, legal profession and the media since its release and been formally published. The China Academy of Arbitration Law decided to carry out its preparation and publication

of the 2015 Annual Report as an effort to sum up the annual development of international commercial arbitration in China and the improvement of arbitration legal system, promote the perfection of China's international commercial arbitration system, build information exchange platform for domestic and foreign commercial arbitration practitioners and theorists, enhance China's influence in international commercial arbitration arena, and provide suggestions and references for future developments of China's international commercial arbitration cause.

The 2015 Annual Report on International Arbitration in China, through empirical analysis and theoretical research, reflects the development status of international commercial arbitration in China and highlights relevant practice. Specifically, based on the analysis of the data of international commercial arbitration cases in 2015 based on the analysis of the data of international commercial arbitration cases in 2015, the 2015 Annual Report on International Arbitration in China follows up the developments of the legal system on international commercial arbitration in China, observes the efforts of Chinese international commercial arbitration institutions to promote the development of international commercial arbitration, discusses the judicial supervision in the field of international commercial arbitration in China, and makes special observation on the application of CISG in such field.

There are four chapters besides the Introduction and the Annual Summary in the 2015 Annual Report on International Arbitration in China. Chapter one refers to the overview of the development of international commercial arbitration, the analysis of data regarding arbitration cases in China, judicial support and

supervision of international commercial arbitration cases by the Supreme People's Court (SPC), and the development of theoretical research on international commercial arbitration in China in 2015. Chapter two covers the observation on the practice of international commercial arbitration in China from the perspectives of attorneys and arbitration clients and through comparative analysis of relevant data from representative international arbitration institutions in China and major foreign arbitration institutions. It also comments on the CIETAC Guidelines on Evidence with a comparative analysis to the IBA Rules on the Taking of Evidence. Chapter three deals with the special observation on international commercial arbitration in China through analysis of 81 awards of CIETAC from 2008 to 2015 in which the application of CISG is involved, summarizing experience and issues in such application. Chapter four focuses on the judicial supervision of international commercial arbitration in China, including confirmation of validity of arbitration agreements, annulment and enforcement of arbitration awards, etc.

The 2015 Annual Report on International Commercial Arbitration in China was undertaken by the research team of Renmin University of China, commissioned by the China Academy of Arbitration Law. Professor Du Huanfang, Vice President of the Law School of Renmin University of China, and Ms. Yue Jie, Director of the Arbitration Research Institute of the CIETAC, lead the team. Main team members are Professor Song Lianbin from the International Law School of China University of Political Science and Law, Ms. Shen Hongyu, judge of the 4<sup>th</sup> Civil Division of the SPC, Mr. Dong Xiao, Partner of Anjie Law Firm and Ms. Yang Fan, Deputy Director of the Arbitration Research Institute of the



CIETAC. The division of task is as follows: Introduction and Annual Summary were composed by Professor Du Huanfang. Chapter one was accomplished by Professor Song Lianbin's team with *Part III, Judicial Supervision of International Commercial Arbitration in China*, composed by Ms. Shen Hongyu. Chapter two was accomplished by Mr. Dong Xiao's team. Chapter three was modified and finalized by Professor Du Huanfang according to recent data based on the research result of Professor Han Shiyuan's team from Tsinghua University School of Law. Chapter four was led by Ms. Shen Hongyu. Professor Du Huanfang, Director Yue Jie and Vice Director Yang Fan compiled and edited this Report after the completion of the draft.

We hereby acknowledge the kind support and generous assistance from the Legal System Coordination Department of the Office of Legislative Affairs of the State Council, the Fourth Civil Division of the SPC, the CIETAC, Anjie Law Firm, Renmin University of China, Tsinghua University, China University of Political Science and Law, etc. for providing information, drafting and providing advise and assessment for this Report, and extend our gratitude to Ms. Gu Huaning, a CIETAC Arbitrator, who translated this Report into English.

The Research Team of 2015 Annual Report on International Commercial Arbitration in China

8 September 2016

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

International commercial arbitration in China remained active in 2015. As is shown in the arbitration work all over China, China's arbitration circle passed the first test with excellent scores in the new development phase. The Supreme People's Court (SPC) issued four important judicial interpretations and normative documents in 2015 though there was no special legislation on arbitration. The SPC gave more judicial support to the implementation of foreign and foreign-related arbitral awards. International commercial arbitration continued to attract great attention from domestic and foreign academia in research.

## I. Data Analysis of International Commercial Arbitration Cases in China

The year 2015 marks the 20<sup>th</sup> anniversary of the implementation of the Arbitration Law of the People's Republic of China (the Arbitration Law) as well as the 20<sup>th</sup> anniversary of the establishment of the first-batch experimental re-constructed Chinese arbitration institutions. As stated in the 2015 report on arbitration work in China by the State Council Legislative Affairs Office, 244 arbitration commissions in China accepted a total of 136,924 cases with an increase of 23,264 cases at the increase rate of 20% compared to the previous year. The total amount of dispute was RMB 411.2 billion with an increase of RMB 145.6 billion

at the increase rate of 55% compared to the previous year.

The average number of cases accepted by Chinese arbitration commissions was 561 with an increase of 78 at the increase rate of 16% compared to the previous year. The average amount of dispute was RMB 1.7 billion with an increase of RMB 0.6 billion at the increase rate of 55% compared to the previous year. Most cases were domestic ones. 62 Chinese arbitration commissions accepted 2,085 foreign-related, Hong Kong-related, Macao-related and Taiwan-related (HMT-related) cases, accounting for 1.5% of the national total caseload. The ratio was almost the same as the previous year.

Among the 244 Chinese arbitration commissions, the three arbitration commissions established within the CCOIC/CCPIT, i.e. the CIETAC, the CMAC and the Arbitration Centre across the Straits (ACAS), accepted 2,104 cases, accounting for 2% of the national total caseload. The amount of dispute was RMB 43.9 billion, accounting for 11% of the national total dispute amount. 4 arbitration commissions in municipalities directly under the central government accepted 9,736 cases, accounting for 7% of the national total caseload. The amount of dispute was RMB 63.3 billion, accounting for 15% of the national total dispute amount. 27 arbitration commissions in cities where the people's governments of provinces and autonomous regions are located accepted 52,448 cases, accounting for 38% of the national total caseload. The amount of dispute was RMB 114.5 billion, accounting for 28% of the national total dispute amount. 211 arbitration commissions in other prefecture-level cities accepted 72,636 cases, accounting for 53% of the national total caseload. The amount of dispute was RMB 189.5 billion, accounting for 46% of the national total dispute amount.

The number of arbitration commissions accepting over 500 cases was 68, accounting for 28% of the national total number. The number of arbitration commissions accepting between 200 and 500 cases was 50, accounting for 21% of the national total number. The number of arbitration commissions accepting between 50 and 200 cases was 74, accounting for 30% of the national total number. The number of arbitration commissions accepting less than 50 cases was 52, accounting for 21% of the national total number. The 68 arbitration commissions accepting over 500 cases include 1 arbitration commission established within the CCOIC, i.e. the CIETAC, 4 arbitration commissions in municipalities directly under the central government, 20 arbitration commissions in cities where the people's governments of provinces and autonomous regions are located and 43 arbitration commissions in other prefecture-level cities.

The number of arbitration commissions accepting more cases than the national average caseload, i.e. 561, was 62, accounting for 25% of the national total number. Altogether, these commissions accepted 108,710 cases, accounting for 79% of the national total caseload. The number of arbitration commissions accepting fewer cases than the national average caseload was 182, accounting for 75% of the national total number. Altogether, these commissions accepted 28,214 cases, accounting for 21% of the national total caseload.

The number of arbitration commissions with increased caseload was 162, accounting for 66% of the national total number, with a decrease of 3% compared to the 163 arbitration commissions accounting for 69% of the national total number in 2014. The number of arbitration commissions with increased dispute amount was 176, accounting for 72% of the national total number, with a decrease

of 5% compared to the 180 arbitration commissions accounting for 77% of the national total number in 2014. The number of arbitration commissions with both increased caseload and increased dispute amount was 129, accounting for 53% of the national total number, with a decrease of 3% compared to the 132 arbitration commissions accounting for 56% of the national total number in 2014.

56,659 cases were settled through mediation or conciliation, accounting for 41% of the national total caseload, with a decrease of 24%, i.e. 17,541 cases, compared with 74,200 cases settled through mediation or conciliation, accounting for 65% of the national total caseload in 2014.

The number of arbitral awards set aside by the people's courts was 209, accounting for 0.15% of the national total number of awards made in 2015, with a minor decrease compared to 203 awards set aside, accounting for 0.18% of the national total number in 2014. The number of arbitral awards unenforced by the courts was 84, accounting for 0.06% of the national total number of awards made in 2015, with a minor decrease compared to 106 awards unenforced by the courts, accounting for 0.09% of the national total number in 2014. 163 arbitration commissions had no award set aside or unenforced by the courts, accounting for 67% of the 244 Chinese arbitration commissions. 20 arbitration commissions had more than 5 awards set aside or unenforced by the courts, accounting for 8%.<sup>1</sup>

Though great achievements were made in China's arbitration in 2015, Mr. Lu Yunhua, the deputy head of the preparatory group for the Association of

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<sup>1</sup> Based on the 2015 annual report on China's arbitration published by the Legal Daily with authorization from Legislative Affairs Office of the State Council. [http://www.legaldaily.com.cn/Arbitration/content/2016-03/29/content\\_6545612.htm?node=79488](http://www.legaldaily.com.cn/Arbitration/content/2016-03/29/content_6545612.htm?node=79488), last visited on 5 September 2016.

Arbitration of China under the Legislative Affairs Office of State Council, pointed out in an exclusive interview by the Legal Daily that there was still broad space for development. “After so long development, China’s arbitration market is still a niche one. The arbitration service, as a dispute settlement method, has not been regarded as the focus and is still limited to traditional commercial disputes. The three features of China’s arbitration, i.e. niche, non-focus and over-traditional, are the prominent problems and likely to restrict its future development”, he said.<sup>2</sup>

## **II. Development of the Legal System Related to International Commercial Arbitration in China**

In 2015, the SPC issued and implemented various judicial interpretations and normative documents supporting and encouraging the development of arbitration. The SPC, through the issuing of three judicial interpretations regarding arbitration, i.e. the Interpretation concerning the Application of the Civil Procedure Law of the People's Republic of China [Fa Shi (2015) No.5], effective as from 4 February 2015, the Provisions on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region [Fa Shi (2015) No.14] effective as from 1 July 2015 and the Official Reply on the Requests of the Higher People's Court of Shanghai Municipality and Other Courts for Instructions on Cases Involving Judicial Review of the Arbitral Awards Issued by the China International Economic and Trade Arbitration Commission, Former Sub-Commissions Thereof and Other Arbitration Institutions [Fa Shi (2015) No.15], effective as from 17 July 2015, clarified some difficult problems in China’s arbitration practice. Several Opinions

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<sup>2</sup> “Amazing Growth in the Caseload of Arbitration Commissions along with the Experimental Diversified and Alternative Service”, ‘Government and Rule of Law’, Legal Daily (31 March 2016) p.6.

of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People's Courts issued in July 2015 is of great declaratory significance for the judicial review on arbitration by the people’s courts.

## **1. Stipulations regarding Arbitration in the New Judicial Interpretation on the Civil Procedure Law**

The Interpretation on the Application of the Civil Procedure Law of the People's Republic of China [Fa Shi (2015) No.5] effective as of 4 February 2015 regarding the 2012 Civil Procedure Law of the People's Republic of China (the Civil Procedure Law) is the longest judicial interpretation in mainland China. Of the 552 articles, 17 relate to arbitration, covering almost all the aspects of arbitration. There are stipulations on the coordination of jurisdictional conflicts between arbitral tribunals and courts, on the recognition and enforcement of interim awards made outside mainland China, and on the calculation of the term for the application of award enforcement, etc. so that arbitral awards can be enforced more efficiently and conveniently in China.

1) Courts with jurisdiction over litigation cases involving compensation for improper pre-action preservation.

The people's court that rendered the preservation ruling has the jurisdiction over the litigation case involving compensation for losses suffered by the other party or any interested party due to the applicant’s failure in initiating litigation or arbitration within the prescribed time after the pre-action preservation is rendered. The people’s court accepting the case or the people’s court rendering

the preservation ruling has the jurisdiction over the litigation case initiated by the other party or any interested party for losses arising out of the preservation if the applicant has initiated litigation or arbitration within prescribed time.

2) A party needs not to provide evidence for facts confirmed by effective awards rendered by arbitration commissions unless there is contrary evidence which suffices to overturn.

3) Preclusion force of arbitral clauses.

Parties are not allowed to initiate litigation over matters regarding which valid arbitration agreements have been signed. The people's court accepting the case involving a valid arbitration agreement shall rule to dismiss the action as per one party's objection.

4) Arbitral awards and court retrial procedures.

If an arbitral award is altered or set aside, the court should retry the case on which the judgement was made according to the rulings of the arbitral award

5) Partial non-enforcement of arbitral awards.

Where part of the rulings of an arbitral award fall under the circumstances for non-enforcement as set forth in the Civil Procedure law, the people's court shall rule not to enforce that part of the award.

6) Courts' non-acceptance of objection or reconsideration application to non-enforcement of arbitral awards. The people's court shall not accept a party's



objection or reconsideration application on the non-enforcement ruling. The parties can reach a new agreement to arbitrate their disputes or go to court.

7) Enforcement procedures are not influenced by confirmation or division of property through arbitration procedures. The enforcement procedure shall not be influenced if the party subject to enforcement affirmed or transferred the ownership of the sealed-up, distrained and frozen property to a third party through arbitration procedure.

8) Time limit for applying for non-enforcement of arbitral awards. Where a party requests the non-enforcement of an arbitration award, the party shall file the request with the enforcement court before the termination of enforcement.

9) The exclusion of courts' exclusive jurisdiction by arbitration agreements. For the cases under the exclusive jurisdiction of courts of the People's Republic of China, the parties shall not select a foreign court; unless they stipulate to settle the dispute through arbitration.

10) The form requirement for the enforcement of arbitral awards. To apply to the people's court for enforcement of an award rendered by a foreign-related arbitral institution of the People's Republic of China, the applicant shall file a written application, to which the original of the award shall be affixed. If the applicant is a foreign party, the written application shall be filed in Chinese.

11) The grounds for defense against the enforcement of arbitral awards. When a people's court enforces the arbitration award rendered by a foreign-related arbitral institution, if the party subject to enforcement makes defense that there is any

circumstance prescribed in Paragraph 1, Article 274 of the Civil Procedure Law, the people's court shall examine the defense, and rule to enforce the award or reject the defense according to the review results.

12) The application, examination and security of preservation. Where a foreign-related arbitral institution of the People's Republic of China submits a property preservation application filed by the party to a people's court for ruling, the people's court may examine the application and decide whether or not to take the preservation measure. The people's court that issues a ruling of preservation shall order the applicant to provide the security, and if the applicant fails to do so, the people's court shall render a ruling to dismiss the application.

13) The recognition and enforcement of foreign ad hoc awards. Where one party applies to the people's court for the recognition and enforcement of an arbitration award rendered by an ad hoc arbitration tribunal outside the territory of the People's Republic of China, the people's court shall review the application in accordance with the Civil Procedure Law.

14) The recognition and enforcement of foreign arbitral awards. A foreign arbitration award may be recognized and enforced in accordance with the relevant international treaties acceded to by the People's Republic of China or on the basis of the principle of reciprocity. Recognition and enforcement are two separate procedures and the court shall review the case as per the party's application.

15) The application period for the recognition and enforcement of foreign arbitral awards. During the period when one party applies for the recognition and enforcement of a foreign arbitration award, the Civil Procedure Law shall apply.

The period of application for enforcement shall be recalculated from the date when the ruling issued by the people's court on the recognition application comes into force.

16) The examination and ruling on the recognition and enforcement of foreign arbitral awards. The people's court shall form a collegial bench to examine a case of recognition and enforcement of a foreign arbitration award. The people's court shall serve the written application upon the respondent. The respondent may state its opinions. The ruling rendered by the people's court upon examination shall be legally effective once it is served upon the parties.

17) The reference for HMT-related cases. The people's courts may apply, *mutatis mutandis*, the special provisions on foreign-related civil procedures to civil actions that relate to the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan Region.

## **2. Recognition and Enforcement of Taiwan Arbitral Awards**

The mutual recognition and enforcement of arbitral awards across the Taiwan Strait is an interregional legal issue. This Chapter also covers relevant Taiwan-related judicial interpretations since in mainland China the special provisions on foreign-related civil procedures usually apply to Taiwan-related cases.

Along with the continuous improvement of relationship and further exchange in civil and commercial matters across the Taiwan Strait, the Provisions on the People's Court's Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan Province [Fa Shi (1998) No.11] and the Supplementary Provisions on

the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region [Fa Shi (2009) No.4] issued by SPC on 22 May 1998 and 24 April 2009 have fallen behind the requirements in practice. The Provisions of the Supreme People's Court on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region [Fa Shi (2015) No.14] came into force as from 2 June 2015. Through the 22 articles in the Provisions, the SPC extends the scope of application for the recognition and enforcement of arbitral awards of the Taiwan Region, specifies the time limit for examination and internal report system regarding the recognition of arbitral awards of the Taiwan Region, clarifies the reasons for refusal of recognition, stipulates the effect of the revocation procedure in a court of the Taiwan Region where one party has applied to the people's court for recognition on the recognition and enforcement procedure in the people's court, and adds the relief for non-recognition. The most important article in the Provisions is Article 14 on circumstances for non-recognition and non-enforcement of arbitral awards of the Taiwan Region. Where, with respect to an arbitral award under application for recognition or enforcement, the respondent provides evidence showing any of the following circumstances, upon examination and verification, the people's court shall issue a ruling not to recognize it:

1) One party to the arbitration agreement lacked competency under the applicable law at the time the parties entered into the arbitration agreement, or the arbitration agreement is invalid in accordance with the governing law as agreed on by the parties, or the provisions of the Taiwan Region on arbitration, in the event that the parties did not agree on the applicable governing law, or the parties did not enter into a written arbitration agreement, unless an application for recognition of

arbitration-mediation award of the Taiwan Region was filed.

2) The respondent did not receive proper notice on the selection and appointment of arbitrators or the arbitration procedure, or the respondent did not state its opinions due to any other reason not attributable to the respondent.

3) The dispute addressed in the arbitral award was not the dispute submitted for arbitration, or did not fall within the scope of the arbitration agreement. Where the arbitral award includes any decision exceeding the scope of items submitted by the parties for arbitration, but the decision in the arbitral award exceeding the scope of items submitted for arbitration may be separated from the decision on the items submitted for arbitration, the part of the decision in the arbitral award on the items submitted for arbitration may be recognized.

4) The formation of the arbitral tribunal or the arbitration procedure violates the agreement between the parties, or, in the absence of the agreement between the parties, fails to comply with the provisions of arbitration in the Taiwan Region.

5) The arbitral award is not yet binding on the parties, or a court of the Taiwan Region has revoked the arbitral award or dismissed an enforcement application.

Where the item in dispute cannot be resolved through arbitration in accordance with the state law, or the recognition of the arbitral award violates the principle of One China or any other fundamental principle of the national laws, or damages social and public interests, the people's court shall issue a ruling not to recognize it.

It is clear that the above circumstances for the recognition and enforcement of arbitral awards of the Taiwan Region in mainland China are basically the same as those in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) except for circumstances regarding the “One-China” policy.

### **3. Judicial Review of Arbitral Awards Issued by the CIETAC and Its Former Sub-Commissions**

The CIETAC and its former South China Sub-Commission and Shanghai Sub-Commission were separated in 2012, triggering a special conflict of arbitration jurisdiction, i.e., which commission could accept cases involving arbitration agreements under which the parties had agreed to submit disputes to Shanghai Sub-Commission or South China Sub-Commission after they ‘declared independence’ from the CIETAC. Such conflict resulted in not only argument among these commissions, but also great trouble of the parties and difficulties in the courts’ judicial review over relevant arbitral awards.

In order to protect the legitimate rights and interests of the parties to arbitration in accordance with the law, and fully respect the autonomy of the will of the parties, in consideration of the historical relations between the CIETAC, the CIETAC South China Sub-Commission and the CIETAC Shanghai Sub-Commission, and from the perspectives of supporting and maintaining the sound growth of arbitration, and promoting the establishment of a diverse dispute resolution mechanism, the SPC, through the Official Reply on the Requests of the Higher People's Court of Shanghai Municipality and Other Courts for Instructions on

Cases Involving Judicial Review of the Arbitral Awards Issued by the China International Economic and Trade Arbitration Commission, Former Sub-Commissions Thereof and Other Arbitration Institutions (the Reply), which came into force as from 17 July 2015, replied on the relevant issues to settle the disputes over the validity of the relevant arbitration agreements, authority of the above arbitration institutions to accept arbitration cases, arbitration jurisdiction, arbitration enforcement and other issues arising out of the revision of CIETAC 2012 Arbitration Rules and the change of names and arbitration rules by the former South China Sub-Commission (already renamed as the South China International Economic and Trade Arbitration Commission, also known as the Shenzhen Court of International Arbitration, hereinafter referred to as the SCIA) and the former Shanghai Sub-Commission (already renamed as the Shanghai International Economic and Trade Arbitration Commission, also known as the Shanghai International Arbitration Center, hereinafter referred to as SIAC). The reply gave unified guidance on the relevant judicial review and have achieved good results.

The SPC, through its 2015 Reply as an effective judicial interpretation and in respect of party autonomy, offered the solution for the determination of jurisdiction among the three commissions based on the separation time of the two former sub-commissions (the renaming date of the CIETAC South China Sub-Commission on 22 October 2012 and that of the CIETAC Shanghai Sub-Commission on 17 April 2013). Where, before the sub-commissions were renamed, the parties had entered into an arbitration agreement, stipulating that a dispute shall be submitted to the CIETAC South China Sub-Commission or the

CIETAC Shanghai Sub-Commission for arbitration, the SCIA or the SIAC shall have jurisdiction over the case. Where, from the day the sub-commissions were renamed, the parties had entered into an arbitration agreement, stipulating that a dispute shall be submitted to the CIETAC South China Sub-Commission or the CIETAC Shanghai Sub-Commission for arbitration, the CIETAC shall have jurisdiction over the case. However, where the applicant applies for arbitration according to the above jurisdiction rules and the respondent does not object or an arbitral award has been rendered, either party applies for setting aside or non-enforcement of the arbitral award on the jurisdiction ground, the people's court shall not support it.

#### **4. Judicial Services and Safeguards for the Construction of the “Belt and Road”**

Under the Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by the People's Courts issued in July 2015, the people's courts shall strengthen the judicial review of arbitral awards involving the parties of countries along the “belt and road” and promote the important roles of international commercial and maritime arbitrations in the construction of the “belt and road.” They shall accurately comprehend and apply the New York Convention, legally recognize and enforce foreign commercial and maritime arbitral awards relating to the construction of the “Belt and Road” in a timely manner, and promote the mutual recognition and enforcement of arbitral awards with countries along the “belt and road” that have not participated in the New York Convention. They shall explore the improvement of such judicial review procedure systems and carry out the



work mechanism of uniform administration of arbitration cases under judicial review. They shall explore methods and ways for giving a full play to the roles of trade, investment, and other international dispute mechanisms by judicial support. The Several Opinions is of important declarative significance in the people's courts' judicial review of arbitration.

### **III. Judicial Review of International Commercial Arbitration in China**

In 2015, Chinese courts concluded 18 cases involving application for confirmation of the validity of foreign-related arbitration clauses, 36 cases involving application for confirmation of the validity of HMT-related arbitration clauses, 59 cases involving application for setting aside foreign-related arbitral awards, 24 cases involving application for setting aside HMT-related arbitral awards, 40 cases involving application for enforcing foreign-related arbitral awards and 4 cases involving application for enforcing HMT-related arbitral awards.<sup>3</sup>

It is shown in the cases involving application for confirmation of the validity of foreign-related arbitration clauses that courts of various levels have unified way of determining the applicable law of foreign-related arbitration clauses first and confirming the validity of both the form and substance of arbitration clauses in accordance with the applicable law. The main reasons for the invalidity of arbitration clauses could be found in the following cases. The parties failed to agree on a selected arbitration commission in the arbitration agreement when the applicable law thereof was P.R.C. laws.<sup>4</sup> The arbitral clause in the charter

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<sup>3</sup> Source: 2015 judicial statistics from the Research Office of the SPC.

<sup>4</sup> (2015) San Zhong Min (Shang) Te Zi No.04910 Civil Ruling by Beijing Third Intermediate People's

party was not incorporated in the bill of lading. The signatory of the arbitration agreement was not authorized.<sup>5</sup> Besides, there were cases on the jurisdictional disputes with regard to specific arbitration commissions.<sup>6</sup>

In 2015, 1 HMT-related arbitral award was set aside with the approval of the SPC in its reply<sup>7</sup> and 2 cases were remanded to the arbitral tribunal.<sup>8</sup> It is found from the rulings on revocation and non-enforcement of foreign-related and HMT-related arbitral awards that the people's courts fully respect the finality of arbitral awards and show the value orientation of encouraging and supporting the development of arbitration. First, the courts strictly follow the principle of judicial review over issues stipulated in laws and exclude substantial matters such as burden of evidence, evidence admissibility and fact finding, etc. from the review. Secondly, the courts only review the grounds relied on and evidence submitted by the parties for the application of revocation or non-enforcement of awards with no initiative enlargement of the review scope except for those elements that the courts may review on its own initiatives such as the violation of public interest and non-arbitrable matters. Thirdly, the courts consider factors including whether the arbitration procedure is against the mandatory provisions of the Arbitration Law and whether the violation of the arbitration rules results in substantial effect on the award out of the respect of the party autonomy and the features of arbitration procedure when deciding the legality of arbitration procedure, thus

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Court, (2015) Min Si Ta Zi No.2,10,21,22,23 Replies of the SPC, (2015) E Min Si Zhong Zi No.00194 Civil Ruling by Hubei High People's Court and (2015) Min Si Ta Zi No.4 and 41 Replies of the SPC.

5 (2015) Min Si Ta Zi No.36 Reply of the SPC.

6 (2015) Min Si Ta Zi No.6 Reply of the SPC.

7 (2015) Min Si Ta Zi No.51 Reply of the SPC and (2015) Er Zhong Min Te Zi No.00429 Civil Ruling by Beijing Second Intermediate People's Court.

8 (2015) Min Si Ta Zi No.39 and 40 Replies of the SPC

party autonomy could be realized in the dispute resolution process. Meanwhile, the courts effectively perform the judicial supervision function, maintain and promote the credibility of arbitration through the timely revocation and non-enforcement of arbitral awards when circumstances stipulated in law such as no jurisdiction of arbitration commissions, violation of due process, etc. occur.

In 2015, in its replies, the SPC confirmed 3 foreign arbitral awards not to be recognized or enforced. The awards were all rendered by the International Cotton Association and the rulings were based on the same reason, i.e., non-existence of a valid arbitration agreement.<sup>9</sup> The recognition and enforcement of 1 Hong Kong arbitral award was refused. The award was rendered by HKIAC and the refusal ground was the tribunal had exceeded its authority in issuing the arbitral award.<sup>10</sup> Though there was increase in the number of cases involving the refusal of recognition and enforcement of awards compared to 2 cases in 2014, the courts review was focused on two issues, i.e., the validity of arbitration agreements and the scope of arbitration. The courts made rulings thereon according to the fact finding in each case and in strict accordance with the New York Convention, strictly observed the principle of reviewing statutory reasons only and applying

9 (2013) Xi Shang Wai Zhong Shen Zi No.0009 Civil Ruling by Wuxi Intermediate People's Court of Jiangsu Province on 14 January 2015 in ALLENBERG COTTON CO. v. Jiangsu Nijia Alley Group Corporation case involving the application for recognition and enforcement of foreign arbitral award. (2013) Xi Shang Wai Zhong Shen Zi No.0003 Civil Ruling by Wuxi Intermediate People's Court of Jiangsu Province on 14 January 2015 in Louis dreyfus Australia co., LTD v. Jiangsu Nijia Alley Group Corporation case involving the application for recognition and enforcement of foreign arbitral award. (2014) Yan Min She Chu Zi No.15 Civil Ruling by Yantai Intermediate People's Court of Shandong Province on 2 November 2015 in ECOMAGROINDUSTRIALASIAPTELTD v. Penglai textile co., LTD. Qingdao Jin Chang Jiang group case involving the application for recognition and enforcement of foreign arbitral award. 10 (2011) Shen Zhong Fa Min Si Chu Zi No.270 Civil Ruling by Shenzhen Intermediate People's Court on 30 March 2015 in Noble Resources International Pte Ltd v. Shenzhen Cereals Group Co., Ltd. case concerning the application for recognition and enforcement of a Hong Kong arbitral award.

the public policy cautiously.

## **IV. Research Highlights of International Commercial Arbitration in China**

### **1. Research Highlights of China's Foreign-Related Arbitration**

In this stage, the relatively important and new contents of the research on China's foreign-related arbitration theories are as follows.

#### **1) Party Autonomy in International Commercial Arbitration**

Party autonomy, as a fundamental principle in international commercial arbitration, used to be a natural and understandable fact. However, it is severely challenged by the complicated expansion of jurisdiction with the support of national laws, the tendency of normalized and litigious arbitration under the influence of institutional arbitration, the demand for protection of special interest in *lex mercatoria* arbitration, and the uncertainty shown in nations' coordination of conflicts between the enforcement of international commercial arbitration awards and public interest through public policy and mandatory laws. Some scholars have even declared recently that 'the contract empire of international commercial arbitration has declined' and 'international commercial arbitration will soon be replaced by other ADR especially mediation'. Is that true? Dr. Lin Yi, in his doctoral dissertation 'The Thesis on The Doctrine of Party Autonomy in International Commercial Arbitration-Based on The Observation of Modern Commercial Society', demonstrated the legitimacy and unbeatable position of the doctrine as a fundamental principle in the system of international commercial

arbitration. The Thesis covers the contents, origins, evolution, value/role, obstacles in development, ups and downs in modern commercial society, future trend and guidance of the system of international commercial arbitration in the future of the doctrine of party autonomy in international commercial arbitration.<sup>11</sup>

## **2) International Commercial Arbitration Power**

Arbitration power, as the core of arbitration system, runs throughout arbitration process. In particular, it is an inseparable part of the arbitration system. Its proper exercise is a necessary guarantee for the realization of the fairness of arbitration. An in-depth understanding thereof helps the clarification of standards and scope of judicial supervision. Mr. Hu Di, in his publication ‘The Research on International Commercial Arbitration Power’, following the usual logic in discussing power from international level, established the main framework of discussing the definition, sources, contents, exercise and supervision of international commercial arbitration power and clarifies the relevant issues rather completely and clearly. Furthermore, Mr. Hu, based on the above discussion, made comprehensive reflection on China’s existing system of international commercial arbitration, pointed out the shortcomings of the 1994 Arbitration Law and analysed the reasons. Finally, he made suggestions for relevant improvement.<sup>12</sup>

## **3) Re-arbitration in International Commercial Arbitration**

Re-arbitration is a flexible and effective system. It follows the idea of efficiency,

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<sup>11</sup> Lin Yi, ‘The Thesis on The Doctrine of Party Autonomy in International Commercial Arbitration- Based on The Observation of Modern Commercial Society’, East China University of Political Science and Law doctoral dissertation (2015).

<sup>12</sup> Hu Di, ‘The Research on International Commercial Arbitration Power’, Law Press (2015).

fairness and party autonomy which is consistent with the international tendency of respecting and supporting arbitration, and has been adopted by most nations. China also adopted the system in the Arbitration Law and translated it in Article 61 of the Arbitration Law<sup>13</sup> and relevant provisions in the 2005 Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China (the Interpretation on the Arbitration Law)<sup>14</sup>. However, the provisions on re-arbitration are too abstract, which have resulted in a series of issues in the courts' application thereof. The advantages of re-arbitration have not been brought into full play. To fully exploit the advantages of re-arbitration, China need to improve the system of re-arbitration from all aspects through clarifying relevant legal issues. Dr. Wang Zhe, in his doctoral dissertation 'The Value Orientation and System Designing of Re-arbitration in International Commercial Arbitration', discussed the value orientation of the system theoretically and researched on specific system designing issues such as the application circumstances, the initiating party, the hearing authority, the scope of hearing and the legal result, etc. Finally, he put forward suggestions for improvement based thereon.<sup>15</sup>

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13 'If the people's court holds that the case may be re-arbitrated by the arbitration tribunal after receipt of the application for cancellation of an award, the court shall inform the arbitration tribunal of re-arbitrating the case within a certain period of time and rule to suspend the cancellation procedure. If the arbitration tribunal refuses to re-arbitrate, the people's court shall rule to resume the cancellation procedure.'

14 Article 21 'Where a case regarding which a party concerned applies for revoking the domestic arbitral award is under any of the following circumstances, the people's court may, in accordance with Article 61 of the Arbitration Law, notify the arbitral tribunal to arbitrate the case for a second time within a time limit: (1) The evidence on which the arbitral award is based is forged; or (2) The other party concealed any evidence, which is enough to impact the impartial award.'

15 Wang Zhe, 'The Value Orientation and System Designing of Re-arbitration in International Commercial Arbitration', East China University of Political Science and Law doctoral dissertation (2015).

#### 4) The Theory of Delocalization

The traditional *lex loci delictus* principle has been recognized and implemented by the international society for long. It shows the national judicial sovereignty and empowers a nation the final saying on legal acts within its territory. However, the delocalization theory rejecting the governing law at the seat of arbitration has originated in Europe since 1950's to meet the demand in specific cases. It advocates that the law at the seat of arbitration may not be the governing law of international commercial arbitration process while the procedural law of other nations may be applied instead so that high degree of liberalization can be achieved in international commercial arbitration. Why was the theory introduced? How to avoid the restraint of the governing law at the seat of arbitration? What are the specific contents of the theory? What effect will it have on international commercial arbitration? Ms. Chen Yanhong, in her publication 'The Delocalization Theory And Its Impact on The Integration of International Commercial Arbitration', had comprehensive and detailed discussion on issues relating to the theory, including the cause, the contents, the practical trends, the shortcomings and the suggestions for improvement, etc. Furthermore, she promoted the idea of the integration of international commercial arbitration, and analyzed and discussed the formation and operation of the idea and the impact of the delocalization theory thereon.<sup>16</sup>

## 2. Research Highlights of International Commercial Arbitration outside China

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<sup>16</sup> Chen Yanhong, 'The Delocalization Theory And Its Impact on The Integration of International Commercial Arbitration', China University of Political Science and Law Publishing House (2015).

In this stage, the relatively important and new contents of the research on international commercial arbitration outside China are as follows.

### **1) Application of The New York Convention**

The New York Convention, as an international convention on the recognition and enforcement of foreign arbitral awards, has played an important role in decades. However, its own nature and the inconsistency in the application by different contracting nations resulted in the difference in its application. Mr. Marke R.P. Paulsson, in his publication ‘The 1958 New York Convention in Action’, made comprehensive interpretation of the New York Convention from the perspective of its international nature. In particular, he adopted the way of interpreting conventions stipulated in the Vienna Convention on the Law of Treaties to interpret the New York Convention article by article.<sup>17</sup>

### **2) Functions of Arbitration Institutions**

Despite the fact that thousands of international civil and commercial disputes are settled through arbitration institutions each year, there is still a lack of well-placed understanding of these institutions. Especially, there is little discussion on the functions of arbitration institutions in the administration of arbitration cases in the theoretical circle. Dr. Remy Gerbay, in his publication ‘The Functions of Arbitral Institutions’, made in-depth research thereon based on the previous research results. He had systematic research on over 40 arbitral institutions’ activities in the administration of cases. Meanwhile, he made observations on courts’ finding of the functions of arbitral institutions in major continental law and common law

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<sup>17</sup> Marike R.P.Paulsson, ‘The 1958 New York Convention in Action’, Kluwer Law International (2016).



countries and regions. Above all, his way of research is to summarize traditional theories, make objective comments thereon and put forward his own ideas.<sup>18</sup>

### **3) Parties' Appointment of Arbitrators**

The right of parties to appoint arbitrators is an important factor why people prefer arbitration as an international civil and commercial dispute resolution method as well as an essential element in the development of the arbitration mechanism. Parties' appointment of arbitrators may bring lots of benefits to arbitration on one side and some inconvenience on the other side. It is of vital importance in the development of the arbitration system and the arbitration process to coordinate between the two sides. Mr. Alfonso Gomez-Acebo, in his publication 'Party-Appointed Arbitrators in International Commercial Arbitration', made an all-round discussion on parties' appointment of arbitrators from historical, theoretical and practical perspectives based on previous research results. In particular, he discussed the historical evolution of appointment of arbitrators by the parties, commented on the current status of the system and analyzed challenges to arbitrators through comparative and empirical study. Finally, he made relevant suggestions for improvement.<sup>19</sup>

### **4) Document Production**

Document production is one of the most important while most controversial procedural issues in international commercial arbitration. It is the key to win cases, but it consumes money and time, complicates the arbitration process and is

<sup>18</sup> Remy Gerbay, 'The Functions of Arbitral Institutions', Kluwer Law International (2016).

<sup>19</sup> Alfonso Gomez-Acebo, 'Party-Appointed Arbitrators in International Commercial Arbitration', Kluwer Law International (2016).

unfamiliar to parties from continental law countries. The 2010 IBA Rules draws up relevant rules and is highly praised by various institutions and individuals in the practice and theoretical circles of arbitration, but it is still under debate due to cultural differences in reality. To find a solution to integrate advantages and disadvantages of document production, Dr. Reto Marghitola, in his publication ‘Document Production in International Arbitration’, provided comprehensive deliberation thereon. The deliberation covers the purpose of document production, the power of arbitral tribunals to order document production, the interpretation of the IBA Rules including in-depth analysis of conflicting interpretations regarding the Rules, document production requirements and objection grounds, the strategies of document production, the rules of document production, punishment for not obeying tribunals’ directions and challenge of arbitral awards, etc.<sup>20</sup>

### **5) Witness Testimony**

In most international commercial arbitration cases, arbitral tribunals mainly rely on written evidence to render awards, but witness testimony still plays a decisive role. Dr. Ragnar Harbst, in his publication ‘A Counsel’s Guide to Examining and Preparing Witnesses in International Arbitration’ made comprehensive discussion on the guidance for lawyers’ examination and preparation of witnesses. The discussion involves the importance of witness testimony, similarities and differences in witness examination between the common law system and the continental law system, the origin of evidence rules in commercial arbitration, advocates preliminary inquiries of witnesses, witness statement, cross-examination, re-inquiries, witness meeting, arrangement of oral hearings,

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<sup>20</sup> Reto Marghitola, ‘Document Production in International Arbitration’, Kluwer Law International (2015).

preparation of witnesses, etc.<sup>21</sup>

## 6) Third-Party Funding in Arbitration

The cost of resolving international civil and commercial disputes through arbitration is quite high. Arbitral institutions have been trying to enhance the efficiency of arbitration and lower the cost through improvement of arbitration rules, but little process has been made. Thus, third-party funding has emerged in arbitration practice. Mr. Jonas von Goeler, in his publication ‘Third-Party Funding in International Arbitration and its Impact on Procedure’, made comprehensive and detailed deliberation on relevant issues of third party funding in arbitration. The deliberation covers the background for the emergence of third-party funding in arbitration, the agreements between funders and funded parties, funding forms, evolution, potential advantages and disadvantages, rules, disclosure of third-party funding in arbitration, special protection of documentary proof, jurisdiction, impartiality and independence of arbitrators, conflict of interest, property guarantee and arbitration fees, etc.<sup>22</sup>

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21 Ragnar Harbst, ‘A Counsel’s Guide to Examining and Preparing Witnesses in International Arbitration’, Kluwer Law International (2015).

22 Jonas von Goeler, ‘Third-Party Funding in International Arbitration and its Impact on Procedure’, Kluwer Law International (2016).

# Chapter Two Observation on 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 endeavors to reflect the latest trend and development direction in China's international commercial arbitration practice mainly through comparison based on the 2015 annual reports and case statistics published by major international arbitration institutions on their websites or through other official channels. Meanwhile, this Chapter contains a brief introduction of the CIETAC Guidelines on Evidence effective as from 1 March 2015, which is a pioneering move for a commercial arbitration institution to publish and implement its rules on evidence, offers valuable reference for tribunals in handling evidence issues and has further pushed forward the internationalization of China's commercial arbitration.

## I. Comparison of the 2015 International Commercial Arbitration Practice in China

### 1. Caseload

In 2015, CIETAC accepted 1,968 cases with an increase of 22% compared to the previous year (statistics of CIETAC caseload from 2007 to 2015 are shown in Figure 2.1). There were 1,531 domestic cases and 437 international cases

(including 156 HMT-related ones). The international caseload has increased by 50 cases compared to the previous year (a 13% growth). There were 71 cases conducted in English or in both Chinese and English, an obvious increase compared to the 58 cases in the previous year (see Figure 2.2). There were 16 cases where arbitration rules other than the CIETAC Rules (including the UNCITRAL Arbitration Rules) were applied. Summary procedure cases accounted for 67 percent of the total caseload. There were 40 international cases with both parties from outside mainland China, a rather significant increase compared to the 28 cases in the previous year (see Figure 2.3).

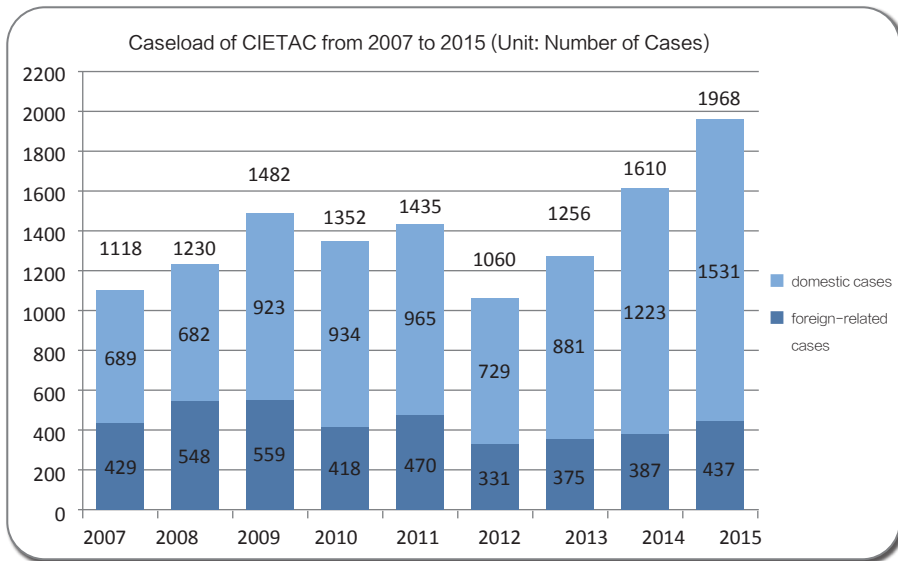


Figure 2.1

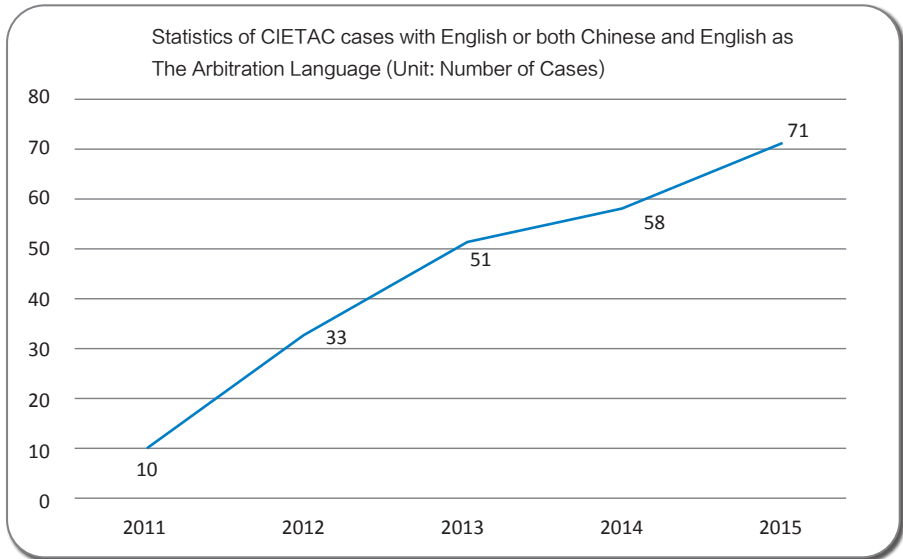


Figure 2.2

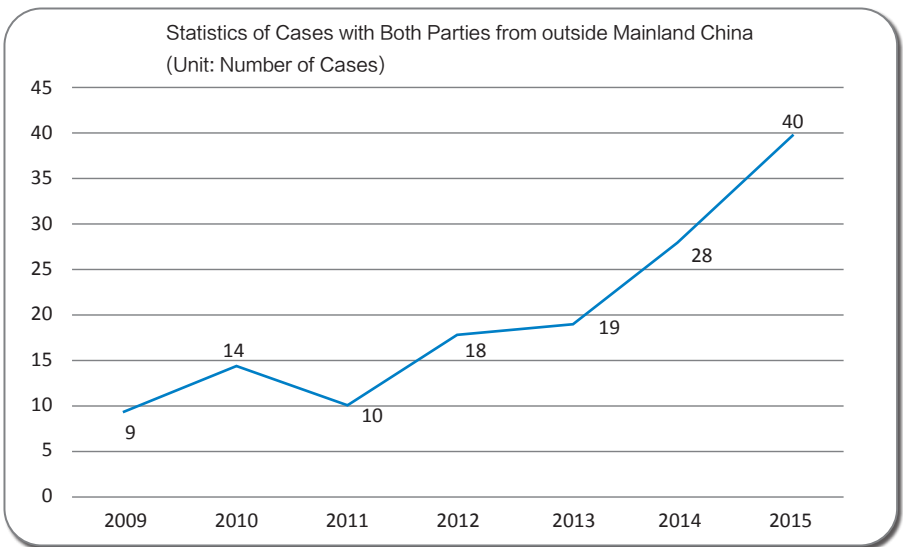


Figure 2.3

The International Court of Arbitration of International Chamber of Commerce (the ICC Arbitration Court) accepted 801 cases in 2015, 10 cases more than the figure in 2014. This was also the second time in its history for its caseload to exceed 800.<sup>1</sup> About 75 percent of the cases involved parties from different nations. Meanwhile, the ICC Arbitration Court also accepted lots of ‘domestic cases’ involving both parties from the same nation. The ICC Arbitration Court had statistics of cases according to the nationalities of the parties. For example, 33 percent of its cases involving Australian parties were domestic ones, while 16 percent of its cases involving American parties were domestic ones.<sup>2</sup>

The London Court of International Arbitration (the LCIA) accepted 326 cases in 2015, reaching a record high with an increase of about 10 percent compared to the previous year. Among the cases, 10 were domestic ones. There were 256 cases where the LCIA Arbitration Rules were applied, and in the rest 70 cases, the UNCITRAL Arbitration Rules were applied .

The Hong Kong International Arbitration Centre (the HKIAC) accepted 271 cases in 2015. About 79 percent of the cases were international ones, 43 percent of which had no connection with Hong Kong, and 93 cases involved parties from mainland China. The HKIAC administered 116 cases according to its Rules or the UNCITRAL Arbitration Rules, among which 94.8 percent were international ones.

The Singapore International Arbitration Centre (the SIAC) accepted 271 cases in

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1 ICC Dispute Resolution Bulletin, 2016-Issue 1, p.4.

2 ICC Dispute Resolution Bulletin, 2016-Issue 1, p.6.

2015 with an increase of 22 percent compared to the previous year, also creating a new record. Among the cases, 84 percent were international ones. The SIAC received 69 applications for fast-track procedure with 27 approved, accounting for 10 percent of the total caseload.

The Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) accepted 181 cases in 2015, ranking sixth since its establishment in 1917. Among the cases, 78 were Swedish domestic ones and 103 were international ones. The SCC Rules were applied in 62 percent of the cases, the SCC Rules for Expedited Arbitration was applied in 27 percent of the cases, while other rules were applied in 13 cases.

The statistics of the caseloads of the above arbitration institutions are shown in Figure 2.4.



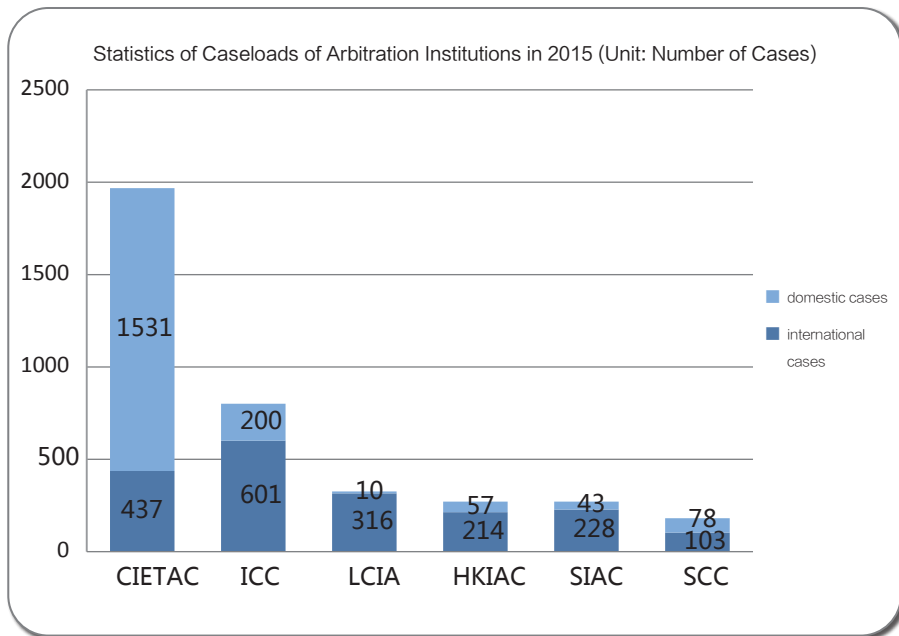


Figure 2.4

## 2. Parties

The internationalization of the parties can also reflect how much an arbitration institution is recognized in international arbitration. According to the statistics published by the arbitration institutions, the parties of the cases accepted in 2015 were from the following countries or regions:

The parties of the CIETAC cases were from 57 countries or regions. The top 10 countries or regions with the most parties involved were Hong Kong, U.S., Germany, Singapore, Japan, South Korea, Macao, Swiss, Italy and Taiwan.

The statistics of these top 10 countries or regions are shown in Figure 2.5.

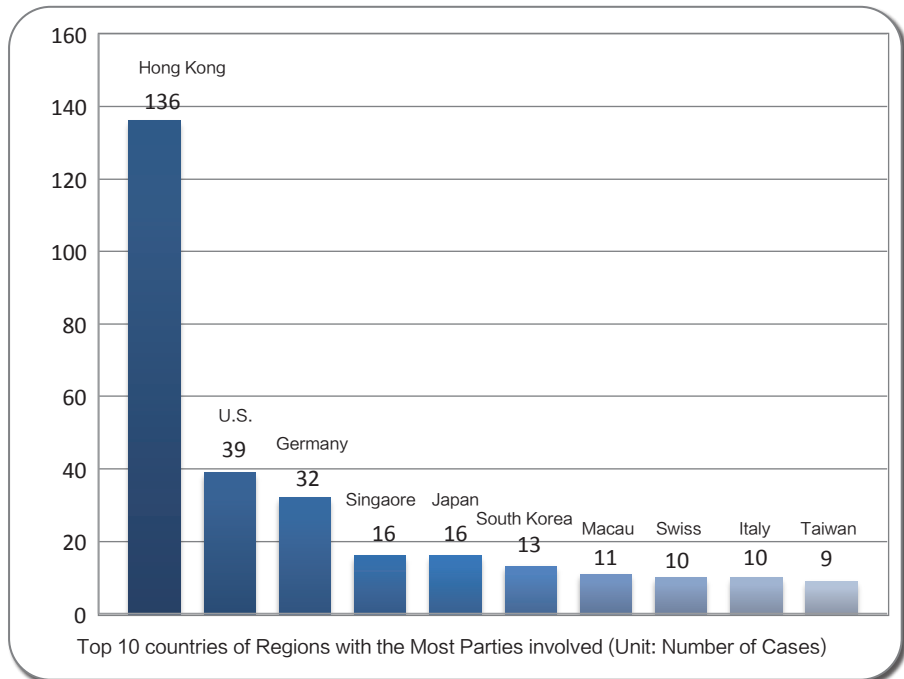


Figure 2.5

Among the parties involved in the cases accepted by the CIETAC from 2007 to 2015, Asian parties accounted for over 50 percent, European ones came second, while those from North America also took up a certain proportion.

The statistics of foreign and HMT parties involved in the cases accepted by the CIETAC from 2007 to 2015 are shown in Figure 2.6.

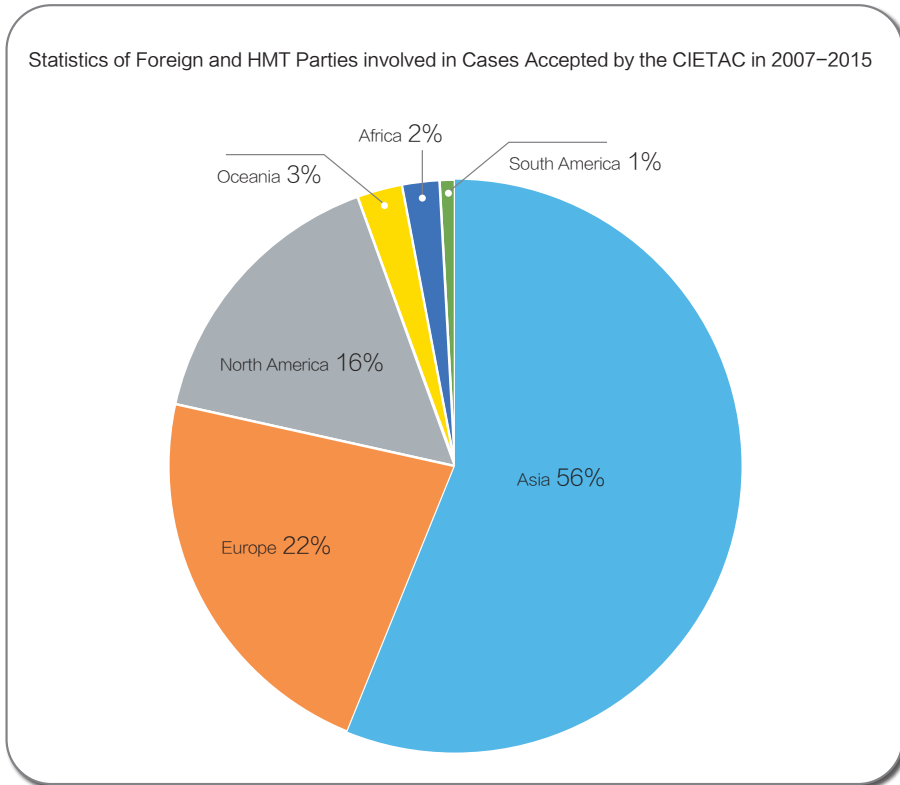


Figure 2.6

The parties of the cases accepted by the ICC Arbitration Court in 2015 were from 133 countries or regions. It is worth mentioning that there was a remarkable increase in the number of cases involving parties from China (including Hong Kong and Macao), with 90 Chinese parties involved which ranked seventh in the list of nations with the most parties involved.<sup>3</sup> The number of parties from

<sup>3</sup> ICC Dispute Resolution Bulletin, 2016-Issue 1, p.4.

mainland China has been increasing steadily.<sup>4</sup>

The parties of the cases accepted by the HKIAC in 2015 were from 41 countries or regions. The top 10 countries or regions with the most parties involved were mainland China, BVI, Macao, Singapore, Cayman Islands, Australia, U.S., Mongolia, U.K., the Philippines and South Korea.

The parties of the cases accepted by the SIAC in 2015 were from 55 countries or regions. The top 10 countries or regions with the most parties involved were India, China, South Korea, Vietnam, Australia, Hong Kong, Indonesia, U.S., BVI and Malaysia.

The parties of the cases accepted by the SCC in 2015 were from 37 countries or regions. The top 10 countries or regions with the most parties involved were Russia, Ukraine, Germany, Norway, U.K., Azerbaijan, Denmark, Italy, U.S. and Cyprus (Cyprus, Tajikistan and Netherlands tied for the tenth place).

### **3. Dispute Types**

There were 17 types of cases among the 437 international cases accepted by the CIETAC in 2015, involving disputes arising from sale of goods, electro-mechanical equipments, share transfer, joint ventures, industrial raw materials, service contracts, construction, decoration, contract projects, real estate construction and development, private loan contracts, house selling and leasing, insurance, franchising and licensing, transport contracts, intellectual property, agency agreements, finance, financial leasing, and others.

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<sup>4</sup> ICC Dispute Resolution Bulletin, 2016-Issue 1, p.5.

The statistics of the types of cases accepted by the CIETAC in 2015 are shown in Figure 2.7.

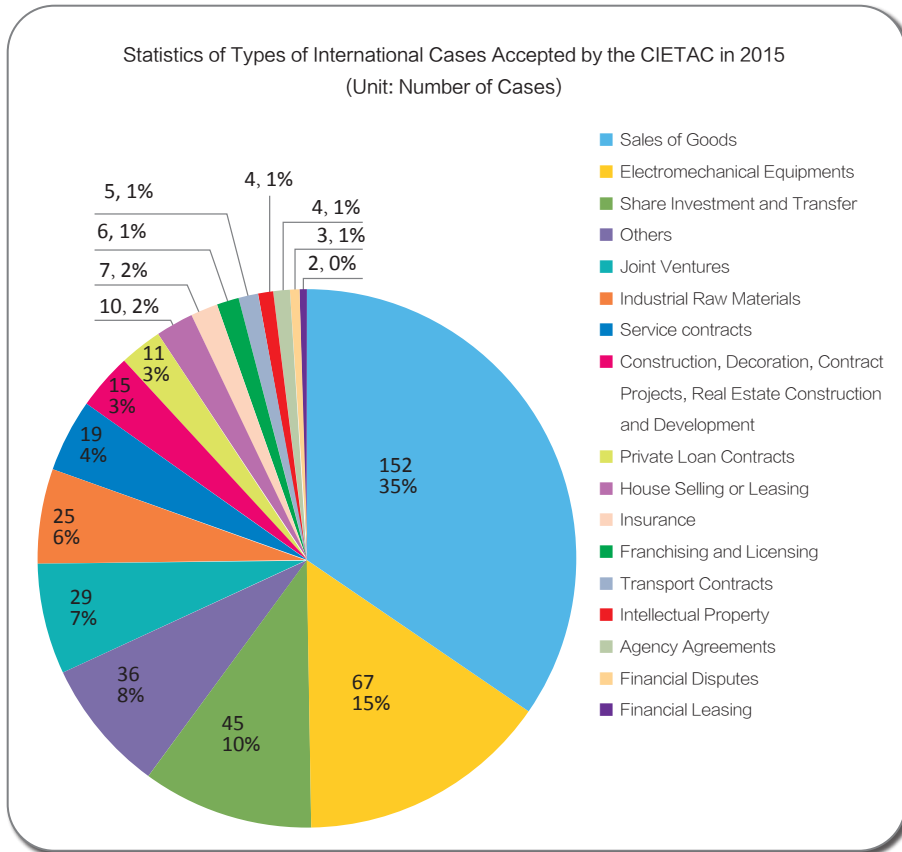


Figure 2.7

Various types of disputes were involved in the cases accepted by the ICC Arbitration Courts in 2015, covering heavy industry, agriculture, transport, construction projects, telecommunications, leisure and entertainment,

pharmaceutical, insurance and financial services as well as the most traditional trade and distribution. Take the data of one season in 2015 as an example. The most frequent dispute type was still the construction project disputes, the second frequent one was energy disputes while other dispute types accounting for more than 5 percent of the total caseload were financial and insurance disputes, industrial equipment disputes, and bulk trade and distribution disputes.<sup>5</sup>

According to the statistics from the LCIA, the cases it accepted in 2015 were mainly composed of medical and pharmaceutical disputes, retail and consumer product disputes, mineral disputes, oil and gas disputes, asset and equity transfer disputes, joint venture disputes, construction and energy disputes, shipbuilding disputes, telecommunications disputes, loan and other financial services disputes, partnership disputes, insurance disputes, culture media and sports disputes, sale of goods disputes, consulting and other professional services disputes.

The main types of disputes involved in the cases accepted by the HKIAC in 2015 were as follows: commercial disputes accounting for 50 percent of the total caseload, construction project disputes accounting for 22.2 percent, maritime disputes accounting for 18 percent, company disputes and insurance disputes, accounting for 8.9 percent and 0.9 percent respectively.

The main types of disputes involved in the cases accepted by the SIAC in 2015 were trade and business disputes, company disputes, transport/maritime disputes, construction/project disputes, insurance disputes, minerals and energy disputes, intellectual property disputes, information technology and financial service

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<sup>5</sup> ICC Dispute Resolution Bulletin, 2016-Issue 1, p.11.

disputes.

According to the statistics from the SCC, there were mainly 12 types of disputes involved in its cases accepted in 2015, including transport disputes, service disputes, share acquisition disputes, shareholders' agreement disputes, construction project disputes, investment disputes, partnership disputes, labor contract disputes, licensing disputes, loan disputes, intellectual property disputes and direct investment disputes.

## **4. Cases Concluded**

### **1) The Rate and Ways of Case Conclusion**

In 2015, the CIETAC concluded 1,821 cases including 402 international ones with an increase of 18 cases compared to the previous year. Such figure was about the same as its 2015 newly accepted international cases (437 cases). Among these cases, 321 were concluded by way of awards, accounting for 79.85 percent, 81 were concluded by way of consent awards or dismissal decisions, accounting for 20.15 percent.

In 2015, the ICC Arbitration Court rendered 498 awards, among which 343 were final awards, 126 were partial awards and 29 were consent awards, accounting for 62.17 percent of the new caseload. Among these awards, 217 were made by sole-arbitrator tribunals while 281 were made by three-member tribunals.<sup>6</sup>

### **2) Time for Case Conclusion**

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<sup>6</sup> ICC Dispute Resolution Bulletin, 2016-Issue 1, p.12.

The arbitral institutions did not distinguish between international cases and domestic ones in their statistics on the time for case conclusion. Accordingly, no such distinction is made below, and readers may get an overall idea of the time for case conclusion at each arbitral institution in the same period.

The CIETAC, summary procedure cases accounted for 67 percent of the cases it accepted in 2015, where the amount in dispute did not exceed RMB 5,000,000 or under other circumstances stipulated in the Arbitration Rules. Based on the statistics of all the cases concluded in 2015, the average time for case conclusion (including domestic and international ones) was 143 days after the formation of the tribunal, while the average time for summary-procedure cases was 104 days after the formation of the tribunal.

The LCIA did not provide detailed data on the time for case conclusion in its annual report, but the statistic on its cases concluded from 1 January 2013 to 15 June 2015 with the application of the LCIA Arbitration Rules can be found in the Costs and Duration<sup>7</sup> Data<sup>8</sup> released on its official website on 3 November 2015. As shown in the data, its median time for case conclusion was 16 months, which means half of the cases were concluded in more than 16 months and the other half concluded in less than 16 months. The average time for case conclusion would be 20 months.

The SCC Arbitration Rules were applied in 62 percent of the cases accepted

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7 From the day the LCIA receives the application for arbitration to the day the final award is made.

8 LCIA Release Costs and Duration Data, <http://www.lcia.org/News/lcia-release-costs-and-duration-data.aspx>, last visited on 20 July 2016.



by the SCC in 2015. In 52 percent of these cases, the time for case conclusion<sup>9</sup> was 6-12 months; in 35 percent of them, the time was 12-18 months. The SCC Expedited Rules were applied in 27 percent of the cases, 62 percent of which were concluded in 3-6 months. Calculated by the above published data, in all the cases accepted by the SCC, the ones concluded in 3-6 months accounted for 18 percent, those concluded in 6-12 months accounted for 39 percent, while those concluded in 12-18 months accounted for 23 percent.

## 5. Arbitrators

Foreign arbitrators or arbitrators from outside mainland China participated in the hearing of 58 international cases accepted by the CIETAC in 2015, with an increase of 23 cases compared to the previous year. Among them, there were 17 arbitrators from 8 countries and regions, including 4 from Taiwan, 3 from Hong Kong, 2 from Germany, 2 from U.K., 2 from Singapore, 2 from Australia, 1 from U.S. and 1 from France.

According to the data of the ICC Arbitration Court, the arbitrators of its 2015 cases were from 77 countries, with U.K., U.S., Swiss, France, Germany, Brazil, Italy, Australia and Canada as the top 10.

Foreign arbitrators participated in the hearing of the LCIA cases in 2015 were from 29 countries, including Australia, Austria, Brazil, Bulgaria, Canada, China, Cyprus, Denmark, Netherlands, France, Germany, Greece, Hungary, Iran, Ireland, Italy, Latvia, Lebanon, New Zealand, Nigeria, Russia, Singapore, South Africa,

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<sup>9</sup> From the day the case is accepted till the day the award is made.

Spain, Sweden, Swiss, Turkey, Ukraine, etc.

Foreign arbitrators participated in the hearing of the HKIAC cases in 2015 were from various countries or regions, with U.K., Hong Kong, Australia, U.S., Singapore, Canada, mainland China, Malaysia, Sweden and New Zealand as the top 10.

The SAIC, in its statistics, divided foreign arbitrators participating in the case hearing into two categories: the SIAC-appointed ones and the party-appointed ones. The SIAC-appointed foreign arbitrators were from 20 countries and regions, including Australia, Canada, China, France, Hong Kong, India, Japan, Malaysia, Netherlands, New Zealand, the Philippines, Saudi Arab, South Africa, South Korea, Sri Lanka, Swiss, Taiwan, United Arab Emirates, U.K. and U.S.. The party-appointed foreign arbitrators involved 4 more countries, including Germany, Ireland, Lebanon and Pakistan. It is shown in the statistics that arbitrators from U.K. and Australia were appointed the most frequently by the SIAC and the parties, perhaps due to historic and geographic reasons.

## **6. Dispute Amount**

Though claims for compensation are not the whole or only request in international commercial arbitration, most arbitral institutions do take such quantifiable claims as the basis for calculating arbitration fees, which indicates the universality of this kind of requests in arbitration. Meanwhile, the dispute amount in the cases accepted by arbitral institutions each year reflects the market recognition of these institutions.

In 2015, the amount in dispute for the 1,968 cases accepted by the CIETAC was 42.54 billion yuan (about USD 6.458 billion), with an increase of 12.5 percent compared to the previous year. This accounted for over 10 percent of the total national dispute amount of 411.2 billion yuan in 2015, ranking the first among the 244 Chinese arbitration institutions. There were 71 cases with an amount of dispute above 100 million yuan<sup>10</sup>, accounting for 3.61 percent of the total caseload. The total dispute amount of international cases was 12.6 billion yuan (about USD 1.913 billion) while the average dispute amount thereof was 28.83 million yuan (about USD 6.3764 million) per case. There were 23 international cases with an amount of dispute above 100 million yuan, accounting for 5.26 percent of the total international caseload. With regard to the average dispute amount in different types of disputes, the top three were, respectively, the cases involving equity investment and transfer disputes, the cases involving electromechanical equipment disputes, and those involving joint venture disputes.

The total dispute amount of cases accepted by the ICC Arbitration Court in 2015 was approximately USD 67 billion, with the average amount of USD 84 million per case.<sup>11</sup> There were 309 cases with a dispute amount above USD 10 million, with an increase of 32 cases compared to the previous year. Meanwhile, 23.2 percent of the cases involved a dispute amount of less than USD 1 million.<sup>12</sup>

In the cases accepted by the LCIA in 2015, 77 percent of the claimants specified the dispute amount in their application for arbitration. The statistic thereof is

<sup>10</sup> RMB 100 million is about USD 15.2 million based on the official exchange rate of China in July 2016.

<sup>11</sup> ICC Arbitration Post Strong Growth in 2015, <http://www.iccwbo.org/News/Articles/2016/ICC-Arbitration-posts-strong-growth-in-2015>, last visited on 20 July 2016.

<sup>12</sup> ICC Dispute Resolution Bulletin, 2016-Issue 1, p.11.

shown in Figure 2.8.

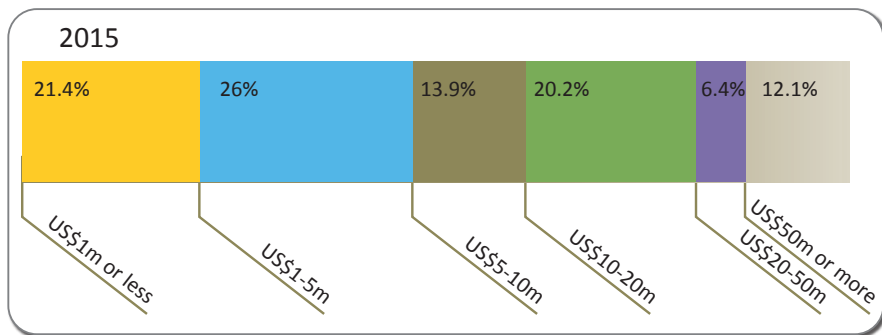


Figure 2.8

The total dispute amount of cases accepted by the HKIAC in 2016 was about HKD 47.9 billion (about USD 6.2 billion) while the average amount was about USD 22.9 million per case.

The total dispute amount of cases accepted by the SIAC in 2015 was SGD 6.23 billion (about USD 4.59 billion), with an increase of 24 percent compared to the previous year. The highest dispute amount involved in a case was SGD 2.03 billion (about USD 1.496 billion), while the average amount was SGD 23 million (about USD 16.9533 million) per case.

## 7. Arbitration Fees

This Chapter makes comparison of possible arbitration fees for three-member-tribunal cases including arbitrators' fees and arbitral institutions' administrative fees with the 6 intervals of USD 1 million, USD 5 million, USD 10 million, USD

30 million, USD 50 million and USD 100 million. The calculation is based on the fee calculators of the respective arbitral institutions.

The calculation result is shown in Figure 2.9.<sup>13</sup>

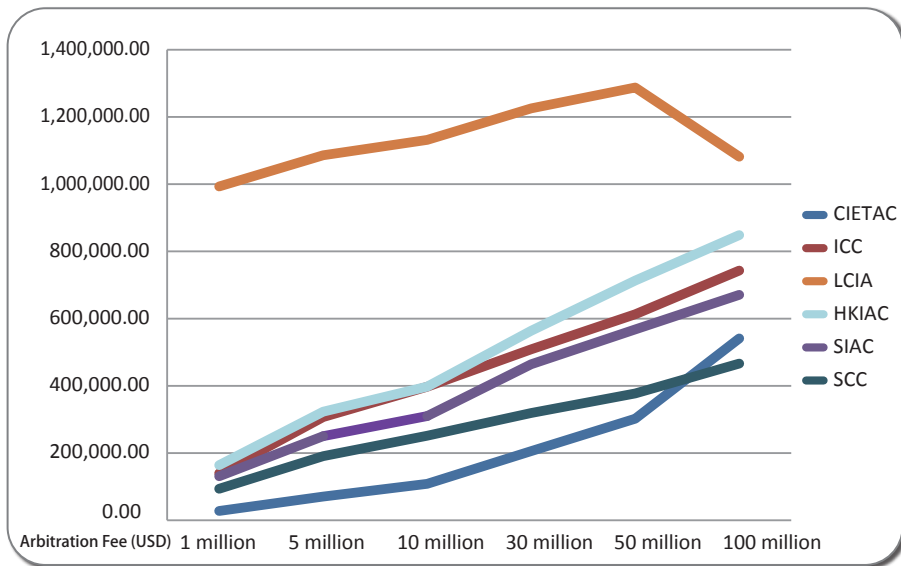


Figure 2.9

(The abscissa is the dispute amount; the ordinate is the arbitration fee)

It may be inferred from the above comparison that the CIETAC apparently has a competitive advantage in its fee collection standards vis-a-vis the other international commercial arbitration institutions.

## 8) Conclusion

<sup>13</sup> The exchange rate is the central parity rate of RMB in August 2016 published on the official website of the People's Bank of China, <http://www.pbc.gov.cn/zhengcehuobisi/125217/125925/index.html>, last visited on 5 August 2016.

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

① The caseloads of major international commercial arbitration institutions were all on the rise, which indicates that arbitration, as a commercial dispute resolution method, has won greater recognition. The CIETAC remained its top position among international commercial arbitration institutions in the total caseload, with its international caseload also ranking among the top list.

② China's international arbitration institution has an apparent advantage in the efficiency of dispute resolution. This is reflected in both the rather short time for case conclusion and the top ratio of summary procedure cases. It is shown in the data relating to case conclusion rate that the cases concluded by China's international arbitration institution in 2015 amounted to 91.99 percent of its newly accepted cases, significantly higher than other international arbitration institutions. It should be admitted that the CIETAC, in the competition among international arbitration institutions in 2015, submitted a satisfactory answer to parties seeking efficient dispute resolution. China's commercial arbitration institution ranked the first in the ratio of summary procedure cases. In particular, the CIETAC has lifted the maximum dispute amount for the application of summary procedure from 2 million yuan to 5 million yuan in its new Arbitration Rules effective as from 1 January 2015 so that the procedure could be applied in more cases, which has greatly enhanced efficiency and saved costs.

③ The cases accepted by China's international commercial arbitration institution

covered more types of disputes. Though each institution has its own way of classifying cases, it may be found from a rough distribution of the caseload that Chinese international commercial arbitration cases involved not only disputes in traditional sale of goods, electromechanical equipments, joint ventures, etc., but also rather new ones in service contracts, finance, equity investment and share transfer, intellectual property, insurance contracts, etc., covering a wide range and distributing over a large spectrum, by which China's arbitration institution has kept abreast with or even in some way surpassed other international arbitration institutions.

④ Concerning foreign arbitrators' participation in case hearing, China's international commercial arbitration institution slightly lagged behind compared to other international arbitration institutions, due to the restrictions by the arbitrators' panel system and arbitration language, etc. However, the CIETAC will offer parties more choices in the appointment of international arbitrators along with the increase in the number of its foreign arbitrators and the relaxation of restrictions on the arbitrators' panel system.

⑤ With regard to dispute amount and arbitration fees, there was apparent increase in the total dispute amounts of all the international arbitration institutions in 2015. Though it is hard to sequence the data, it can be found from the current statistics that the total dispute amount of the CIETAC was higher than that of some well-known arbitration institutions abroad, which indicates that the caseload of China's international commercial arbitration institution has reached the average international level. However, the arbitration fees collected by

China's international commercial arbitration institution for the vast majority of cases involving common-range dispute amounts were the lowest among all the institutions, accounting for only 17-50 percent of the fees of other international arbitration institutions, with an apparent cost-effective competitive advantage.

⑥ The internationalization of China's commercial arbitration has been further improved, which is shown in more involvement of Chinese parties in international commercial arbitration cases and higher recognition of the internationalized service provided by China's commercial arbitration institution. It is shown in the comparison of the internationalization of parties that the ICC Arbitration Court, as a traditional international arbitration institution, maintained its advantageous influence in the circle. More Chinese parties were involved in cases administered by the ICC Arbitration Court, indicating their better understanding and higher recognition of international arbitration. Meanwhile, China's international commercial arbitration institution has been known and chosen by more and more foreign parties. Furthermore, China's international commercial arbitration institution administered more cases conducted in English, showing the improvement of its ability in offering multi-language service. Chinese international commercial arbitration institutions, represented by the CIETAC, have administered an increasing number of cases where arbitration rules other than the administrator's own rules were applied, and have witnessed a growth in the number of cases where both parties are from outside mainland China. These not only indicate that the development of arbitration in China conforms to the international trend, but also illustrate that the professionalism in case administration of Chinese international arbitration institutions have won the trust



and affirmation of the parties, and their internationalized arbitration services have been more and more recognized by parties whose mother tongues are not Chinese.

## **II. The CIETAC Guidelines on Evidence Help Promoting the Internationalization of Arbitration in China**

As from 1 March 2015, the CIETAC Guidelines on Evidence came into force. This is a pioneering move for a commercial arbitration institution to publish and implement its rules on evidence, and offers valuable reference for tribunals in handling evidence issues.

### **1. Legal Sources for Evidence Issues in Commercial Arbitration**

It is well-known that there is no unified code of evidence in China. Relevant legislation is scattered in various procedural laws and other legal documents such as judicial interpretations. In the hearing of arbitration cases, parties in their production and examination of evidence, and arbitrators in their finding of facts, follow evidence rules for civil and commercial litigation or take such rules as reference in most cases. However, arbitral tribunals prefer a more relaxed attitude towards evidence issues in commercial arbitration due to the special features of arbitration procedures such as flexibility and party autonomy. Thus, although evidence rules in civil and commercial litigation may be applied in arbitration, they are neither mandatory, nor necessary to be fully copied. The legal sources for evidence issues in China's international commercial arbitration before the implementation of the CIETAC Guidelines of Evidence are as follows:

Firstly, relevant stipulations in the Arbitration Law and the Civil Procedure Law, such as Articles 43, 45 and 46 of the Arbitration Law.<sup>14</sup> The evidence rules in the above laws are mostly only stipulated in principle.

Secondly, the judicial interpretation on evidence rules in civil and commercial litigation, i.e., Some Provisions of the Supreme People's Court on Evidence in Civil Procedures.

Thirdly, relevant provisions in applicable arbitration rules such as Articles 41-44 of the 2015 CIETAC Arbitration Rules<sup>15</sup> and Articles 27 and 29 of the

<sup>14</sup> The Arbitration Law of the People's Republic of China

Article 43 The parties shall produce evidence in support of their claims. An arbitration tribunal may collect on its own evidence it considers necessary.

Article 45 Any evidence shall be produced at the start of the hearing. The parties may challenge the validity of such evidence.

Article 46 In the event that the evidence might be destroyed or if it would be difficult to obtain the evidence later on, the parties may apply for the evidence to be preserved. If the parties apply for such preservation, the arbitration commission shall submit the application to the basic-level people's court of the place where the evidence is located.

<sup>15</sup> China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules [2015]

Article 41 Evidence

1. Each party shall bear the burden of proving the facts on which it relies to support its claim, defense or counterclaim and provide the basis for its opinions, arguments and counter-arguments.
2. The arbitral tribunal may specify a time period for the parties to produce evidence and the parties shall produce evidence within the specified time period. The arbitral tribunal may refuse to admit any evidence produced after that time period. If a party experiences difficulties in producing evidence within the specified time period, it may apply for an extension before the end of the period. The arbitral tribunal shall decide whether or not to extend the time period.
3. If a party bearing the burden of proof fails to produce evidence within the specified time period, or if the produced evidence is not sufficient to support its claim or counterclaim, it shall bear the consequences thereof.

Article 42 Examination of Evidence

1. Where a case is examined by way of an oral hearing, the evidence shall be produced at the oral hearing and may be examined by the parties.
2. Where a case is to be decided on the basis of documents only, or where the evidence is submitted after

## UNCITRAL Arbitration Rules)<sup>16</sup>. The parties generally make clear agreement on

the hearing and both parties have agreed to examine the evidence by means of writing, the parties may examine the evidence in writing. In such circumstances, the parties shall submit their written opinions on the evidence within the time period specified by the arbitral tribunal.

### Article 43 Investigation and Evidence Collection by the Arbitral Tribunal

1. The arbitral tribunal may undertake investigation and collect evidence as it considers necessary.
2. When investigating and collecting evidence, the arbitral tribunal may notify the parties to be present. In the event that one or both parties fail to be present after being notified, the investigation and collection of evidence shall proceed without being affected.
3. Evidence collected by the arbitral tribunal through its investigation shall be forwarded to the parties for their comments.

### Article 44 Expert's Report and Appraiser's Report

1. The arbitral tribunal may consult experts or appoint appraisers for clarification on specific issues of the case. Such an expert or appraiser may be a Chinese or foreign institution or natural person.
2. The arbitral tribunal has the power to request the parties, and the parties are also obliged, to deliver or produce to the expert or appraiser any relevant materials, documents, property, or physical objects for examination, inspection or appraisal by the expert or appraiser.
3. Copies of the expert's report and the appraiser's report shall be forwarded to the parties for their comments. At the request of either party and with the approval of the arbitral tribunal, the expert or appraiser shall participate in an oral hearing and give explanations on the report when the arbitral tribunal considers it necessary.

## 16 The UNCITRAL Arbitration Rules

### Article 27 - Evidence

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.
3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.
4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

### Article 29 - Experts appointed by the arbitral tribunal

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they

arbitration rules in their arbitration agreements, therefore they should be regarded as having reached consensus on the evidence provisions therein.

Fourthly, based on many years of practice, some international institutions have developed detailed and specific rules on evidence for the reference of parties and tribunals. For example, the International Bar Association (the IBA) issued the Rules on the Taking of Evidence in International Arbitration (the IBA Rules), the Chartered Institute of Arbitrators made the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, the International Center for Dispute Resolution (the ICDR) issued the ICDR Guidelines for Arbitrators Concerning Exchange of Information, and the International Institute for Conflict Prevention & Resolution published the Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

However, it is very rare for the parties or tribunals to choose the above rules in the

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have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

practice of international commercial arbitration in China. On the one hand, they are not familiar with these rules and not ready to use them, and on the other hand, these rules are inconsistent with traditional practice in China's arbitration. It can be found from the foreword of the CIETAC Guidelines on Evidence that the main legal sources of the Guidelines are the Arbitration Law and the CIETAC Rules while the evidence rules in civil and commercial litigation and the IBA Rules are not direct resources but references only.

## **2. Features of the CIETAC Guidelines on Evidence**

Generally speaking, the CIETAC Guidelines on Evidence is a special set of rules based on the summary of the CIETAC practice. The Guidelines not only integrate with the CIETAC Rules and its long-term practice, but also take appropriate reference of the Chinese evidence rules in civil litigation that are suitable for use in arbitration as well as the IBA Rules. The Guidelines have the following features:

Firstly, the Guidelines are evidence rules applicable to arbitration. Considering that arbitration, in contrast to litigation, has features such as flexibility and party autonomy, the Guidelines make it clear in the foreword that its application is subject to the parties' consent while the parties may agree to adopt the Guidelines in part or in whole, which gives the parties great freedom in adopting the Guidelines and the tribunals more flexibility in handling the application of the Guidelines in cases since the tribunals may only take it as reference instead of mandatory rules.

Secondly, the Guidelines are more suitable for international commercial arbitration in China. It is clearly stated in the foreword that ‘the application of the Guidelines is presumably to be more appropriate in an arbitration the seat of which is in Mainland China and where the Arbitration Law of the People’s Republic of China is the law applicable to the arbitration procedure’. Since the Guidelines are in accordance with the Arbitration Law, the CIETAC Rules and practice, and with appropriate reference to the IBA Rules as well as the Chinese evidence rules in civil and commercial litigation that are suitable for use in arbitration, the Guidelines, from the level of legislative technique, are better connected with the current Chinese legislation on civil and commercial evidence rules. Therefore, the Guidelines are easier for the parties and arbitrators to understand and apply, and are more in line with the traditional practice of arbitration in China. Many stipulations in the Guidelines directly reflect the current evidence rules in China’s civil and commercial litigation. For example, Article 1.4 on the burden of proof for alleging that the amount of liquidated damages as provided for in the contract is lower or higher than the actual loss suffered reflects Article 114 of the Contract Law of China; Article 12.1 regarding evidence preservation is in accordance with the stipulations in the Civil Procedure Law and the Arbitration Law; and Article 16.2 which stipulates that ‘[F]or written documents in respect of which discrepancies are likely to exist between the original and photocopies of the original, a party and the tribunal may request that the original be presented for examination’ bears the mark of the Chinese judicial practice.

Thirdly, the Guidelines also incorporate some internationalized approach on the basis of Chinese local practice on evidence. For example, parties are allowed

to submit electronic versions of documentary evidence under Article 6.2, no more requiring the precondition of parties' consent with the tribunal's approval, or the tribunal's otherwise decision. This is in accordance with the practice of other international arbitration institutions and helps improving the efficiency of arbitration by greatly saving the time of arbitration institutions for documents exchange. Another example is Article 14 regarding the translation of documents, under which relevant issues may be determined through consultation between parties and tribunals, in contrast to the traditional practice of requiring translation in the language of arbitration under all circumstances, thus saving unnecessary translation fees and improving efficiency of arbitration. Furthermore, a system similar to the disclosure of specific evidence in the common law jurisdictions is introduced in Article 7 of the Guidelines, under which '[A] party may request the tribunal to order the other party to produce a specific document or a narrow and specific category of documents'. This mechanism is also an innovation based on the practice of international commercial arbitration in China with reference to relevant provisions on the 'Request to Produce' in the IBA Rules.

### **3. Comparison between the CIETAC Guidelines on Evidence and the IBA Rules**

The CIETAC, when drafting its Guidelines on Evidence, took appropriate reference of the IBA Rules so as to keep in line with international commercial arbitration practice. The IBA Rules are based on the relatively consistent practices regarding evidence issues in international commercial arbitration and the result of compromise between the common law and continental law systems in relevant

rules and practice.<sup>17</sup> The IBA Rules have been taken as reference by many major international arbitration institutions, and have been highly recognized. The CIETAC Guidelines, learning from the IBA Rules and integrating Chinese legislation and practice of arbitration and evidence rules, have its own features. The CIETAC Guidelines and the IBA Rules share similarities while reserving differences.

### 1) Similarities

Firstly, both the CIETAC Guidelines and the IBA Rules are for reference with no mandatory force.<sup>18</sup> This is fundamentally consistent with the features of arbitration as a dispute resolution method. It is unrealistic to force parties or tribunals to adopt evidence rules in arbitration.

Secondly, the CIETAC Guidelines and the IBA Rules adopt similar classifications of evidence, dividing evidence into documentary evidence, witnesses of fact, expert opinions, inspection and appraisal. The CIETAC Guidelines neither adopt the evidence classification in the Civil Procedure Law nor include other types of evidence in international arbitration.

Thirdly, the CIETAC Guidelines lay emphasis on evidence production, collection and exchange, which is similar to the IBA Rules. Among the 26 articles of the CIETAC Guidelines including supplementary provisions, 11 are relevant to evidence collection and exchange and 3 are related to evidence assessment, which

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<sup>17</sup> Lu Song, 'Evidence in International Commercial Arbitration', Beijing Arbitration (Vol. 8), p.96.

<sup>18</sup> Foreword of the CIETAC Guidelines on Evidence and Article 1 of the IBA Rules.



means over half thereof are about evidence production, collection and exchange.<sup>19</sup>

## 2) Differences

Firstly, concerning the application of the rules, the CIETAC Guidelines show more respect to party autonomy and are more lenient and tolerant than the IBA Rules. The CIETAC Guidelines may be applied only by parties' consent, while the IBA Rules be adopted either by the choice of the parties or by the decision of the tribunal.

Secondly, the style and content of the CIETAC Guidelines are different from those of the IBA Rules. There are 26 articles in 5 chapters under the CIETAC Guidelines, which follows the normal style of chapters and sections in Chinese legislation. In contrast, there are 9 articles with no chapters but definitions on relevant concepts in the IBA Rules, which is in accordance with the common law tradition. As to the style, the CIETAC Guidelines cover a wider range of evidence rules than the IBA Rules, and the contents of the two are different. The IBA Rules mainly include sections of witnesses of facts, expert witnesses, evidence exchange and admissibility and assessment of evidence, while the CIETAC Guidelines involve various aspects such as burden of proof, evidence production, evidence collection and exchange, evidence examination and assessment, etc., with specific provisions on assumption of the burden of proof and standard of proof.

Secondly, the CIETAC Guidelines are different from the IBA Rules on the

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<sup>19</sup> Xu Jianguo, Shen Yuan & Ruan Fangyang, 'Comparison between the Guidelines on Evidence and the IBA Rules on the Taking of Evidence', <http://www.08kan.com/gwk/MzA4MTY3ODQwNA/204223087/1/7f81589cd417cb9f44065837ceefffb.html>, last visited on 26 July 2016.

relevant provisions concerning witness statements and expert opinions. The IBA Rules incorporate the features of the evidence systems in the common law and civil law jurisdictions. However, it can be found from the provisions related to witness statements and expert reports that the Rules are under more influence of the common law system, reflecting the features of evidence rules under the adversary approach of the common law system, i.e., emphasis on appearance and examination of witnesses. The IBA Rules adopt stricter requirements on the admissibility of witness statements. If a witness fails without a valid reason for testifying at an evidentiary hearing, his statement will not be admissible. However, it is stipulated in the CIETAC Guidelines that the statement of a witness who fails to appear at the hearing for examination without good cause shall not independently serve as the basis for the establishment of a fact, but this does not necessarily result in the inadmissibility of his statement. The strict requirement on appearance and examination of witnesses is also adopted in the relevant provisions on expert reports in the IBA Rules. Experts shall be present at hearings and may be questioned by the tribunal, the parties and the party-appointed experts. The CIETAC Guidelines only contain a brief provision stipulating that ‘[T]he tribunal may appoint one or more experts on its own initiative. The parties shall assist the tribunal-appointed expert, and provide any documents and information that the expert requests. The expert shall issue his/her opinion which shall be forwarded to the parties for comments’.<sup>20</sup>

Finally, compared with the IBA Rules, the CIETAC Guidelines clarify the

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<sup>20</sup> Xu Jianguo, Shen Yuan & Ruan Fangyang, ‘Comparison between the Guidelines on Evidence and the IBA Rules on the Taking of Evidence’, <http://www.08kan.com/gwk/MzA4MTY3ODQwNA/204223087/1/7f81589cd417cb9f44065837ceefffb.html>, last visited on 26 July 2016.

standard of proof for fact finding in arbitration. It is stipulated in Article 24 of the CIETAC Guidelines:

‘24.1 Where conflicting evidence has been adduced by the parties in respect of a particular fact, the tribunal may make a determination of the fact pursuant to the principle of the preponderance of evidence.

24.2 The tribunal shall make a finding of fraud only if clear and convincing evidence exists to support the fact.’

The importance of the standard of proof in trials is self-evident, because judges rely on it to meet relevant legal requirements in fact finding, while parties rely on it to prove facts with evidence produced and determine whether the proof is enough. With the standard of proof incorporated in the evidence rules and the standard clarified in advance, parties may have a better prediction on the result of the final award in arbitration, thus the acceptability and authority of the arbitral award are better ensured.

Arbitration, as an important dispute resolution method, has features such as party autonomy, flexibility and efficiency compared to litigation. Evidence rules in arbitration should also adapt to these features. The introduction of the CIETAC Guidelines on Evidence is a Chinese initiative in making specialized and non-litigious evidence rules in arbitration. The drafting of the Guidelines is based on the IBA Rules which come from advanced experience in repeated practice of international arbitration, which reflects the continuous and steady internationalization of the system of international commercial arbitration in China.

# Chapter Three Special Observation on International Commercial Arbitration in China<sup>1</sup>

## -The Application of the CISG in International Commercial Arbitration in China

The United Nations Convention on Contracts for the International Sale of Goods (the Convention or the CISG) has been the most successful achievement in the unification of private international law and turned to be a ‘lingua franca’ of international sales.<sup>2</sup> There are 85 contracting states now.<sup>3</sup> Though the enactment and creation of laws are important, the real life of laws is in the interpretation and application. The life of laws would wither while the value thereof would get lost if there were no interpretation or application. That is true for treaties as well.<sup>4</sup> For the

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1 This Chapter is drafted through amendment and adjustment according to the keynote of the Annual Report and latest data based on the Application of the CISG in International Commercial Arbitration which is the study result of Professor Han Shiyuan’s team from Tsinghua University the School of Law as commissioned by the CIETAC. The gratitude is reiterated here to the team. The English version of the study result is in Shiyuan Han, ‘The Application of the CISG in International Commercial Arbitration in China’, in Ingeborg Schwenzer (ed.), 35 Years CISG and Beyond, Eleven International Publishing, 2016, pp.91-111. The Chinese version, Han Shiyuan, ‘The Application of the CISG in International Commercial Arbitration in China’, China Legal Science, Vol. 5 (2016).

2 P. Schlechtriem, ‘Keynote Address’ in Pace International Law Review ed., Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004, Munich: Sellier. European Law Publishers, 2005, pp.84-85.

3 [http://www.uncitral.org/uncitral/zh/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/zh/uncitral_texts/sale_goods/1980CISG_status.html), last visited on 24 August 2016.

4 Du Huanfang, ‘Path Dependence and Method Expansion in the Interpretation of Private International

uniform text of international trade rules, the unified text itself does not necessarily result in the uniform law. The ultimate goal should go beyond unifying the texts and be the unification of the operation of laws. Thus, there is a need to emphasize the unified interpretation and application of the Convention throughout the world. The functions of judgments applying the Convention should not be limited to the settlement of disputes but be extended to the improvement of unification of the laws. From this perspective, each case involving the application of the Convention may be a good growing point for the Convention. China, among the first group of the Convention's contracting states, has attracted much attention from around the world to its interpretation and application of the Convention.

In view of the above, this Chapter makes empirical research and special observations on 81 awards related to the Convention rendered by the CIETAC from 2008 to 2015. It intends to reveal the current status of the application of the Convention in China from the perspective of international commercial arbitration, analyze the difference between such status and the uniform interpretation and application requested by the Convention and find solution thereof. The CIETAC, as the longest-established arbitration commission in China, enjoys high reputation domestically and internationally. The Pace University School of Law have collected a large number of CIETAC awards involving the application of the Convention in the database<sup>5</sup> and made research thereon,<sup>6</sup> which is of far-reaching

Law Treaties', China Legal Science, Vol. 2 (2014).

<sup>5</sup> <http://www.cisg.law.pace.edu/cisg/text/casecit.html#a07>, last visited on 24 August 2016.

<sup>6</sup> For example, A Vincze, 'Conformity of the Goods in the UN Convention on Contracts for the International Sale of Goods (CISG)-Overview of CIETAC's Practice', in C.B. Andersen and U. G. Schroeter eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday*, London: Wildy, Sommonds & Hill Publishing, 2008,

influence in international academic and professional communities. This Chapter makes research on Chinese and English awards provided by the CIETAC which are still unavailable in the database of the Pace University. In consideration of the confidentiality, the relevant case numbers and award numbers will be omitted, and reference will be made to the award dates, the subject matters involved in transaction and the parties' nationalities to identify specific cases.

## **I. General Situation of CISG-related Awards**

### **1. Simplicity and Complexity of Judgments**

Different institutions have different styles of judgments. Some nations may prefer concise judgments while others adopt rather complicated ones like academic papers.<sup>7</sup> Each style has its strong and weak points. Concise judgments can meet the demands of raising efficiency, solving practical problems and relieving judges from work pressure, but may lack sufficient reasoning. Complicated ones, though with abundant reasoning, impose great challenge to judges in the sense of time, energy and wisdom, and lack operability when there is a huge caseload.

Of course, when drafting judgments, the form is determined by the need of the content, so is the style of the judgments. According to statistics, the total number

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pp.552-581; Fan Yang, 'CISG, CIETAC Arbitration and the Rules of Law in P.R. of China: A Global Jurisconsultorium Perspective', in *ibid.*, pp.600-626, M. R. Shulman and L. Singh, 'China's Implementation of the CISG through Arbitral Institutions', translated by Wang Wanlu, *China University of Political Science and Law Journal*, Vol. 1 (2011).

<sup>7</sup> *Analysi of judgment reasoning status in U.K., France and Germany, etc.*, Xu Zhengxian, 'Science of Civil Law and Judicial System (2009)', published by Xin Xue Lin Publishing Co., Ltd., Tai Bei, p.228, pp.239-240.

of words in the 81 CISG-related CIETAC awards is 974,406. The minimum number of words in an award is 2,578<sup>8</sup> while the maximum is 49,620.<sup>9</sup> The average number of words in an award is 12,030. Calculated without the minimum and the maximum, the average number of words is 11,674 which is equivalent to that of law papers acceptable to most Chinese legal journals.

## 2. Reasoning and Invocation

In judging cases and applying laws, it is naturally necessary to mention the source and content of specific legal provisions, which is inseparable from citing law articles. Interpretation must be made on the invoked articles, and gaps should be filled when there are insufficient provisions or loopholes. Therefore, the primary task of adjudicators is to find the applicable law articles, invoke and interpret them in judgments.

The CIETAC awards follow a uniform model containing three basic parts, i.e., the statement of facts, the tribunal's opinion and the award. Procedural issues including the acceptance of case, the formation of tribunal and the hearing are listed before the statement of facts. The invocation of law articles is not found in the third part, i.e., the award. Generally, it is briefly stated as 'Above all, the tribunal makes the following award'. It is quite common and with no exception in the 81 CIETAC awards, so it may be regarded as the CIETAC style.

Of course, no invocation of law articles in the award part does not mean no such

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8 The CIETAC award on 24 April 2008 (iron ore, South Korea buyer v. Chinese seller).

9 The CIETAC award on 21 September 2009 (sulfur, mainland China buyer v. Hong Kong seller).

invocation in the whole award. Among the 81 awards, those quoting specific legal provisions in the tribunal’s opinion part account for 69% of the total (Figure 3.1 shows 51% thereof invoke Chinese laws while only 35% invoke the Convention) while 38% have absolutely no invocation.

Figure 3.1

	invocation		No invocation	number of cases
	The Convention	Chinese laws		
Year 2008	0	6	8	14
Year 2009	8	8	7	19
Year 2010	2	7	10	19
Year 2011	4	7	6	15
Year 2012	2	2	0	2
Year 2013	4	4	0	4
Year 2014	4	3	0	4
Year 2015	4	4	0	4
Total	28	41	31	81
	*56			

(\*The number 56 does not equal to 28 plus 41 since there are cases involving the invocation of both the Convention and Chinese laws.)

### 3. Ratio of Awards in Favor of Chinese or Foreign Parties

Scholars have been committed to exploring a set of methods for unified interpretation of the Convention so as to ensure the uniform application and



interpretation. In this regard, Professor Magnus from the University of Hamburg, Germany pointed out that even such methods were adopted, there would still be obstacles to frustrate all the efforts of maximizing the unification in the interpretation of the Convention. The obstacles include a ‘political’ interpretation of the CISG and great difference in judgment quality of various countries. The so-called ‘political’ interpretation means that domestic courts deliberately favour their own citizens in judgments on international relations. In cases involving international sale of goods, it is easy for courts to favour business of their own country in the judgments. Such favour is not done openly but through a concealed way via the interpretation of the vague and flexible terms of the respective law. “Sales law-and in particular the CISG-contains so many vague and flexible terms that their systematic interpretation in favour of the home industry would pose no real difficulty”.<sup>10</sup>

Obviously, such ‘political’ interpretation of the Convention is in conflict with the principle of fairness including ‘like case, like treatment’ and impartiality of judgments. So we should keep alert on it. Professor Magnus proposed a verification method that for cases involving the application of the Convention, if the courts decide the case in a neutral, impartial manner, there should be ten foreign parties and ten domestic parties should have won their cases at least in theory. In another word, the ratio of winning foreign parties to winning domestic parties should be 1:1.

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<sup>10</sup> U. Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in A. Janssen and O. Meyer eds., *CISG Methodology*, Munich: Sellier, European Law Publishers 2009, pp.35-36.

Figure 3.2 shows the analysis result of the awards involving the application of the Convention rendered by the CIETAC from 2008 to 2015. The ratio of winning Chinese parties to winning foreign parties is 1.68:1. How to interpret such result? Is there a serious problem of ‘political’ interpretation in the CIETAC’s practice involving the application of the Convention? These questions will be discussed later in this Chapter.

Figure 3.2

	Chinese Party Win	Foreign Party Win	Draw	Total
Year 2008	7	5	2	14
Year 2009	15	4	0	19
Year 2010	11	7	1	19
Year 2011	8	6	1	15
Year 2012	1	1	0	2
Year 2013	1	2	1	4
Year 2014	3	1	0	4
Year 2015	1	2	1	4
Total	47	28	6	81

#### 4. Application of the CISG

The application of the Convention involves the understanding of Chapter 1,

especially Article 1 thereof. Figure 3.3 shows the research result of the 81 Convention-related CIETAC awards in the 8 years and the following Part II will make analysis thereon.

Figure 3.3

	Autonomous Application		Non- Autonomous Application		Application of Domestic Laws under Private International Laws	Total
	Autonomous Application	Mistaken as Non-Autonomous Application	Explicit Agreement	Implied Choice		
Year 2008	5	2	5	1	1	14
Year 2009	9	1	6	2	1	19
Year 2010	7	0	9	1	2	19
Year 2011	4	2	5	2	2	15
Year 2012	1	0	1	0	0	2
Year 2013	3	0	1	0	0	4
Year 2014	4	0	0	0	0	4
Year 2015	3	0	1	0	0	4
Total	36	5	28	6	6	81

In Hong Kong-related cases, most CIETAC tribunals deny the autonomous

application of the Convention on a contract of sale of goods with one party's place of business in Hong Kong. However, there are still awards holding the opposite position. For example, in one award involving disputes arising out of the contract for sale of solar panels between an American buyer and a Hong Kong seller which contains no agreement on the applicable law, it is stated in the tribunal's opinion that 'Considering the Claimant and the Respondent are companies registered in Florida, U.S. and Hong Kong respectively, the countries of registration are both contracting states of the CISG while neither party excluded the application thereof explicitly in the contract, the Claimant invoked provisions of the CISG as its legal ground in the application for arbitration while the Respondent never objects thereto, the tribunal deems that the CISG should be applied in this case.'<sup>11</sup> In another award involving disputes arising out of the contract for sale of Indonesian nickel ore between a mainland China buyer and a Hong Kong registered seller, it is stated in the tribunal's opinion that 'The contract is foreign-related. The parties agreed in the contract that the CISG should be applied to the contract. Such agreement is not against mandatory provisions in Chinese laws and administrative regulations, so the CISG shall be the applicable law of the contract as per Article 41 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships'.<sup>12</sup>

## II. Application of the CISG in International Commercial Arbitration in China

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11 The CIETAC award on 31 May 2010 (solar panel, American buyer v. Hong Kong seller).

12 The CIETAC award on 4 March 2013 (Indonesian Nickel ore, mainland China buyer v. Hong Kong seller).

The applicability of the Convention has been discovered as a subject of discussion, not only in Europe<sup>13</sup>, but also in China<sup>14</sup>. As pointed out by a German professor, the grounds for tribunals' application of the Convention are different. Some tribunals rely on Article 1.1 (a) of the Convention or rules of private international law, while others may treat the Convention as a part of the *Lex Mercatoria* or existing trade usages.<sup>15</sup> In the CIETAC practice, the ground for the application of the Convention is either the parties' agreement or Article 1.1(a) of the Convention though the latter has begun to be questioned by Chinese scholars. The following analysis is still based on the normal CIETAC practice, i.e. autonomous or direct application of the Convention.

In the practice of international commercial arbitration in China, if the parties' places of business are in different contracting states of the Convention, the tribunals normally apply the Convention unless the parties have excluded the application thereof or relevant disputes are not within the scope thereof.<sup>16</sup>

## 1. Autonomous Application

### 1) Most CIETAC Awards Apply the Convention Autonomously under

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13 See U. P. Gruber, 'The Convention on the International Sale of Goods (CISG) in Arbitration', 2009 *Int'l Bus. L.J.* pp. 15-34; A. Janssen and M. Spilker, 'The Application of the CISG in the World of International Commercial Arbitration', 2013 *RabelsZ* 77, pp. 131-157.

14 Some Chinese scholars object to the direct application of the CISG in arbitration based on the contractual nature of arbitration and difference between arbitration and litigation. Du Tao, 'Issues regarding the Application of the CISG in Arbitration', *Oriental Law* (2009), Vol. 3.

15 U. P. Gruber, 'The Convention on the International Sale of Goods (CISG) in Arbitration', 2009 *Int'l Bus. L.J.* p.23.

16 Han Jian, 'The Application of the CISG in International Commercial Arbitration in China', *Wuhan University International Law Review* (2008), Vol. 2.

### **Circumstances of Autonomous Application.**

According to the UNCITRAL Digest of Case Law on the Convention on Contracts for the International Sale of Goods (2012 Edition), the Convention prevails over recourse to private international law. ‘In those countries, however, where international uniform substantive rules are in force, such as those set force by the Convention, courts must determine whether those international uniform substantive rules apply before resorting to private international law rules at all. This means that recourse to the Convention prevails over recourse to the forum’s private international law rules. This approach has been justified on the grounds that, as a set of uniform substantive law rules, the Convention is more specific insofar as its sphere of application is more limited and leads directly to a substantive solution, whereas resort to private international law approach requires a two-step approach—that is, the identification of the applicable law and the application thereof.’<sup>17</sup> ‘According to the criterion set forth in article 1 (1)(a), the Convention is “directly” or “autonomously” applicable, i.e. without the need to resort to the rules of private international law.’<sup>18</sup> According to Certain Issues of the Ministry of Foreign Trade and Economic Cooperation in Connection with the Implementation of United Nations Convention on Contracts for the International Sale of Goods<sup>19</sup> that ‘Since our government has already signed the Convention,

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<sup>17</sup> UNCITRAL, UNCITRAL Digest of Case Law on the Convention on Contracts for the International Sale of Goods (2012 Edition), p.4, [http://www.uncitral.org/uncitral/en/case\\_law/digests.html](http://www.uncitral.org/uncitral/en/case_law/digests.html), last visited on 10 August 2016.

<sup>18</sup> Ibid., p.11.

<sup>19</sup> (87) Wai Jing Mao Fa Zi No. 22 issued on 4 December 1987. The SPC transmitted the document with the Circular, requesting for proper application of the Convention in foreign-related economic trials. Fa (Jing) Fa (1987) No. 34 issued on 10 December 1987.

it should assume the commitments on the implementation of the Convention. Therefore, according to the provision of Article 1.1 of the Convention, from January 1, 1988, the contracts for sale of goods reached between the Chinese companies and the companies in the aforementioned countries (except Hungary) will automatically apply the provisions of the Convention and the disputes or litigations arisen should be also settled under the Convention, unless otherwise agreed.’ The autonomous application of the Convention was mentioned above. The same position about Article 1(1) of the Convention is held by academic circles in and out of China.<sup>20</sup>

As shown in the CIETAC awards, the tribunals of 7/8 cases could either directly and autonomously apply the Convention as requested above when the condition in Article 1.1(a) is met or apply relevant proper laws such as Chinese laws under the most significant connection doctrine to matters not stipulated in the Convention such as the validity of contracts.

## **2) A Few Cases Incorrectly Treated as Non-autonomous Application or Application as Agreed**

Nevertheless, there are still 1/8 of the CIETAC awards where the CISG should be applicable autonomously but the tribunal have incorrectly treated them as

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<sup>20</sup> P. Schlechtriem and P. Butler, *UN Law on International Sales*, Berlin: Springer-Verlag, 2009, p.13. Shan Hailing, ‘The Application of the CISG in China from the Perspective of Private International Law, Politics and Laws (2003), Vol. 5; Chen Zhidong, Wu Jiahua, ‘The Application of the CISG in China’, *Science of Law*(2004), Vol. 10; ChePizhao, ‘The Applicability of the CISG’, *Foreign Trade Practice* (2008), Vol. 4. This Chapter uses ‘autonomous application’ instead of ‘direct application’ not only because of the wording in the MOFTEC document but also to avoid confusion with the ‘direct application’ of treaties in China.

non-autonomous application by private international law rules. The specific circumstances are different and basically include the following types.<sup>21</sup>

① Chinese laws were applicable as having the closest connection with the disputing contract according to the conflict of law rules. Meanwhile, the Convention was applicable since the parties' places of business were in different contracting states while the parties had not excluded the application of the Convention.<sup>22</sup> It may be called the concurrent application of the CISG and the Chinese domestic law.

② The tribunal deemed that the laws of the country with the closest connection to the contract involved should apply when the parties had not agreed on the applicable laws. Considering China was closely connected to the signing and performing of the contract and was the place of arbitration, Chinese laws should apply. Where there was no Chinese law, the Convention may apply since the parties' places of business were in different contracting states of CISG. It is using the CISG to supplement Chinese law.

③ The tribunal deemed that Chinese laws should apply to the execution, validity, interpretation, performance and dispute resolution of the contract as per Article 41.4 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships, Article 126 of the Contract Law and Article 142 of

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21 The CIETAC award on 2 June 2008 (Plywood, Singapore buyer v. Chinese seller). In the award, though the relationship between the P.R.C. Contract Law and the Convention in application is not mentioned, it can be found from the tribunal's opinion that the Contract Law prevails in the application. It is the same in the CIETAC award on 20 October 2008 (plastic bags, Chinese seller v. American buyer).

22 The CIETAC award on 18 December 2009 (CNC machine tools, South Korea seller v. Chinese buyer).



the General Principles of the Civil Law which were on the applicable laws of foreign-related contracts, as Chinese laws had the closest connection with the case considering the fact that the seller under the obligation of characteristic performance was Chinese party (the Respondent) and the subject matter involved in the dispute was stored in the warehouse of Dalian Port.<sup>23</sup> It also said whereas both China and the United States were contracting states of the Convention, if the CISG had any different provision, the CISG would be applied except those China had declared reservation. It is applying the CISG only when it has different provisions from Chinese domestic law.

④ For a case where the Convention should have been applied autonomously, the tribunal deemed that Chinese laws and regulations should apply with reference to the Convention and other international treaties and practices since the buyer had agreed in the repayment agreement to ‘accept jurisdiction of the judicial authorities at the place of the seller when fails to execute this agreement’.<sup>24</sup>

Besides the above types, some awards have a few low-level errors which should not have occurred. For example, some tribunals applied the Convention, mistaking non-contracting nations such as India<sup>25</sup> and the Philippines<sup>26</sup> for

23 The CIETAC award on 26 October 2011 (frozen salmon fillet, American buyer v. Chinese seller).

24 The CIETAC award on 11 August 2011 (aluminum profile, Chinese seller v. Australian buyer). The buyer’s agreement should have been taken as agreement on courts’ jurisdiction. If so, it would be under doubt whether the disputes should have been submitted to arbitration or litigation. No choice of proper law is contained therein. The Convention should have applied autonomously since the parties’ places of business are in contracting states of the Convention and they had never agreed on the applicable law. For matters not stipulated in the Convention, relevant applicable laws should have been determined according to private international law rules.

25 The CIETAC award on 25 December 2008 (iron ore, Chinese buyer v. Indian seller).

26 The CIETAC award on 11 September 2009 (copper ore, Chinese buyer v. Filipinos seller).

contracting ones. Some awarded according to the domestic laws applicable under private international law rules in cases where the Convention should have applied autonomously, ignoring Article 1.3 of the Convention and adopting the parties' nationalities as the standard.<sup>27</sup> Some Chinese scholars had pointed out that the parties' places of business should not be determined according to their nationalities.<sup>28</sup> Another example involves Article 2 of the Convention which states that 'This Convention does not apply to sales: ... (e) of ships, vessels, hovercraft or aircraft'. In the case, the Chinese buyer had purchased the air-cushion transportation system (called 'hovercraft' by the seller's agent) from the American seller and requested to return the goods due to quality problems, the tribunal deemed that 'Considering this dispute involves international sale of goods and the parties reached no agreement on the applicable laws in the contract, Chinese laws shall apply to this case under the closest connection doctrine since the place of performance, the place where the subject matter is, the place of arbitration and other constituent elements of the legal relationship are all in China. For matters not covered thereby, relevant provisions of the Convention shall apply, since the seller's nationality is American and the buyer's is Chinese while both China and U.S. are contracting states of the Convention'<sup>29</sup>. Such opinion seems to be disputable.<sup>30</sup>

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27 The CIETAC award on 5 August 2011 [baked molybdenum concentrate, British Virgin Island Seller (it is found in the award that the seller's place of business is in China) v. German buyer].

28 Zhao Yong, 'The Application Scope and Features of the CISG', *Foreign Affairs Review (China Foreign Affairs University Journal)*, 1986), Vol. 2.

29 The CIETAC award on 31 March 2010 (air-cushion transportation system, Chinese buyer v. American seller).

30 The Convention shall not have applied as per Article 2 (3) thereof if the subject matter were hovercraft and the applicable law shall have been determined under private international law rules. If so, the tribunal

The above examples of mistaking autonomous application for non-autonomous one may originate from the arbitrators' wrong perception. Thus, it is necessary to clarify some basic concepts which may involve the relationship between international treaties and domestic laws,<sup>31</sup> the divergence of 'dualism' and 'monism', the argument of transformation or incorporation, the distinction between self-executing treaties and non-self-executing treaties, etc. Those are basic theoretical and practical issues in international law, although no final conclusion has yet been reached on most of the issues. Considering the above and the purpose of this Chapter, this Chapter only covers possible minimum topics thereon only when it is necessary to analyse the effectiveness, implementation and application of the Convention.

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would have lacked sufficient ground to supplement Chinese laws with the Convention. If this case 'involves international sale of goods disputes' as found by the tribunal, the Conventional should have applied autonomously since the parties had not agreed on the applicable law and their places of business were in different contracting states but not supplemented Chinese laws which was determined as the applicable law under private international law rules as stated in the tribunal's opinion.

31 This is a fundamental but long-lasting topic in international jurisprudence. Relevant reference is as follows. Li Zhaojie, 'Discussion on Treaties' Effect on Chinese Laws and Relevant Issues', Chinese Journal of International Law (1993). Wang Tieya, 'Status of Treaties in Chinese Legal System', Chinese Journal of International Law (1994). Chen Hanfeng, Zhou Weiguo & Jiang Hao, 'Relationship between International Treaties and Domestic Laws and Practice in China', Forum on Political Science and Law (China University of Political Science and Law Journal, 2000), Vol. 2. Wang Xiqi, 'Comparison of Implementation of International Treaties across Taiwan Strait', China Review on International Laws and Transnational Laws (Taiwan), Vol. 5, Iss. 2. Wan Exiang (chief editor), 'Research on the Relationship between International Laws and Domestic Laws-from the Perspective of Domestic Application of International Laws', Beijing University Publishing House (2011). D. Shelton ed., International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion, Oxford University Press (2011). It should be noted that the last English publication is the compilation of thesis devoted to the conference on international law in domestic system of the international congress of the International Society of Comparative Law, collecting reports from various countries, which shows that such issue is still a realistic one all the legal systems are facing.

The CISG, as an international treaty, has nations as the signing parties,<sup>32</sup> which are called ‘the contracting states’. As an agreement among contracting states, the Convention of course has binding force on the contracting states, and the contracting states have an obligation to implement the Convention. To this point, the Convention is still a thing outside the domestic legal systems, though the contracting states are under the obligation of implementing it. As for China, neither the Chinese Constitution Law nor the Legislation Law has a provision on how a treaty like the Convention becomes a part of Chinese domestic system. Before the transformation is realized, Chinese parties are under no obligation of complying with the Convention.

After the Chinese government joined the Convention upon ‘ratification’, China did not enact a special law to transform the content of the Convention into domestic legal system. So it should not be treated as the ‘transformation’ of the Convention into the domestic legal system. The official level reactions of China on the Convention are mainly shown in two documents: the Certain Issues in Connection with the Implementation of United Nations Convention on Contracts for the International Sale of Goods issued by the former MOFTEC to its affiliates and foreign trade companies, and the SPC’s Circular thereof to Chinese courts. The above documents both request Chinese institutions and companies to ‘implement’ the Convention. It should be noted that the subject of such

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<sup>32</sup> It is provided in Article 26 of the Vienna Convention on the Law of Treaties that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’<sup>32</sup>China deposited the instrument of ratification on 3 September 1997 and the Convention took effect in China on 3 October 1997. China made reservation on Article 66 of the Convention and declared the execution by Taiwan on 27 April 1970 illegal and invalid.

implementation is not the Chinese government though it is mentioned therein that Chinese government 'should assume the commitments on the implementation of the Convention'. It can be said that the above document and notification actually played the role of transforming the treaty into integral part of the domestic legal system through such way, i.e. transformation via notification from a ministry under the State Council and the SPC instead of legislative authorities, which does not seem perfect. Functionally, such transformation is more like 'incorporation'. The Convention has been part of domestic laws once it was incorporated into Chinese legal system while courts and arbitral institutions can directly apply the Convention when relevant conditions are met. Therefore, the Convention is a kind of self-executing treaty in China. After the incorporation of the Convention into Chinese legal system, the content thereof has the nature of both behaviour norm and adjudication norm, which is in line with the purpose of the MOFTEC and the SPC issuing the above notification. Such being the case, the Convention shall naturally bind parties whose places of business are in China while courts and arbitral institutions shall apply the Convention when relevant conditions are met.

A treaty, once 'incorporated' into Chinese legal system, turns into part of the system. It is stipulated in Article 142.2 of the General Principles of the Civil Law that 'If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.' The provision is analysed as follows. First, as a premise, it clearly

affirms the ‘source of law’ status of international treaties concluded or acceded to by China. Secondly, as its main purpose of norm, it provides the hierarchical structure of effectiveness of different sources of laws, i.e., international treaties takes precedence to general domestic civil laws. It should not be understood that international treaties only apply when ‘differing from those in the civil laws’. The provision may leave the wrong impression that the burden of proof is on those alleging the application of treaties. It seems that whoever alleging the application of treaties shall prove the existence of provisions ‘differing from those in the civil laws’. Such burden of proof is absurd and unique. Thus, it is necessary to make clear the purpose of norm of this stipulation to avoid misunderstanding and misuse. It should be conceptually clarified that the Convention is both ‘a uniform law’ and integral part of domestic legal systems of contracting states. Domestic courts and arbitral institutions, when applying the Convention, are not applying a legal source different from and outside the domestic legal sources, but an integral part of the domestic legal sources. Not only should there be any ‘discrimination’, priority should be given to the Convention since the General Principles of the Civil Law clearly provides the treaty a status of source of law and a higher level of effectiveness.

Furthermore, the essence of the ‘autonomous application’ in Article 1.1(a) of the Convention needs to be understood. For example, it seems natural for Chinese courts or arbitral tribunals to determine the applicable law of a case according to private international law rules, when it involves an international sale of goods contract between a buyer whose place of business in China and a seller whose

place of business is in U.S., since it is a foreign-related case. However, the true meaning of Article 1.1(a) is the Convention shall autonomously apply since the Convention, as integral part of Chinese legal system as well as American legal system, is a common law of both parties. There is no need to consider private international law. This is the so-called ‘one go’ instead of ‘two steps’. From the perspective of China, private international law rules are components of Chinese civil laws as per Article 145.2 of the General Principles of the Civil Law, Article 126.1 of the Contract Law and Article 41 of the Law on Choice of Law for Foreign-related Civil Relationships. Observing from within the Chinese legal system, when such conflict of law rules are in conflict with Article 1.1(a) of the Convention, the Convention provision shall prevail as per Article 142.2 of the General Principles of the Civil Law. The conclusion is still that adjudicators cannot resort to private international law rules directly.

### **3) The Implied Choice of Chinese Laws with the Convention as Supplement**

For a case arising out of the sales contract with the parties’ places of business in different contracting states and the parties had not agreed on the applicable laws, the tribunal deemed that it was appropriate to apply relevant Chinese laws based on the ground that the respondent had made no objection to the claimant’s allegation that relevant Chinese laws and the Convention should apply but emphasized the application of relevant Chinese laws in its defense and statements. Meanwhile, the tribunal supported the claimant’s request of applying the Convention in the case since the parties’ domiciles were in Uruguay and China which were contracting states of the Convention. The tribunal deemed that the

application of the Convention was in line with the two nations' commitments to the Convention when there was no stipulation in Chinese laws.<sup>33</sup>

Analysis of the law application involved in the above case is as follows. First, the tribunal tried to find a common ground in the parties' statements and found it to be the relevant Chinese laws. Thus the tribunal deemed the parties had agreed on the application of relevant Chinese laws impliedly. There is nothing wrong. The question is whether the abstract choice of relevant Chinese laws equals to the exclusion of the Convention. As mentioned above, the Convention has constituted part of the contracting states' legal systems. It is recognized in international academia that an abstract choice of a contracting state's laws does not result in the exclusion of the Convention. Further discussion will be made in the following section. Secondly, if it does not result in the exclusion, what is the relationship between the Convention and Chinese laws in the regard of law application? There would be no doubt if the parties had expressly agreed on the application of Chinese laws with the Convention as supplement. If the parties had made no such agreement like the situation in the above case, what is the solution? Possible solutions are as follows. ① Taking the parties' agreement as equivalent to the choice of Chinese laws, the tribunal could have applied Chinese laws with the Convention as supplement based on the priority of agreement. ② Treating it as an issue within Chinese legal system, the tribunal could have applied the Convention with Chinese laws as supplement as per Article 142.2 of the General Principles of the Civil Law. The former is similar to the actual position of the tribunal while the

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<sup>33</sup> The CIETAC award on 27 December 2011 (plastic woven cloth volumes, Uruguay buyer v. Chinese seller).



latter is the proper result according to the consensus of the international academia.

Though it is not reflected in the tribunal's invocation of Chinese laws, i.e., Articles 68 and 113 of the Contract Law as to how the Convention supplemented Chinese laws, this touches upon an interesting topic. Indeed, the Contract Law of China, though promulgated later than the Convention, is not as detailed and specific as the Convention. For example, the Contract Law contains no specific stipulation on the calculation of damages for breach of contract.

## 2. Non-autonomous Application

### 1) Parties' Express Agreement

According to statistics, there were 28 cases in which the parties had expressly agreed on the application of the Convention in the eight years, accounting for 35 percent of the total number of cases to which the Convention applied, i.e. 81. Among the 28 cases, there are situations where one of parties' place of business are not in a contracting state<sup>34</sup> and there are situations where both parties' places of business are in contracting states<sup>35</sup>. There are cases where the parties expressly agreed on the application of the Convention in the sales contract and cases where

34 Such as the CIETAC award on 11 January 2008 (multifunctional filter, Chinese buyer v. Indian seller), the CIETAC award on 28 November 2008 (mechanical equipment, Chinese buyer v. British seller), the CIETAC award on 18 August 2009 (medicine, Chinese seller v. Mali buyer), the CIETAC award-1 on 26 April 2010 (lateritic nickel ore, Filipino seller v. Chinese buyer) and the CIETAC award -1 on 26 April 2010 (lateritic nickel ore, Filipino seller v. Chinese buyer).

35 Such as the CIETAC award on 2 February 2010 (solar grade polysilicon, Singapore buyer v. Chinese seller), the CIETAC award on 17 September 2010 (alfafa processing production line equipment, Chinese buyer v. Spanish seller), the CIETAC award on 7 April 2011 (fiber cement board production line, Chinese buyer v. German seller), the CIETAC award on 22 July 2011 (cold rolled steel coil, South Korea buyer v. Chinese seller) and the CIETAC award on 15 July 2011 (sodium sulfide, Russian buyer v. Chinese seller).

the parties reached the agreement to apply the Convention afterwards during the oral hearing.<sup>36</sup> Such application is non-autonomous since it is achieved by the parties' consent.

#### ① The Degree the Parties' Agreement is Respected

Both the Convention and Chinese laws (Article 3 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships) recognize party autonomy and respect the parties' choice of applicable laws. Where the parties explicitly choose the Convention as the applicable law, the tribunal will generally respect the parties' choice and apply the Convention.<sup>37</sup> In the case involving a mainland Chinese buyer and a Hong Kong seller, though the parties had agreed explicitly on the application of the Convention in the contract, the tribunal deemed the expressed intention valid since it was not against any mandatory legal provisions or public order and good social customs. Under such circumstances, the relevant provisions of the Convention could be regarded as supplements to the contract terms, binding both parties.<sup>38</sup>

36 Such as the CIETAC award on 9 April 2008 (biochemical analyzer, Chinese buyer v. Hong Kong seller) and the CIETAC award on 9 November (tea machinery, Japanese seller v. Chinese buyer).

37 Taking the case of one company with the place of business in China and another company with the place of business in India agree on the application of the Convention as an example, some scholars are in support of such application such as Zhao Chengbi, 'Uniform Law on International Trade', Law Press (1998), p.350 while those against it advocate the determination of the applicable law according to the closest connection doctrine since China's reservation to Article 1.1(b) when ratifying the Convention shows its basic attitude that the Convention shall not apply to contracts signed by and between Chinese companies and parties from non-contracting states. Such reservation is mandatory in law, thus party autonomy shall be limited. The Convention cannot apply as per the parties' agreement. Chen Zhidong, Wu Jiahua, 'Discussion on the Application of the CISG in China', Journal of Law, Iss. 10 (2004).

38 The CIETAC award on 30 November 2009 (laterite nickel ore, mainland China buyer v. Hong Kong seller).

However, there are exceptions. For example, in another case involving a mainland China buyer and a Hong Kong seller, the tribunal, though noticing both parties had alleged the applicability of the Convention to the contract in the case and finding such expressed intention valid since it was not against current statutory provisions in Chinese laws or public order and good social customs, insisted on the application of the laws of mainland China under the closest connection doctrine. Under such precondition, however, the tribunal deemed the Convention not be excluded from applying to certain aspects of the contract involved.<sup>39</sup> In another case involving a Hong Kong company and a mainland China company, the tribunal deemed that the applicable law should be the one with the closest connection to the contract, i.e. the laws of mainland China. Meanwhile, the tribunal, noticing both parties' multiple invocation of the Convention in their statements, found the Convention be taken as reference when there was no relevant stipulation in the laws of mainland China.<sup>40</sup> Such application of law is more or less weird, as the party autonomy principle should precede the closest connection doctrine when it is found that the parties have agreed on the applicable law.<sup>41</sup> It is difficult to understand why the tribunal insisted on determining the applicable law according to the closest connection doctrine in the circumstance that the parties had chosen the Convention expressly or impliedly.

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39 The CIETAC award on 21 September 2009 (sulfur, mainland China buyer v. Hong Kong seller).

40 The CIETAC award on 31 August 2009 (flake sulfide, Hong Kong buyer v. Mainland China seller).

41 According to Article 4.2 of the Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters [Fa Shi (2007) No.14] which is expired but was effective at the time of hearing, 'if the parties have not agreed on the applicable law of a contract dispute but invoked the law of the same country or region while raising any objection to the law application, they shall be deemed as having chosen the applicable law to the contract dispute'.

② Is the Convention Excluded by agreeing to ‘apply Chinese Laws’?

Does the parties’ express agreement on the application of Chinese laws mean the exclusion of the Convention by agreement (Article 6)? Obviously we cannot give a direct answer, but need to distinguish different circumstances and present the positions shown in the CIETAC awards.

First, the Convention shall not apply when the parties have expressly agreed on the application of ‘Chinese laws’ in the contract without mentioning the Convention either concurrently or alternatively.<sup>42</sup> It is another issue whether Chinese laws can be supplemented by the Convention. In the case the parties had agreed on the application of both Chinese laws and the Convention without specifying which one preceded, the tribunal deemed that ‘the Convention shall prevail when it is in conflict with Chinese laws’.<sup>43</sup>

Secondly, it is common for the CIETAC tribunals to treat ‘Chinese laws’ and the Convention as two separate things and exclude the Convention from the concept of ‘Chinese laws’ when the parties have not made it clear whether the Convention is included in the ‘Chinese laws’ chosen by them.<sup>44</sup> Under such

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42 The CIETAC award on 24 January 2008 (Toluene, Hong Kong seller v. Mainland China buyer). It is stipulated in the contract of the case that Chinese laws shall apply when the place of contract or the location of the goods when disputes arise is in mainland China or the Chinese company is the respondent while the Convention shall apply in other circumstances.

43 The CIETAC award on 17 September 2010 (alfalfa processing production line equipment, Chinese buyer v. Spanish seller)

44 It is inconsistent in the CIETAC awards whether dualism or monism should be adopted in the relationship between the Convention and Chinese laws. The analysis of relevant changes may be found in Han Jian, ‘The Application of the CISG in International Commercial Arbitration in China’, Wuhan University International Law Review, Iss. 2 (2008).

circumstance, ‘Chinese law’, as understood by the tribunals, mainly refers to the Contract Law and other domestic laws and regulations of China. Does that mean the complete exclusion of the application of the Convention? The application of ‘Chinese laws’ (the Contract Law) naturally excludes the Convention over matter stipulated in both of them, such as whether there constitutes the fundamental breach of contract. Further distinction should be made to answer the question whether the Convention may supplement over matters not stipulated in ‘Chinese laws’ (the Contract Law), such as the calculation of damages for breach of contract. Normally, the tribunals would like to supplement ‘Chinese laws’ with the Convention when the parties’ places of business are in different contracting states.<sup>45</sup> In such cases, the Convention would autonomously apply when the parties have not agreed on the applicable law. There is room for interpretation whether the Convention is excluded by the parties’ agreement on Chinese laws as the applicable law. The tribunals sustained the supplementary role of the Convention on the ground that the parties had not expressly excluded the application of the Convention. However, the tribunals did not accept the Convention as supplement to Chinese Laws in the circumstance that one party’s place of business was not in contracting state.<sup>46</sup>

<sup>45</sup> The CIETAC award on 9 September 2008 (mechanical equipment, Chinese buyer v. Israeli seller). The CIETAC award on 4 June 2009 (Neodecanoyl chloride, Chinese buyer v. Japanese seller). Another similar one is the CIETAC award on 15 May 2009 (Ferrosilicon, Swiss buyer v. Chinese seller). But the tribunal made a further step in the hearing of the case, letting the parties reach agreement on the application of mainland China laws, thus excluding the application of the Convention. The CIETAC award on 20 July 2010 (mechanical equipment, Chinese buyer v. South Korean seller).

<sup>46</sup> The CIETAC award on 16 July 2010 (iron ore, Chinese buyer v. Indian seller). The tribunal refused the application of the Convention though the agent of the party whose place of business was not in a contracting state invoked the Convention in arbitration, but applied Chinese laws instead. Another one is the CIETAC award on 13 April 2011 (hot-rolled strip, Hong Kong seller v. South Korea buyer). It is under

However, it may be inferred from some awards that the tribunals held the ‘monism’ position. For example, the tribunal, in the CIETAC award on 22 January 2010 (Copper pipe, American buyer v. Chinese seller), deemed that the Convention should prevail when it contained different provisions from Chinese laws since the parties’ places of business were in different contracting states as per Article 142 of the General Principles of the Civil Law based on the parties’ agreement in the Sales Contract that ‘the validity, interpretation, performance and execution of this agreement shall be governed by the P.R.C. laws’.<sup>47</sup> Another example is the CIETAC award on 27 September 2011 (hollow shape steel, Irish buyer v. Chinese seller) in which the tribunal deemed that the Convention should prevail when it was different from Chinese laws as pre Article 142 of the General Principles of the Civil Law after the parties had agreed on Chinese laws as the applicable law during the hearing.<sup>48</sup>

Different opinions are found in case laws and academic research of other nations regarding whether general reference of a contracting nation’s laws include the Convention. However, the prevailing view is such general reference should be regarded as including the Convention unless the parties explicitly refer to a debate whether the Convention autonomously apply to Kong Kong which is part of China. The tribunal was against such autonomous application and strictly limited the applicable law to mainland China laws.

47 The CIETAC award on 22 January 2010 (Copper pipe, American buyer v. Chinese seller). If the case is not interpreted as ‘monism’, ‘The law governing foreign-related contracts in civil and commercial matters shall refer to the substantive law in a relevant country or region, excluding the conflict law and procedural law’ as per Article 1 of the Rules of the Supreme People’s Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters [Fa Shi (2007) No.14] which was effective at the time of hearing. If Article 142 of the General Principles of the Civil Law were regarded as ‘the conflict law and procedural law’, the legitimacy of the tribunal’s application thereof would be under doubt.

48 The CIETAC award on 27 September 2011 (hollow shape steel, Irish buyer v. Chinese seller).

nation's domestic trading laws.<sup>49</sup> Some scholars have named the circumstance where the parties' choice of a contracting state's national law results in the application of the Convention as 'indirect choice'.<sup>50</sup> The same position is found in the CISG Advisory Council Opinions<sup>51</sup> and is widely supported by international commercial arbitration practice.<sup>52</sup> Under such trend, the dualism that treats 'Chinese laws' and the Convention as separate things in Chinese practice should be changed. Though the Convention is not 'natural birth' of Chinese legislative authorities, it should be treated as 'natural birth' after the ratification and 'incorporation' into Chinese legal system and should be treated with priority over general domestic civil laws.

Furthermore, there is the circumstance where the parties specifically agree on the application of the law of a contracting state such as Chinese laws, despite the autonomous application of the Convention. Some scholars have pointed out it would be meaningless for the parties to expressly choose the applicable law if it

49 P. Schlechtriem and P. Butler, UN Law on International Sales, p.15.

50 See A. Janssen and M. Spiker, *The Application of the CISG in the World of International Commercial Arbitration*, *RabelsZ* 77, 131-157, 135 (2013).

51 The CISG Advisory Council is not an official organization. Its members are experts and scholars specialized in the CISG research from different nations. It has continuously issued the Opinions to solve difficult problems in the practice of adjudicating with the CISG, committed to promoting the unified application and interpretation of the Convention internationally, and kept close cooperative relationship with UNCITRAL. The Opinions are getting more and more international influence. For example, the German Federal Court quoted the No. 13 Opinion of the Advisory Council in its judgment on 28 May 2014. The Hague International Court invoked the same opinion in its latest judgment. Related information may be found on the official website <http://www.cisg-ac.org/>. According to Article 4(b)(i) of the latest Advisory Council Opinion, i.e. 'Exclusion of the CISG', released in South Africa with Dr. L. Spagnolo from the Law School of Monash University in Australia as the reporter, the extent to exclude, diminish or change the CISG could not be inferred merely from the choice of the law of a contracting state.

52 Such as the ICC case No. 6653 awarded on 26 March 1993 (steel), involving the sales agreement between a German steel company and a Syrian buyer. See <http://cisgw3.law.pace.edu/cases/936653il.html>.

is not to exclude the Convention. Such view seems to be reasonable. However, as responded by Professor Schlechtriem, the parties usually have reasons to choose the law in the contract. For example, the Convention only provides for special matters of sales contracts without covering other matters such as set-off, credit assignment and contract validity, thus the choice of law clause in sales contracts is always worth recommending. Even under circumstances where the Convention is applicable as per Article 1.1 (a), it is important for the parties to choose the applicable law since the applicable law is to be determined under private international law rules for matters not covered by the Convention.<sup>53</sup> The above response is noteworthy. Obviously, Professor Schlechtriem's position is to wish that the Convention can be applied more in international sales of goods. Even if the parties have agreed on the applicable law, such agreement shall be interpreted as having the only role of supplementing the Convention as long as there is room for such interpretation,

### ③ Alteration to the Agreed Choice of law

It is found in a CIETAC award that the parties, having expressly chosen the Convention and the UNIDROIT Principles of International Commercial Contracts,<sup>54</sup> agreed in the hearing to change the applicable law to the Contract Law of China and relevant Chinese laws. Thus, the tribunal deemed the applicable law be the Contract Law and relevant Chinese laws. Such alteration is rare and the reasons behind it cannot be found in the award. One possible reason is the tribunal

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<sup>53</sup> P.Slechtriem and P.Butler, UN Law on International Sales, p.16.

<sup>54</sup> The CIETAC award on 10 September 2009 (mold, Hong Kong buyer v. Mainland China seller).



and agents are not familiar with the laws chosen by the parties, thus prefer Chinese laws which they know better.

## **2) Parties' Implied Choice of the Convention**

It refers to the circumstance where the parties have never agreed on the application of the Convention in writing or orally, but the willingness to such application is reflected in their respective acts. The most typical way is to show such intention through the statements by the parties' lawyers. For example, the lawyers invoke provisions of the Convention to support their views. In such circumstance, some tribunals are willing to apply the Convention when handling cases.<sup>55</sup>

A contrary example is when the parties had not agreed on the applicable law, the tribunal, under the precondition set in Article 1.1(a) of the Convention, deemed it appropriate to apply Chinese laws since both parties had invoked the Contract Law in their submission and made no objection to the application of Chinese laws, and further found the Convention applicable since there was no exclusion of the Convention in the contract.<sup>56</sup>

## **3. Application of Domestic Laws under Private International Law Rules**

Among the 81 awards, domestic laws were applied to 6 of them according to

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<sup>55</sup> The CIETAC award on 3 December 2010 (Polyvinyl chloride resin, Afghanistan buyer v. Chinese seller).

<sup>56</sup> The CIETAC award on 25 February 2008 (beef slaughtering production line, Chinese buyer v. Netherlands seller).

private international law rules.<sup>57</sup> In most of these cases, one party's place of business is in a contracting state while the other party's place of business is in a non-contracting state, which leads to the reflection whether China should withdraw its reservation to Article 1.1(b) of the Convention.

The Chinese government made reservation to Article 1.1(b) of the Convention. It is not easy to find the reasons for such reservation. However, more and more scholars are calling for the Chinese government to withdraw this reservation<sup>58</sup> like its withdrawal of the reservation to Article 11 of the Convention (flexible requirement on contract form). Due to the reservation, there were tribunals determining relevant domestic laws as the applicable laws under private international law rules if the parties had not agreed on the applicable law in the circumstance that one party's place of business was in China while the other party's place of business was in a non-contracting state.<sup>59</sup>

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57 The CIETAC award on 25 December 2008 (iron ore, Chinese buyer v. Indian seller, Chinese laws and the Convention were applied wrongly). The CIETAC award on 11 September 2009 (copper ore, Chinese buyer v. Filipino seller, the Convention was applied wrongly). The CIETAC award on 7 December 2009 (chrome ore, Chinese buyer v. Pakistan seller, Chinese laws were applied). The CIETAC award on 19 February 2010 (chrome ore, Chinese buyer v. Turkish seller, Chinese laws were applied). The CIETAC award on 31 March 2010 (air-cushion transportation system, Chinese buyer v. American seller, Chinese laws and the Convention were applied).

58 Chen Zhidong, Wu Jiahua, 'Discussion on the Application of the CISG in China, *Journal of Law*, Iss.10 (2004). Yang Fan, 'China's Reservation to the CISG and the Convention's Application in the CIETAC Arbitration, *Wuhan University International Law Review*, Iss. 2 (2008). Li Wei, 'Discussion on China's Withdrawal of the Reservation to Article 1.1 (b) of the CISG', *Jurists*, Iss.5 (2012).

59 Such as the CIETAC case on 7 December 2009 (chrome ore, Chinese buyer v. Pakistan seller, default) and the CIETAC award on 19 February 2010 (chrome ore, Chinese buyer v. Turkish seller, default). Turkey acceded to the convention on 7 July 2010 and the Convention has been effective to Turkey as from 1 August 2011. The CIETAC award on 20 July 2011 (Sodium tripolyphosphate, Turkish buyer v. Chinese seller). Of courses, there were cases in which the tribunals autonomously applied the Convention by mistake while the applicable law should have been determined under private international law rules, such as the CIETAC

Looking up the legislative history of Article 1.1(b) of the Convention, Mr. Kopac, the representative from Czechoslovakia, pointed out during the First Committee Deliberations, that there were special legal rules governing international trade contracts in his country ( and some other countries as well), so it would create difficulties in the application of subparagraph (b), comparing with other countries where internal and international contracts were governed by the same rules. His position was supported by Mr. Wagner, the representative from the Democratic Republic of Germany.<sup>60</sup> The Chinese delegation did not make any specific comment thereon. At the beginning of the fifth Meeting, Mr. Li Chih-min, the representative from China mentioned that the Chinese delegation found that the five articles deliberated were basically acceptable, but the Chinese delegation would certainly suggest or support some amendments.<sup>61</sup> From the above, we find no specific opinion or reason regarding Article 1.1(b) of the Convention.

On 11 December 1986, U.S.A and China approved or ratified the Convention, making the Convention enter into force on 1 January 1988. It is well-known that the Chinese government and the American government agreed on acceding to the Convention and bringing it into force together. Since both countries made reservation to Article 1.1(b) as per Article 95 of the Convention when acceding to

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award on 4 November 2011 (Isononyl alcohol, Turkish buyer v. Chinese seller). The Convention was not effective on Turkey when the contract was signed, thus the Convention should not apply autonomously as per Article 100.2 thereof.

60 See the Minutes of the First Committee Meeting (in the afternoon of 10 March 1980. See J. O. Honnold, *Documentary History of the Uniform Law for International Sale: The studies, deliberations and decisions that led to the 1980 United Nations Convention with introductions and explanations*, Deventer: Kluwer Law and Taxation Publishers, 1989, pp. 458-459.

61 The fifth meeting (3pm 13 March 1980). *Ibid.*, p.475.

it, people may reasonably speculate the above reservation be part of the agreement between the two governments.<sup>62</sup>

The key point mentioned by the Czechoslovakia representative above constitutes the substantial reason for the Convention to permit contracting states to make reservation to Article 1.1(b). The reservation may ensure special domestic laws governing international trade contracts to be applied in such circumstance. Specific to China, it is to ensure the application of China's Law on Economic Contracts Involving Foreign Elements to trade contracts by and between Chinese legal persons whose places of business are in China and foreign legal persons whose places of business are in non-contracting states.<sup>63</sup> This special law was abolished on 1 October 1999 and the circumstances have changed. There is no need to ensure the application of the Law on Economic Contracts Involving Foreign Elements which was replaced by the Contract Law. Comparing with the Convention, the Contract Law can be described as a general law while the Convention is the special law. Naturally, for international sales of goods contracts involving foreign elements, the Convention shall apply and there is no special need for the application of the Contract Law. Surely, the Contract Law, as the 'uniform law' unifying three preceding contract laws, exercise its governing role over both domestic and foreign-related contracts. It still applies to foreign-related contracts other than those governed by specific conventions such as the

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62 This was pointed by Professor P. Winship, an American scholar, the international seminar for the 35th anniversary of the Convention (35 Years CISG and Beyond) on 29-30 January 2015 in Swiss for the purpose of this Report. His view was supported by Professor A. Garro from Columbia Law School, U.S. It is hereby noted with appreciation to them.

63 The law was promulgated on 21 March 1985 and came into force on 1 July 1985.

CISG in the circumstance that Chinese law is the applicable law. At this point, the substantial reason for China's reservation to Article 1.1 (b) of the Convention has disappeared.

In addition, China has been integrated into global community since the beginning of reform and opening-up thirty years ago. China acceded to the WTO and the foreign trade administration system has undergone great changes. These changes have served to inspire reflection on China's last reservation to the Convention. The reservation has both advantages and disadvantages. With the changing situation, the advantages have dissipated while the disadvantages remain or even become more. It is time for China to withdraw its reservation to Article 1.1 (b) of the Convention.

#### **4. HMT(Hong Kong, Macao and Taiwan) and the CISG**

After the return of Hong Kong and Macao to China, the Chinese government has not made any declaration or submitted any relevant document concerning the Convention's legal status in the two regions. It has been pointed out by some scholars that according to Article 93 of the Convention, if a contracting state has two or more territorial units with different legal systems governing matters stipulated by the Convention while the contracting state makes no declaration as per Article 93.1, the Convention shall apply to all the territory of the state. It is thus concluded that the Convention shall apply in Hong Kong and Macao regions.<sup>64</sup>

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<sup>64</sup> Han Jian, 'The Application of the CISG in International Commercial Arbitration in China', Wuhan University International Law Review, Iss. 2(2008).

It has also been pointed out that Hong Kong, Taiwan and Macao, as important trade partners of mainland China, are not members of the Convention, thus the Convention shall not apply to transactions between mainland China parties and parties from the three regions even if Chinese laws apply under private international law rules since such transactions were not sales of goods ‘between parties whose places of business are in different States’. However, disputes arising out of such transactions are regarded as foreign-related contract disputes under Chinese laws. Chinese courts shall determine the applicable law with reference to Chinese private international law rules while trying the cases. If the parties choose the Convention as the applicable law under the party autonomy principle, such choice shall be deemed as legal and valid as well.<sup>65</sup>

Concerning the above circumstance, the key element that ‘contracts of sales of goods between parties whose places of business are in different States’ still lacks even if China withdraws its reservation to Article 1.1 (b) of the Convention. Other practical approaches need to be considered. First, the provisions in the Convention are more neutral and can meet the demand in the inter-regional transactions better. Thus, it is obvious in policy choice that the Convention has priority over other proper laws determined under conflict law rules. Secondly, these cases are defined as ‘foreign-related’ cases in China’s judicial practice. Thus, it is only of formal meaning to distinguish regions from nations. Substantial consideration shall prevail. Therefore, as a possible solution of the problem, it is suggested to confirm the ‘quasi-application’ of the Convention in such circumstance by the Supreme

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<sup>65</sup> Li Wei, ‘Discussion on China’s Withdrawal of the Reservation to Article 1.1 (b) of the CISG’, *Jurists*, Iss.5 (2012).

People's Court's judicial interpretation.

### **III. Further Analysis and Comments**

#### **1. Improvement on Invocation of Legal Provisions and Reasoning in Arbitral Awards**

It is found through analysis of the CISG-related CIETAC awards from 2008 to 2015 that the average number of words in an award is 12,000, equivalent to that of a legal thesis. Therefore, it can be said that the CIETAC awards follows long style. There are surely reasons for such result. One reason is the CIETAC caseload is not too heavy for the arbitrators, which means the arbitrators have enough time to hear cases and draft awards. At the same time, the CIETAC encourages well-reasoned awards. Thus, the arbitrators, when having sufficient time, are naturally willing to make awards with more reasoning.

Fact finding and law application are basic tasks for adjudicators. Only clear fact finding and proper law application can convince parties. The adjudicators' main task in making judgments is to express the reasons clearly. They need to explain how they examine evidence and find facts. The author of this chapter only read the final awards without checking the relevant case documents, thus makes no comment on relevant fact finding, but focuses on law application.

Discussing the invocation of legal provisions in awards, we may make a comparison with Chinese courts' invocation in their judgments. The SPC has released the Circular on Intensifying the Formulation of Civil Ruling

Documents,<sup>66</sup> the Provisions on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments<sup>67</sup> and the Provisions on the Issuance of Judgments on the Internet by the People's Courts.<sup>68</sup> Now, the 'Chinese Judgments Online' website of the SPC offers access to a large number of online verdicts in which normative invocation of legal provisions can be found.

The invocation of specific legal provisions are found in 69 percent of the 81 CIETAC awards of which 35 percent involves invocation of the Convention and 51 percent involves invocation of Chinese laws. The directly related issue is the tribunals, when invoking no specific legal provisions, had limitations in the reasoning of their opinions. 'The tribunal's opinion', in which the tribunals show their understanding of relevant legal provisions and explain their logics of finding, is the most valuable part for other adjudicators and scholars. Careless and oversimplified reasoning is still very common. It is generally believed that the quality of arbitral awards is higher than that of court judgments, which is also a common sense shared by arbitration professionals. However, Chinese arbitrators appear to enjoy more 'freedom' than judges as long as the invocation of the Convention is concerned. There is still room for improvement for the invocation of the Convention in CIETAC awards.

To understand the reason for such phenomenon, analysis of the composition of the CIETAC arbitrators must be made. Among the CIETAC arbitrators, there are

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66 27 June 2006, Fa Shi [2006] No. 145.

67 26 October 2009, Fa Shi [2009] No.14.

68 21 November 2013, Fa Shi [2013] No.26.



retired judges, retired legislators, senior lawyers and other practitioners and law professors. They have rich practical experience, which is a big advantage through life-long accumulation. The well-known saying ‘The life of the law has not been logic: it has been experience’<sup>69</sup> by Holmes on the first page of his publication ‘the Common Law’ may easily leave people with the impression that only experience is important while logic does not matter. However, we deeply feel through reading the CIETAC awards that experience alone is not sufficient. It is only reliable on the ground of solid logic. The CIETAC, for improvement, may consider appointing arbitrators with complementary advantages when forming tribunals.

Taking judgments by judicial institutions of other contracting states as reference does not mean the other states’ case laws have binding force. Rather, foreign case laws are of persuasive value only. Essentially, this is the requirement under Article 7.1 of the Convention as well which stipulates ‘regard is to be had...to the need to promote uniformity in its application’. <sup>70</sup> In another word, what matters is not the precedent effect of judgments by foreign courts or awards by tribunals, or the particular significance endowed on the award by the institution accidentally handling a specific legal issue for the first time, but the inclusion of existing relevant adjudication into the scope of consideration for the reasoning of awards. <sup>71</sup>

In fact, the invocation of foreign judgments in reasoning can be helpful from the perspective of comparative law when there are loopholes in the domestic laws. In contrast, in a case applying the Convention, such invocation is not to fill in

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69 O. W. Holmes, *The Common Law*, New York: Dover Publications, Inc. 1991, p.1.

70 See F. Ferrari and M. Torsello, *International Sales Law-CISG*, pp.8-9.

71 F. Enderlain and D. Maskow, *International Sales Law*, New York: Oceana Publications, 1992, p.56.

loopholes in laws, but mainly to play the reference role in the narrow context of legal interpretation. From this point of view, there are further reasons in China to invoke judgments involving the application of the Convention by judicial bodies of foreign countries. First, the SPC has recently advocated a Guiding-case System. Although such system does not have the legal binding force as the case law of common law countries, it provides the internal persuasiveness<sup>72</sup> which is of the same value as precedents to adjudicators as foreign case law. Secondly, since the Convention is an international uniform law and a ‘lingua franca’ of international sales, different Contracting States share the same rules. The Convention has been integrated in China’s legal system, so the relevant ‘guiding-cases’ of CISG in China should not be limited to Chinese CISG case laws, but cast eyes to foreign judicial practice.

Foreign case laws can provide reference when handling domestic cases of the same type. Language and information barriers are not insurmountable. At least the Chinese version of the UNCITRAL Digest of Case Law on the CISG and other literatures are easily accessible from the internet.

## **2. How to Evaluate the Ratio of Win**

The ideal fair result of 1:1 conceived in theory by Professor Magnus faces the following challenges in reality. First, foreign parties may be absent from oral

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<sup>72</sup> It is not up to the SPC whether the guidance cases have legal binding force since it involves the allocation of legislative power and is a policy choice in the constitutional level. The ‘persuasiveness’ has nothing to do with the ‘policy choice’ but is the quality any adjudication should have as an objective existence.

hearings due to various reasons such as knowing justice is not on his side, lacking of financial support or having language barriers. In the CIETAC cases, though the tribunals tried hard to contact the foreign parties, a large number of foreign parties were absent from hearings and waived their rights while Chinese parties were rarely absent. Secondly, foreign parties may not entrust the appropriate agents. The arbitration results may be influenced by actual communication barriers due to language or culture differences when no Chinese lawyers are involved. Thirdly, international trade has special structural factors. For example, there are more cases in which sellers claim for payment than those in which buyers claim for delivery of goods or quality problems. Among the two types, the former is simpler and easier to win. Considering the above complicated factors, the 1:1 ideal model of Professor Magnus is not realistic and need to be adjusted. It is difficult to find to what extent the adjustment should be made. After all, the psychological or subconscious factor ‘those who are not our kin are sure to be of a different heart’ exists objectively either in Asia, Europe or America. Good judges and arbitrators will consciously resist the interference of such factor in their judgment so as to ensure fairness and impartiality. Problems exist in the CLOUT cases used by Professor Magnus to verify his assumption. These cases are all carefully chosen by the correspondents of each nation and are not representative of the day-to-day judgments in specific jurisdictions. A persuasive verification should be like what is done in this Chapter, i.e. through empirical research on all the relevant cases of a specific institution in consecutive years.<sup>73</sup>

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<sup>73</sup> The material for this research, i.e. the cases provided by the CIETAC, are not specially selected but more like keyword search results from its file storage. The reason of such conclusion is because in some cases the tribunals did not apply the Convention but the parties alleged its application.

The readers may make their own judgment whether the appropriate ratio should be 1.5:1 or 2:1 instead of 1:1. Different institutions, as said by Mr. Hu Shi, a Chinese scholar, ‘please take a look at the mirror’,<sup>74</sup> make judgments according to their own circumstances. It can never be over emphasized for institutions and adjudicators to be wary of ‘political interpretation’ of the Convention.

## IV. Conclusions and Suggestions

1. This Chapter, based on research of the 81 Convention-related CIETAC awards from 2008 to 2015, reveals experience and problems in the application of the Convention in international commercial arbitration in China. It is shown by statistics that the average number of words in each award is about 12,000. The awards follow the “long” style. As to invocation of laws, 38 percent awards contain no invocation while only 35 percent contain invocation of specific legal provisions. Therefore, there is still room for improvement. Concerning reasoning, some awards do not have refined reasoning due to the lack of specific citation of legal provisions. Furthermore, attention or reference of foreign cases has not been found in the awards. Improvement needs to be made for the application of the Convention as a uniform law.

2. The ratio of winning Chinese parties to foreign ones is 1.68:1 which is different from the ‘theoretical ideal model’ 1:1, but is still a reasonable one considering the complicated factors in reality. However, emphasis on no ‘political interpretation’ of the Convention is never too much in order to achieve uniformity in the

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74 Hu Shi, ‘Please Take a Look at the Mirror’, Guangming Daily Publishing House.

application and interpretation of the Convention.

3. The autonomous application of the Convention was made in 7/8 of the cases when relevant conditions were met. For the other 1/8 cases, the tribunals determined the applicable law under private international law rules such as the closest connection doctrine instead of the autonomous application of the Convention. It is necessary at least for the arbitrators of these cases to update their knowledge of law and change their legal concepts.

4. The Convention has been ‘incorporated’ into Chinese legal system as officially ratified by China. It is a formal source of law and shall have priority over general domestic laws in application. Adjudicators, when applying the Convention, shall be fully aware that they are applying a part of the domestic legal system, and shall never ‘discriminate’ against it in application with any excuse.

5. Misreading of Article 142.2 of the General Principles of the Civil Law shall be corrected. This provision clearly affirms the ‘source of law’ status of international treaties concluded or acceded to by China and establishes the internal hierarchical structure of effectiveness in China’s different sources of civil laws, i.e. international treaties have higher level or priority over general civil laws. It cannot be misinterpreted as providing a burden of proof for those alleging the application of international treaties, i.e. whoever claiming the application of international treaties shall prove the existence of ‘different provisions’.

6. Generally, parties’ express agreement that ‘Chinese laws shall apply’ in contracts shall not be interpreted as excluding the application of the Convention.

In practice, Chinese domestic laws and the Convention used to be treated as two different things, which is in conflict with the basic position that the Convention, once adopted and ‘incorporated’, has been integrated in Chinese legal system. Relevant concepts should be updated to keep in line with the consensus of international theoretical and practical circles. Correspondingly, the position in practice that application of the Contract Law should be considered first and the Convention serves as supplement shall be reversed.

7. The circumstances for China’s reservation to Article 1.1(b) have changed. China shall withdraw the reservation and gear itself to international standard in the application of the Convention.

8. Hong Kong, Macao and Taiwan are important trade partners of mainland China. It is difficult for the Convention to regulate the inter-regional sales of goods unless the parties agree on its application. The SPC is suggested to issue judicial interpretation on the ‘quasi-application’ of the Convention on such ‘foreign-related contractual disputes’ and find a way out at the right moment.

## Chapter Four Judicial Supervision of China's International Commercial Arbitration

This Chapter makes comprehensive analysis and comment of the legal issues involved in judicial review of international commercial arbitration cases, foreign-related arbitration cases and HMT-related arbitration cases in 2015 via the collection of judgments published on the China Judgments Online, the replies from the 4<sup>th</sup> Civil Division of the SPC publicized in the Guidance for Trial of Foreign-Related Commercial and Maritime Cases and other data from the internet.

### I. Confirmation of Validity of Foreign-related and HMT-related Arbitral Clauses

#### 1. Applicable Law to a Foreign-Related or HMT-Related Arbitral Agreement

In *Gao Zhengyi, a Taiwan resident, v. Guang Dong Lang Zheng Law Firm* concerning confirmation of validity of an arbitral clause, the parties signed the Agency Agreement, agreeing to submit contractual disputes to Shenzhen Arbitration Commission. The court ascertained that it should refer to Article 18 of the Law on Choice of Law for Foreign-related Civil Relationships to determine the applicable law in reviewing the validity of the Taiwan-related arbitration agreement. The laws at the place of the arbitration commission, i.e. the P.R.C.

laws, should apply in the confirmation of the validity of the arbitral clause since the parties had not agreed on the applicable law thereof.<sup>1</sup>

In *CNPC Bohai Drilling Engineering Co. Ltd. Petroleum EPC Branch and Far East Energy (Bermuda), Ltd.* concerning confirmation of validity of an arbitral agreement, the parties signed the Fracturing Service Contract, agreeing that ‘any party may submit disputes or claims to arbitration...Any arbitral award will be final...The award is enforceable in any relevant nation including but not limited to P.R.C.’, without mentioning a specific arbitration institution or the applicable law for the confirmation of validity of the arbitral clause. Afterwards, they could not reach supplementary agreement on the arbitration institution or the applicable law. The court ascertained that the *lex fori*, i.e. the P.R.C. laws, should apply in the determination of validity of the foreign-related arbitration agreement when the parties had not agreed on the applicable law thereof, the place of arbitration or the arbitration institution, or made no clear agreement thereon according to Article 18 of the Law on Choice of Law for Foreign-related Civil Relationships and Article 14 of the SPC’s Interpretations on Several Issues Concerning Application of the Law on Choice of Law for Foreign-Related Civil Relationships(I). The parties, though expressing the intent to arbitrate, had not agreed on a specific arbitration institution or place of arbitration and could not reach a supplementary agreement thereon, so the court applied the P.R.C. laws in the confirmation.<sup>2</sup>

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1 (2015)Shen Zhong Fa She Wai Zhong Zi No. 134 Civil Ruling by Shenzhen Intermediate People’s Court.

2 (2015)San Zhong Min (Shang) Te Zi No.04910 Civil Ruling by Beijing 3rd Intermediate People’s Court.



It is found from the above cases that the law applicable to an arbitration agreement is ascertained in the following sequence according to Article 18 of the Law on Choice of Law for Foreign-related Civil Relationships and Article 14 of the SPC's Interpretations on Several Issues Concerning Application of the Law on Choice of Law for Foreign-Related Civil Relationships(I). The law chosen by the parties shall apply first. The law at the place of arbitration or the location of the arbitration institution shall apply when there is no chosen applicable law. The *lex fori*, i.e. the P.R.C. laws, shall apply only when there is no chosen applicable law, place of arbitration or arbitration institution or no clear agreement.

## **2. Interpretation of the Choice of Arbitration Institutions in Arbitral Clauses**

### **1) Interpretation of Inaccurate Choice of Arbitration Institution**

In *China Overseas Holdings Limited etc. v. Elite Honest Investment Limited* concerning confirmation of validity of an arbitration agreement, the arbitral clause involved refers the arbitration institution to 'China Trade Arbitration Commission Beijing Sub-commission'. The court ascertained that though the name of the institution was different from 'China International Economic and Trade Arbitration Commission', it may be presumed from the parties' intention expressed in the contract that their real intent was to choose the CIETAC. Furthermore, China Overseas Holdings Limited etc. did not submit evidence to prove the existence of other arbitration institutions whose name was similar to 'China Trade Arbitration Commission Beijing Sub-commission'. It is provided in

Article 3 of the SPC's Interpretation concerning Some Issues on Application of the Arbitration Law 'Where the name of an arbitration institution as stipulated in the agreement for arbitration is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected'. Thus, the court found CIETAC as the selected institution and the arbitral clause valid.

## **2) Ascertainment between Two Arbitral Institutions in One City**

In *Gao Zhengyi, a Taiwan resident, v. Guang Dong Lang Zheng Law Firm* concerning confirmation of validity of an arbitral clause, the court adopted the method of ascertaining the arbitral institution with the most similar name. The court ascertained that 'Shen Zhen Arbitration Commission' was the most similar one to 'Shen Zhen City Arbitration Commission' in the arbitral clause while other institutions in the same city had an apparently different name. The connotation and denotation of 'the arbitration commission in Shenzhen City' or 'Arbitration Commission in Shenzhen' were different from the meaning of the clause. The court found 'Shenzhen Arbitration Commission' as the chosen arbitral institution and the arbitral clause valid.<sup>3</sup>

## **3) Interpretation When Only the Choice of the Place of Arbitration was Agreed**

In *Changyu Construction Co., Ltd. v. Singapore Sembawang Engineers*

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<sup>3</sup> (2015) Shen Zhong Fa She Wai Zhong Zi No. 134 Civil Ruling by Shenzhen Intermediate People's Court.

*and Constructors Pte Ltd. etc.* concerning jurisdictional objection over the construction project subcontract dispute, the parties' contract agrees that 'disputes or notifications shall be finally settled through arbitration in Zhuhai in accordance with the effective arbitration rules of the institution listed in Appendix 1', whereas Appendix 1 states 'Arbitration Rules of China International Arbitration Centre' in Chinese and 'Arbitration Rules of China' in English. The court ascertained that the chosen place of arbitration was Zhuhai. According to Article 2 of the SPC's Interpretations on Several Issues Concerning Application of the Law on Choice of Law for Foreign-Related Civil Relationships (I) and Article 16 of the SPC's Interpretation concerning Some Issues on Application of the Arbitration Law, the *lex fori*, i.e. the P.R.C. laws, should apply in the confirmation of validity of the arbitral clause. No conclusion could be drawn from the Appendix that the selected arbitral institution was China International Arbitration Centre. There is only one arbitration commission at Zhuhai, the chosen place of arbitration, i.e. Zhuhai Arbitration Commission. According to Article 6 of the SPC's Interpretation concerning Some Issues on Application of the Arbitration Law, Zhuhai Arbitration Commission can be ascertained as the selected arbitral institution. The court found the arbitral clause valid with the requirement in Article 16 of the Arbitration Law met and rejected the case.<sup>4</sup>

In *China Shipping Logistics (Northern) Co., Ltd. v. Benxi Beiyong Iron & Steel Group Imp.& Exp.Co., Ltd.* concerning the confirmation of validity of the foreign-related arbitral clause in the voyage charter party, the parties signed the charter party, agreeing 'GENERAL AVERAGE/ARBITRATION IF ANY IN BENXI

<sup>4</sup> (2013) Zhu Jin Zhu Min Er Chu Zi No.35-2 Civil Ruling by Zhuhai Jinwan District People's Court.

AND CHINESE LAW TO BE APPLIED’. The SPC replied that though Benxi Arbitration Commission was the only arbitral institution in Benxi City, the clause was only a special agreement on the place of arbitration and the law applicable to arbitration. It neither constituted an agreement on the sole means for dispute resolution nor excluded litigation. The arbitral clause should be found invalid as per Article 16.2 of the Arbitration Law.<sup>5</sup> The SPC adopted strict interpretation and refused to infer a clear and exclusive agreement of arbitration commission from the agreement on the place of arbitration.

The above cases show a unified practice of respecting the parties’ intent to arbitrate, determining a specific arbitral institution through the courts’ interpretation and trying to realize the parties’ intent to arbitrate as much as possible within the current legal framework, but there is still room for further unification of the courts’ interpretation on whether there is a clear and exclusive agreement on the arbitration institution.

### **3. Interpretation of the Scope of an Arbitration Agreement**

In the retrial case *Yanmar Engine (Shanghai) Co., Ltd. (Yanmar) v. Xiamen Hagaric Enterprise (Hagaric) and Yanmar Co., Ltd.* concerning jurisdictional objection over the right of reputation infringement, the issue of determining the scope of arbitration arose.<sup>6</sup> Yanmar alleged that the infringement of the right of reputation claimed by Hagaric was actually a dispute arising out of the cancellation of the Export and Distribution Agreement signed by and between the

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5 (2015) Min Si Zhong Zi No. 15 Civil Ruling by the SPC.

6 (2015) Min Si Ta Zi No. 21, 22 Replies by the SPC.

two parties while the arbitral clause therein had been confirmed valid by binding judgment. The Higher People's Court of Fujian ascertained the case as an action for infringement of the right of reputation instead of contractual disputes arising out of the execution of the Export and Distribution Agreement, and rejected the jurisdictional objection. The SPC in the retrial, found the agreed arbitration matters of the case was 'any or all disputes arising out of the agreement or transactions under the agreement' which covered two aspects according to common understanding. Firstly, the nature of arbitration matters was any disputes including contractual, infringement or other disputes. Secondly, the disputes to be arbitrated must arise out of the Export and Distribution Agreement or transactions under the agreement. The infringement claimed by Hagaric was about Yanmar's delivery of false information concerning the cancellation of Hagaric's distribution right, etc. to Hagaric's business network members who were not parties of the agreement which happened after the cancellation of the agreement. Though the claimed infringement had certain factual connection with Yanmar's cancellation of the agreement, the infringement itself was neither within the scope of contractual rights and obligations under the agreement nor due to the exercise of rights and obligations thereunder, but rather an independent civil action. Thus, it is appropriate for the Higher Court of Fujian to find the disputes involved in the case falling out of the scope of arbitration agreement. The SPC maintained the ruling thereof. Meanwhile, the SPC pointed out that in the interpretation of the scope of arbitration, when the infringement dispute resulting from the breach of contractual obligations led to overlapping of the liability for breach of contract and infringement, the plaintiff was bound by the arbitral clause in the contract

even if he chose to file an action on infringement. The arbitral clause's application in disputes between the plaintiff and the defendant who were parties thereof should not be influenced if the plaintiff added defendants who were not parties to the arbitral agreement. The fundamental principle of contract interpretation was adopted in judging the parties' consent to arbitrate in the case, which is of positive meaning in the determination of the scope of arbitration. The express denial of parties' avoidance of arbitral clauses through afterwards choice of cause of action or adding defendants also clearly shows the principle that valid arbitration agreements exclude courts' jurisdiction.

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

### **1. Scope of Judicial Review on Arbitration**

In *East Well International Trading Co. Ltd.* case concerning the application for enforcement of a foreign-related arbitral award,<sup>7</sup> one party alleged the non-conformity of the arbitration procedure with the arbitration rules because Article 39 of the CIETAC Arbitration Rules setting proof of burden on parties for facts stated in their claims, defenses and counterclaims was violated due to the other party's failure to provide quality inspection report and use of false evidence to deceive the arbitral tribunal. The SPC found in its reply that the ground for non-enforcement of the award was unsustainable since the above allegation involved evidence admission, fact finding and responsibility determination in the arbitration

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7 (2015) Min Si Ta Zi No. 53 Reply by the SPC.

case which were neither arbitral procedural matters nor within the scope of courts' judicial review and was not the circumstance of 'non-conformity between the arbitration procedure and the arbitration rules' stipulated in Article 274.1.3 of the Civil Procedure Law.

## **2. Confirmation of Validity of Arbitration Agreements**

### **1) The Binding Force of an Arbitral Clause over the Dispute Arising out of the Enforcement Settlement Agreement**

In *Singapore Luminent Enterprise Pte., Ltd. (Luminent) v. Xiamen Lujinghai Taiwan Shipping Cargo Supply Co., Ltd. (Lujinghai)* concerning the application for setting aside an arbitral award, the parties signed the sales contract, agreeing 'any dispute arising out of or relevant to this contract...if not settled, any party shall be entitled to submit the dispute to the CIETAC'. Luminent applied for setting aside the award on the ground that Lujinghai fraudulently signed the Enforcement Settlement Agreement during the enforcement of the arbitral award, and disputes arising out of the Enforcement Settlement Agreement were not bound by the arbitral clause in the Sales Contract. The court ascertained 'any dispute arising out of or relevant to this contract' should be understood in a broad sense to cover any disputes between the parties on the existence, the formation time, the interpretation, the performance, the liability for breach, the amendment, suspension, assignment, cancellation or termination of the contract. The Enforcement Settlement Agreement made clearer the rights and obligations formed on the basis of the payment liability determined in the arbitral award

for the purpose of settling problems left over from the performance of the Sales Contract by making a specific plan with the consideration of the party's actual payment ability. Thus, the court found the dispute arising out of the Enforcement Settlement Agreement was relevant to the Sales Contract and should be bound by the dispute resolution method agreed therein, and rejected the application for setting aside the award.

## **2) The Binding Force of an Arbitration Agreement on Non-signatories**

In *Shanghai Kuma Huangxing Shopping Centre Management Co., Ltd.(Kuma), Shijia Co., Ltd.(Shijia) v. Germany Union Co.( Union)) and Defa Shopping Centre Management (Shanghai) Co., Ltd.(Defa)* concerning the application for setting aside a foreign-related arbitral award,<sup>8</sup> the application ground was that Defa was not a party to the arbitral clause since it was a non-signatory to the Framework Agreement containing the arbitral clause while the condition for contract assignment was not fulfilled since Kuma had never received any letter of assignment or notification when it was stipulated in the agreement that Union, when appointing a buyer, should send letter of notification and letter of confirmation to Kuma. The SPC found in its rely that Defa was not established at the time of the signing of the Framework Agreement so it did not sign on the agreement. The SPC further stipulated that Defa was a party of the Framework Agreement with no need to re-sign the arbitral clause. According to the agreement and its appendix, i.e. the Real Estate Sales Contract, that Kuma and Shijia knew and agreed that Union would perform the agreement by appointing a newly-

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<sup>8</sup> (2015) Min Si Ta Zi No.8 Reply by the SPC.



established company, thus they should have expected sufficiently on the arbitral clause's binding force on disputes arising out of the agreement between them and the appointed newly-established company. Furthermore, Kuma, in its application for arbitration in another case, also confirmed that Union had appointed Defa as the purchaser. The SPC found the issue whether the time and method Union appointed the purchaser met the specific requirement under the agreement involving substantial rights and obligations and beyond the scope of judicial review, hence rejected the application for setting aside the award. The case is of positive meaning since an arbitral clause's binding force on non-signatories is supported from the perspective of respecting parties' intent to arbitrate, protecting legitimate expectation and upholding the principle of estoppel.

### 3. Relevant Issues in Arbitration Procedures

#### 1) Foreign Parties' Authorization of Arbitration Agents

In *Trunkbow Asia Pacific (Shandong) Co., Ltd.(Trunkbow) v. America Super Micro Computer Co., Ltd. (Super Micro)* concerning the application for setting aside an arbitral award (the *Trunkbow* case),<sup>9</sup> the main ground for the application is the Super Micro's claims should have been regarded as withdrawn for its absence from the oral hearing since the power of attorney of Super Micro's representative in the oral hearing had not been notarized and certified. The court ascertained that Super Micro had proved its authorization in accordance with the CIETAC Arbitration Rules by submitting the power of attorney issued

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<sup>9</sup> (2015) Min Si Zhong (Shang) Zi No.263 Civil Ruling by Beijing 4<sup>th</sup> Intermediate People's Court.

for the arbitration case and the receipt of the CIETAC Secretariat, etc. as per Article 20 of the Arbitration Rules stating ‘A party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration. In such a case, a Power of Attorney shall be forwarded to the Arbitration Court by the party or its authorized representative(s)’. There is no specific stipulation on the application of the provision on notarization and certification of power of attorneys in Article 264 of the Civil Procedure Law in arbitration procedures. Thus, Super Micro’s authorization was valid though it had not been notarized and certified.

## **2) Evidence Production and Examination**

In *Germany Gauna Glass and Plastic Devices Plant v. Germany Bushier Industrial Investment Co., Ltd.* concerning the application for setting aside an arbitral award,<sup>10</sup> the ground for the application is the arbitration procedure is in serious violation of law due to the appraisal report by the appraiser under one party’s entrustment. The court ascertained that the evidence effect of the report and whether the tribunal could rely thereon to make the award were not directly related to the violation of arbitration rules. The court rejected the application on the ground that Article 44 of the Arbitration Law allows arbitral tribunals to submit special matters to appraisal institutions agreed upon by parties or appointed by tribunals without depriving parties’ rights to entrust appraisers to make appraisal reports and submit such reports as evidence.

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<sup>10</sup> (2015) Min Si Zhong (Shang) Zi No.118 Civil Ruling by Beijing 4<sup>th</sup> Intermediate People’s Court.

In the above mentioned *Trunkbow* case, Trunkbow had another ground for the application that it had been deprived of the right to produce evidence due to the tribunal's rejection of its application for extending the time limit. The court found the tribunal's handling of the evidence production procedure appropriate since the tribunal had the power to decide on the extension application in accordance with the situation of the case under Article 39.2 of the Arbitration Rules and rejected the application.

### **3) Issues on Whether the Tribunals' Collection of Evidence Violates Due Process**

In *Haiyang Dafeng Ren Auto Service Co., Ltd.(Haiyang), Japan HAYAMA Co., Ltd. v. Zhongshan Mingyi Environment Engineering Co., Ltd.* concerning the application for setting aside an arbitral award,<sup>11</sup> Haiyang alleged that the tribunal's failure in investigating and collecting the originals of the four monitoring reports issued by Zhongshan Environmental Monitoring Station of which it had submitted copies led to mistakes in fact finding of the case. The court ascertained the tribunal's non-collection of the originals was within the tribunal's discretion and not against due process since it was provided in the applicable arbitration rules that the tribunal may undertake investigation and collect evidence as it considers necessary or upon its approval of the party's application.

## **4. Clerical Errors in Arbitral Awards**

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<sup>11</sup> (2015) Shen Zhong Fa She Wai Zhong Zi No.239 Civil Ruling by Shenzhen Intermediate People's Court.

In *Shanghai Yifeng Group (Huai'an) Investment Co., Ltd. (Yifeng) v. UVD Enterprise Limited (UVD)* concerning the application for setting aside an arbitral award,<sup>12</sup> Yifeng alleged the award void due to the unclear statement of UVD's name therein. The court ascertained that the misstatement of 'UVD Enterprise Limited' which was UVD's registered name in Hong Kong as 'Enterprise Limited' was in fact a clerical error. It was clear that the corresponding subject should be UVD. The error was also corrected by the arbitration institution in the form of correction of award. Thus, the court found such ground unsustainable and rejected the application.

## 5. Arbitrators' Obligation to Disclose Conflict of Interest

In *Chung Han Gi, a South Korea resident, v. Shanghai Junyi Haipeng Venture Investment Centre, etc.(Junyi)* concerning the application for setting aside an arbitral award,<sup>13</sup> the application ground was the presiding arbitrator had not disclosed the fact that he was in the same law firm with Junyi's arbitration agent and they had been responsible for several projects together as the signing lawyers. The court ascertained that the presiding arbitrator and Junyi's arbitration agent were not in the same firm during the arbitration process though they had once practiced in the same firm. The presiding arbitrator's signature on securities documents prepared by the firm as the person responsible did neither indicate his actual participation in the projects nor prove the existence of relationship which could have sufficiently influenced the impartiality of arbitration. Thus, the court

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12 (2015) Si Zhong Min (Shang) Te Zi No.00320 Civil Ruling by Beijing 4<sup>th</sup> Intermediate People's Court.

13 (2015) Si Zhong Min (Shang) Te Zi No.00218 Civil Ruling by Beijing 4<sup>th</sup> Intermediate People's Court.

rejected the application.

## 6. Implementation of the Reply

In *Hindustan Clean Energy Limited (Hindustan) v. LDK Solar Hi-tech (Suzhou) Co., Ltd.* concerning the application for setting aside an arbitral award,<sup>14</sup> it is stated in the letter of guarantee issued by Hindustan that disputes shall be submitted to ‘China International Economic and Trade Arbitration Commission (CIETAC) in Shanghai’. Hindustan alleged that the CIETAC was not the chosen arbitration institution and the application of the 2012 CIETAC Arbitration Rules was wrong. The court ascertained that the arbitral clause clearly referred to the CIETAC as the chosen arbitration institution. To say the least, even if the chosen arbitration institution was another local institution in Shanghai, the court should reject the application as per Article 3 of the Reply stating that ‘Where, before the Reply came into force, the CIETAC, the CIETAC South China Sub-Commission or the CIETAC Shanghai Sub-Commission had accepted cases which they should not have accepted as per Article 1 of the Reply, the parties apply for annulment or non-enforcement after the arbitral awards were made on the jurisdiction ground, the people's court shall not support them’. The court found no apparent procedural error in the CIETAC’s application of its 2012 Arbitration Rules and rejected Hindustan’s application.

It is found from current cases that various judicial review cases resulting from the jurisdictional disputes among the CIETAC and its former sub-commissions

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<sup>14</sup> (2015) Si Zhong Min (Shang) Te Zi No.00189 Civil Ruling by Beijing 4<sup>th</sup> Intermediate People’s Court.

including cases concerning the application for annulment or non-enforcement of arbitral awards have been properly resolved in general after the Reply came into force.

### **III. Recognition and Enforcement of Foreign Arbitral Awards**

#### **1. Validity of Arbitration Agreements**

In *Ecomusa, Inc.(Ecomusa) v. Foshan City Nanhai Zhaoli Textile Co., Ltd. (Zhaoli)* concerning the application for recognition and enforcement of a foreign arbitral award,<sup>15</sup> Zhaoli alleged that the arbitral clause in the Sales Contract had no binding force on Zhaoli since Zhaoli had neither signed or stamped the Sales Contract nor reached agreement with Ecomusa on the purchase of raw cotton. The court ascertained the contract was signed by fax and expressed in the form of fax. Ecomusa claimed it had submitted the fax to the arbitration institution and could not get it back, and submitted a declaration from John Gibson, Chairman of the arbitration institution, stating that the contract attached was a copy of the fax. The bank account contained in Zhaoli's stamp on the contract was once used by Zhaoli. The fax time and number at the top of the copy of the fax supported Ecomusa's allegation on the signing process of the contract. The testimony by Ecomusa's witness at the oral hearing could also prove the signing process. Thus, the court found there was sufficient evidence to support the fact the parties had entered into the contract and agreed on the arbitral clause. Accordingly, the court

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<sup>15</sup> (2014) Fo Zhong Fa Min Er Chu Zi No.125 Civil Ruling by Foshan Intermediate People's Court of Guangdong Province on 29 June 2015.

ruled to recognize and enforce the award.

In the case concerning the application for recognition and enforcement of a foreign arbitral award by Louis Dreyfus Australia Co. (Louis),<sup>16</sup> the arbitral clause in the contract states that all disputes relevant to the contract shall be settled through arbitration in Liverpool according to the International Cotton Association (the ICA) Rules and Bylaws. There was a signature of ‘Zhang Yongzhong’ in the column of buyer’s representative with no official stamp of Nijiaxiang Co. (Nijiaxiang). Nijiaxiang, in its defense of the arbitration case, alleged it had neither signed contract with Louis or Allenberg Cotton Co. (Allenberg), or authorized anyone to sign the contract. The court ascertained that Zhang Yongzhong, though recognizing the inclusion of both Nijiaxiang and its subsidiary Tiangong Co. (Tiangong) in his name card, was only the general manager of Tiangong and had no position in Nijiaxiang. Nijiaxiang, though controlling Tiangong, never intervened in Tiangong’s daily operation. The court held that Louis should have proved Nijiaxiang’s agreement on reaching the arbitral clause with it when there was no stamp of Nijiaxiang on the contract while Zhang Yongzhong denied his signature on the contract containing the arbitral clause. Louis, though submitting the fax of the contract, failed to further prove the authenticity of the signature of ‘Zhang Yongzhong’ thereon. Even after the court’s explanation, Louis still clearly refused the appraisal of the signature. Even if the signature was truly by Zhang Yongzhong, the name card of Zhang Yongzhong alone was not sufficient to make Louis reasonably believe his authorization from Nijiaxiang to sign the contract

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<sup>16</sup> (2013) Xi Shang Wai Zhong Shen Zi No.0009 Civil Ruling by Wuxi Intermediate People’s Court of Jiangsu Province on 14 January 2015.

since the parties' previous trade practice was signing contracts in hard copies with official stamps. Thus, the court ruled non-recognition and non-enforcement of the award as per Article V. 1(a) of the New York Convention. In another case initiated by Allenberg, the court refused the recognition and enforcement on the same ground.

In *Ecom Agroindustrial Asia Ptd., Ltd. Singapore (Ecom) v. Qingdao JCJ Penglai Textile Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,<sup>17</sup> the court ascertained that Ecom could not submit the originals of the Sales Confirmation and the Sales Contract since they were signed by fax while Ecom submitted no further evidence to prove the authenticity thereof. Thus, the court refused the recognition and enforcement of the award since it could not find the existence of a written arbitration agreement between the two parties. The SPC replied to Shandong Higher People's Court after it reported the case,<sup>18</sup> that the key issue was whether the parties had signed an arbitration agreement. Such issue was within the scope of fact finding. According to Article 2 of the SPC's Notice on Issues concerning Requests for Instructions in Trials, higher people's courts should be responsible for issues involving facts and evidence of reported cases. Thus, the people's court accepting the case should make its determination on whether the parties had signed an arbitration agreement after the hearing of the case, and should make the ruling on non-recognition and non-enforcement of the award if it found the parties had not signed it.

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17 (2014) Yan Min She Chu Zi No.15 Civil Ruling by Yantai Intermediate People's Court of Shandong Province on 2 November 2015.

18 (2015) Min Si Ta Zi No.29 Reply by the SPC.



Along with the development of e-commerce, facsimile and other data telegrams have been more and more widely used due to their efficiency and convenience. It is provided in Article 11 of the Contract Law that written form refers to a form such as a written contractual agreement, letter, electronic data text (including a telegram, telex, fax, electronic data exchange and e-mail) that can tangibly express the contents contained therein. Thus, in the application of evidence rules, the admissibility of evidence in the form of fax should not be denied solely because of the form. The probative value of a facsimile should be determined in light of its content and relevance to other evidence. The rule for evaluating facsimiles is well-explained in the *Ecom v. Zhaoli* case. Furthermore, it may be found from the above cases that the issue regarding the existence and validity of arbitration agreements not only is a legal one but also involves a lot of fact finding and evidence evaluation. The current internal reporting system for judicial review on foreign-related arbitration with the basic structure of request for instruction on legal issues is in urgent need of improvement since it imposes difficulties in fact finding and influences the functions of review and supervision.

## **2. Extensive Interpretation of Foreign-related Elements**

Under current Chinese laws, domestic disputes shall not be arbitrated outside mainland China. Therefore, whether the nature of the dispute is defined as domestic or foreign-related is of vital importance in the determination of the validity of an arbitral clause. In *Siemens International Trading Ltd., Shanghai (Siemens) v. Shanghai Golden Landmark Co., Ltd. (Golden)* concerning the

application for recognition and enforcement of a foreign arbitral award,<sup>19</sup> the court ascertained that the contract appeared to have no typical foreign-related element since both parties were legal persons registered in China while the agreed place of delivery and the location of the equipment, the subject matter of the contract, were both in China. However, the contract had the following distinct characteristics compared with normal domestic contracts. Firstly, both parties, though being Chinese legal persons, were wholly foreign-owned enterprises registered in Shanghai Pilot Free Trade Zone which generally had close connection with foreign investors in aspects such as capital sources and ultimate interest attribution. Secondly, there were certain international sales of goods features in the flow of the subject matter of the contract. The subject matter had been delivered from abroad to the pilot free trade zone which was under the customs' supervision. The import formalities were completed when it flowed from within to outside the zone after the customs clearance and tax payment had been performed timely as per the contract. Furthermore, the performance of the contract involved the application of special customs' supervision measures in the pilot free trade zone. Thus, the court found the legal relationship involved was foreign-related according to Article 1.5 of the SPC's Interpretations on Several Issues Concerning Application of the Law on Choice of Law for Foreign-Related Civil Relationships (I) regarding 'other circumstances under which the civil relationship may be determined as foreign-related civil relationship' and the arbitral clause valid, and ruled the recognition and enforcement of the award.

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<sup>19</sup> (2013) Hu Yi Zhong Min Ren (Wai Zhong) Zi No. 2 Civil Ruling by Shanghai 1st Intermediate People's Court on 27 November 2015.

It may be found from the SPC's reply concerning the case that one essential consideration in determining the foreign-related civil relationship is both parties' actual participation in the whole arbitration procedure since Siemens, after Golden had initiated the arbitration case, submitted its counterclaims after the tribunal had rejected its jurisdictional objection while Golden, after the award had been rendered, performed part of its obligations thereunder.<sup>20</sup> The flexible determination of foreign-related elements to support the validity of arbitral clauses can better reflect the principles of good faith and estoppel. Meanwhile, it must be noticed that the lack of definition of 'foreign-related civil relationships' in the Law on Choice of Law for Foreign-Related Civil Relationships and the discretion granted under Article 1.5 of the SPC's Interpretations on Several Issues Concerning Application of the Law on Choice of Law for Foreign-Related Civil Relationships (I) regarding 'other circumstances under which the civil relationship may be determined as foreign-related civil relationship' may result in flexible criteria for the determination of foreign-related elements and more uncertainty in the validity of arbitral clauses. Thus, the circumstances under which such miscellaneous provision may be applied need to be stylized through judicial precedents so as to make clear the corresponding judgment rules.

### **3. Relevant Legal Issues in Arbitration Procedures**

#### **1) Non-delivery of an Award to a Party**

In *Jessmith & Sonscotton, LLC. V. Jihua 3509 Textile Co., Ltd. (Jihua)*

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<sup>20</sup> (2015) Min Si Ta Zi No.5 Reply by the SPC.

concerning the application for recognition and enforcement of an international arbitral award,<sup>21</sup> Jihua objected on the ground that ICA had not delivered the arbitral award to it. The court ascertained that the amended arbitral clause in the Sales Contract stated that ‘if any dispute occurs, the seller is entitled to choose arbitration. The law of England shall apply’. It is stipulated in Article 55.3 of the U.K. Arbitration Act 1996 that ‘Nothing in this section affects section 56 (power of the tribunal to withhold award in case of non-payment)’ and in Article 56.1 that ‘The tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators’. Article 308.7 of the ICA Rules and Bylaws provides that ‘The award will only be released on the payment of the stamping fee and any outstanding fees, costs and expenses’. The court found the ICA’s non-delivery of the award to Jihua due to its non-payment of relevant fees was not against the U.K. Arbitration Act or the ICA Rules and Bylaws. Thus, the court ruled to recognize and enforce the award.

## 2) Due Notification of Arbitration

In *Krasilnikov v. Heilongjiang Dadao Auto Trading Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,<sup>22</sup> the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation sent the notices on the formation of arbitral tribunal, the oral hearing, the arbitral award to the respondent by post, which

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21 (2014) E Xiao Gan Zhong Min Wai Chu Zi No.00001 Civil Ruling by Xigan Intermediate People’s Court of Hubei Province on 20 August 2015.

22 (2015) Hei Zhong She Wai Shang Cai Zi No.1 Civil Ruling by Heihe Intermediate People’s Court of Heilongjiang Province on 23 December 2015.

was confirmed by the post receipts and Russian post office website records. The court found the delivery way in accordance with Articles 16.3 and 16.6 of the Arbitration Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation regarding arbitration notification.

In *Ecomusa v. Zhaoli*,<sup>23</sup> as to whether Zhaoli had been properly notified of the arbitration matters, the court held that Zhaoli's address contained in the stamp and listed at the top of the contract was the main place of business of Zhaoli last known to the arbitration institution and the address used by the institution for arbitration correspondence. The delivery by post was in accordance with relevant provisions on notification in the agreed arbitration rules while FedEx's tracking record showed the successful delivery. Thus, the court found Zhaoli was properly notified in the arbitration procedure.

In *Noble Resources International Pte Ltd v. Kairuide Holding Co., Ltd.* concerning the application for recognition and enforcement of a foreign arbitral award,<sup>24</sup> the court ruled on the recognition and enforcement of the award on the ground that the delivery of relevant arbitration documents by post or email was legal and valid under the *lex loci arbitri* while the delivery record showed successful delivery.

### **3) Application for Non-enforcement after the Ruling on Recognition of an**

<sup>23</sup> (2014) Fo Zhong Fa Min Er Chu Zi No.125 Civil Ruling by Foshan Intermediate People's Court of Guangdong Province on 29 June 2015

<sup>24</sup> (2015) De Zhong Min Chu Zi No.3 Civil Ruling by Dezhou Intermediate People's Court of Shandong Province on 3 March 2015.

## Arbitral Award

In *Tianjin Zhongchen Tomato Product Co., Ltd. (Zhongchen) v. Conagra foods (Mauritius) Limited (Conagra)*,<sup>25</sup> Zhongchen applied for the non-enforcement on the ground that the court, when hearing Conagra's application on recognition and enforcement, did not explain the difference between the arbitration claims stated in the award and those in Conagra's Request for Arbitration. The arbitral tribunal, with no legal ground, had changed Conagra's claims in the award and requested Zhongchen pay huge amount of compensation to Conagra. The enforcement application should have been rejected under Article V.1(c) of the New York Convention since the tribunal had exceeded its authority in issuing the award. The court held that it had affirmed the non-existence of circumstances for non-recognition and non-enforcement and approved the recognition and enforcement of the SIAC award involved in the case in the effective ruling, and rejected Zhongchen's application for non-enforcement on the same ground according to Article V of the New York Convention, Articles 260 and 274 of the Civil Procedure Law for its lack of legal basis.

## 4) Connection between Foreign Arbitration and Domestic Litigation Procedures

In *South Korea Daewoo Shipbuilding & Marine Engineering Co., Ltd. (Daewoo) v. Panama Glory Advance Corporation* on affirmation of ship mortgage right,<sup>26</sup> the

<sup>25</sup> (2015) Er Zhong Zhi Shen Zi No.0002 Civil Ruling by Tianjin 2<sup>nd</sup> Intermediate People's Court.

<sup>26</sup> (2014) Xia Hai Fa Que Zi No.1 by Xiamen Maritime Court. See 'Connection between Domestic Litigation and Foreign Ad Hoc Arbitration Procedures in Foreign-related Ship Contractual Disputes', People's Judicature (Cases) Iss. 5 (2016).

connection between the domestic property preservation procedure and the foreign arbitration procedure as well as the recognition and enforcement procedure was involved. Daewoo applied for credit registration in Xiamen Maritime Court after the court had legally seized and auctioned the ship involved. Daewoo initiated this case over the ship mortgage right in Xiamen Maritime Court which had jurisdiction as the court at the location of the seized ship. Thereafter, Daewoo initiated arbitration in London according to the arbitral clause in the ship building contract and submitted its application for pending of this case to Xiamen Maritime Court which approved the application and ruled the pending. Xiamen Maritime Court resumed the hearing of this case after the award had been rendered in London and recognized by the court. The court, after hearing, held that the ship mortgage right claimed by Daewoo was valid since the credit right secured by the mortgage right had expired and such fact had been affirmed by the London award and the court's ruling on recognition thereof. Accordingly, the court made the judgment confirming the validity of Daewoo's mortgage right and priority of repayment from the ship auction. Xiamen Maritime Court, before the award was rendered in the foreign arbitration procedure over the main contract dispute, had suspended its case on the accessory contract dispute. Such practice embodies the principle of judicial restraint and comity, avoids conflicts which may arise between domestic and foreign procedures or litigation and arbitration procedures, and reflects the people's courts' support of the enforcement of foreign awards in China.

#### **4. Public Policy**

In *Jacobson Golf Course Design Inc. (Jacobson) v. Sihui Zhenhuiyuan Property Development Co., Ltd, Sihui City Huiguan Investment Co., Ltd. (Huiguan)*,<sup>27</sup> Huiguan's defense ground was a foreign enterprise undertaking a design of construction project in China must choose at least one Chinese design enterprise with the qualification in construction project design to cooperate in the design while the construction unit should be responsible for the prequalification of the foreign enterprise. Jacobson's violation of China's mandatory provision for finding no Chinese cooperator and obtaining no prequalification constituted the violation of public policy stipulated in Article V.2 of the New York Convention. The court found Huiguan's allegation on non-recognition and non-enforcement of the award due to the violation of public policy unsustainable since the violation of China's mandatory legal provisions was not completely equivalent to the violation of China's public policy while the recognition and enforcement of the award would not constitute the violation of China's fundamental social interest and basic legal principles.

In *Noble Resources International Pte Ltd. (Noble) v. Shenzhen Cereals Group Co., Ltd. (Shenzhen Group)* concerning the application for recognition and enforcement of a Hong Kong arbitral award (the Noble case),<sup>28</sup> the General Administration of Quality Supervision, Inspection and Quarantine (the General Administration), during the performance of the contract, required the suspension of imports of soybeans from Brazil and entry of qualified ones only after

<sup>27</sup> (2015) Zhao Zhong Fa Min Yi Zhong Zi No.26 Civil Ruling by Zhaoqing Intermediate People's Court on 19 October 2015.

<sup>28</sup> (2011) Shen Zhong Fa Min Si Chu Zi No.270 Civil Ruling by Shenzhen Intermediate People's Court on 30 March 2015.



selection for in-transit soybeans in its announcement regarding soybean seed-coating. Shenzhen Group argued that the tribunal's determination of the General Administration's announcement for public health safety as quarantine restriction and request on the Chinese importer to bear the risk thereof was against China's social public interest. The court ascertained that the soybeans involved in the case were in line with the entry inspection and quarantine requirements and not among those prohibited goods. The court rejected the public policy defense since there was neither evidence showing the soybeans involved would cause serious safety and health problems nor facts of any damage to public health while the award was on Shenzhen Group's payment obligation to Noble.

## 5. Awards Exceed the Tribunals' Power

In the *Noble* case,<sup>29</sup> the parties signed the Sales Contract of soybeans, agreeing that if Shenzhen Group was the buyer, the dispute should be submitted to HKIAC. Thereafter, the parties signed the Supplementary Agreement concerning the relevant expenses of ship detention and abnormal unloading due to the General Administration's requirement, agreeing disputes thereunder be submitted to Chinese courts under Chinese laws. Shenzhen Group in its defense alleged that the tribunal had exceeded its power. The court ascertained that the Supplementary Agreement had amended the stipulations in the Sales Contract. After such amendment, Noble instead of Shenzhen Group should bear the charges due to the quarantine limitation/ detention at the port of discharge while disputes thereof

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<sup>29</sup> (2011) Shen Zhong Fa Min Si Chu Zi No.270 Civil Ruling by Shenzhen Intermediate People's Court on 30 March 2015.

should be settled through litigation instead of arbitration. The tribunal's decision on the compensation of additional charter cost due to the extended stay in the port of discharge, i.e. Qingdao Port, involved matters under the Supplementary Agreement which were beyond the scope of arbitration and the scope of the arbitral clause in the Sales Contract, thus constituted the circumstance for non-enforcement under Article 7.1.3 of the SPC's Arrangements on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region.

## **6. Jurisdictional Issues in the Recognition and Enforcement of Foreign Arbitral Awards**

In *Swiss Marine Service Ltd. (Swiss Marine) v. Yueyufeng International Co., Ltd.* concerning the application on recognition of a foreign arbitral award,<sup>30</sup> the court held that Swiss Marine, though only applied for the recognition, should comply with Article 11 of the Special Maritime Procedure Law which stipulates that the party applying for enforcement of a maritime arbitral award shall file the application with the maritime court of the place where the property subjected to execution or of the place where the person subjected to execution has its domicile. The court found no jurisdiction and rejected the application since Swiss Marine had submitted no evidence to prove the property subjected to execution or the domicile of the person subjected to execution was in the area under the court's jurisdiction. As to Swiss Marine's submission of the performance guarantee for

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<sup>30</sup> (2014) Guang Hai Fa Ta Zi No.2 Civil Ruling by Guangzhou Maritime Court of Guangdong Province on 2 February 2015.

the affreightment contract issued by a third party, Zhuhai Yueyufeng Co., the court found the guarantor was not a party of the award while the guarantee was not a property subjected to execution as well.

In the retrial case concerning the application for recognition of a foreign arbitral award by Seoil Shipping Co., Ltd. (Seoil), Ganglu Iron & Steel Co., Ltd. (Ganglu) after Seoil had applied for the maritime injunction to detain the goods of LMJ International Ltd. (LMJ), took the goods after its provision of security. The first-trial court refused to accept Seoil's application for recognition of the foreign award between Seoil and LMJ in its ruling which was sustained by Tianjin Higher People's Court. Seoil applied for the SPC's retrial on the ground that the first-trial court's ruling on non-acceptance involved mistakes in application of law since LMJ has property available for execution in the area under the court's jurisdiction while Ganglu's security was replacement of the detained goods. The SPC found in the retrial<sup>31</sup> that Seoil's evidence was not sufficient to prove that LMJ had property for execution in the area under the first-trial court's jurisdiction. The buyer of LMJ's goods was a third party, Tongmao Co. (Tongmao), while the buyer of Tongmao was Ganglu. Thus, Tongmao instead of LMJ had the creditor's right over the accounts receivable under the doctrine of privity of contract. Ganglu's provision of security was to avoid Seoil's loss due to wrong application of the maritime injunction. Thus, the security was provided for Seoil instead of LMJ. The SPC found the non-acceptance of Seoil's application by the first-trial court on the ground that the domicile of LMJ and the property subjected to execution were not in the court's area of jurisdiction under Article 283 of the Civil Procedure

31 (2015) Min Shen Zi No.3170 Civil Ruling by the SPC on 18 December 2015.

Law and Article 11 of the Special Maritime Procedure Law appropriate and ruled to reject the retrial application.

It should be noted that Article III of the New York Convention stipulates that ‘Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles’. Some scholars hold that this article distinguishes the recognition procedure and the enforcement procedure. The former shall be directly based on the Convention while the later shall comply with the courts’ special provisions on enforcement procedures at the place of enforcement besides the Convention’s stipulations.<sup>32</sup> Furthermore, each state’s understanding of whether the enforcement of awards under the Convention is under the precondition of the existence of property at the place of enforcement is not the same.<sup>33</sup> There is clear distinction between recognition procedure and enforcement procedure in Article 547 of the judicial interpretation on the Civil Procedure Law. Whether jurisdiction over cases on the recognition of foreign arbitral awards could be appropriately expanded under the spirit of ‘favorable for the enforcement of awards’ in Article III of the Convention awaits for further judicial interpretations.

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32 Albert van den berg, *The New York Convention of 1958: An Overview*, [www.arbitration-icca.org](http://www.arbitration-icca.org).

33 It is found in precedents of U.K., U.S. and India that the applicant may submit its application for recognition and enforcement to the court at the place of the debtor’s property or at a contracting state where the applicant believes the monetary award may be realized. But a German court refused the enforcement on the ground that there was no debtor’s property in Germany (Kammergericht [KG] Berlin, Germany, 10 August 2006, 20 Sch 07/04), published in *UNCITRAL 1958 New York Convention Guide*, [www.newyorkconvention1958.org](http://www.newyorkconvention1958.org).

## Annual Summary

Sixty years have passed since international commercial arbitration first started in China in the 1950s. China's international commercial arbitration has achieved remarkable growth along with China's significant improvement of its comprehensive national strength and international status, the comprehensive deepening of its economic and trade exchange with foreign countries as well as the implementation and promotion of the Belt and Road Initiative. Arbitration has been accepted as one of the primary methods to resolve international commercial disputes. Chinese international commercial arbitration institutions have won international reputation while the CIETAC has been recognized as one of the world-renowned international arbitration institutions alongside with the International Court of Arbitration of the International Chamber of Commerce (ICC), the Arbitration Institute of Stockholm Chamber of Commerce (SCC), etc.

In retrospect of the year 2015, the development of China's international commercial arbitration can be summarized from the following five aspects.

First, the number of China's international commercial arbitration cases has increased steadily, but the development is unbalanced. 2015 marks the 20<sup>th</sup> anniversary of the implementation of the Arbitration Law as well as the 20<sup>th</sup> anniversary of the establishment of the first-batch experimental re-constructed Chinese arbitration institutions. In 2015, 244 arbitration commissions in China accepted a total of 136,924 cases. Among them, 62 arbitration commissions

accepted 2,085 foreign-related, HMT-related cases, accounting for 1.5 percent of the national total caseload. The development of the 62 arbitration commissions concerning the handling of international commercial arbitration cases is very unbalanced as well.

Second, China's legal system of international commercial arbitration is improving while the judicial interpretations and normative documents issued and implemented by the SPC provide favourable judicial environment and safeguard for the encouragement and support of the development of arbitration. The provisions on arbitration in the new judicial interpretation on the Civil Procedure Law cover almost all aspects of arbitration, including the coordination of jurisdictional conflicts between tribunals and courts, the recognition and enforcement of interim awards made outside mainland China, and the calculation of the term for the application of award enforcement, etc. so that arbitral awards can be enforced more efficiently and conveniently in China. The SPC's Several Opinions on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts is of great declaratory significance for the judicial review by the people's courts.

Third, China's international commercial arbitration institutions have comparative advantages and have gained more and more recognition internationally. They have apparent advantages in the efficiency of dispute resolution while the cases accepted involve diversified types of disputes. Parties have more choices in appointing arbitrators with more foreign arbitrators involved in case handling and the gradual release of restrictions under the panel system. The increase of

cases in which Chinese international commercial arbitration institutions apply foreign arbitration rules and cases involving both parties from outside mainland China shows parties' trust in their professional case administration capability and service level as well as the improvement of credibility of arbitration. The CIETAC, through its initiative of implementing the Guidelines on Evidence, is the forerunner of commercial arbitration institutions in publishing and implementing evidence rules, fills the gap in Chinese laws and has further pushed forward the internationalization of China's commercial arbitration.

Fourth, the application of law is clearer in China's international commercial arbitral awards and the application of the CISG is gradually mature, but there is still room for improvement. According to incomplete statistics, the tribunals of 7/8 cases could autonomously apply the CISG as requested when the condition of autonomous application is met. The CISG, as the uniform law in international sales of goods, needs unified interpretation and application. It is a development trend to follow the international practice and improve the unified application of the CISG.

Fifth, the fundamental principle of "pro-arbitration" or "arbitration-friendly" is further reflected in the judicial support and supervision of China's international commercial arbitration. The people's courts fully respect the finality of arbitral awards and strictly follow the principle of judicial review over issues stipulated in laws and exclude substantial matters such as burden of evidence, evidence admissibility and fact finding, etc. from the review. The people's courts only review the grounds relied on and evidence submitted by the parties with no

voluntary enlargement of the review scope except for those the courts may review on its own initiatives such as the violation of public interest and non-arbitrable matters, which shows the value guidelines of encouraging and supporting the development of arbitration. Meanwhile, the people's courts effectively perform the judicial supervision function, maintain and promote the credibility of arbitration through the timely annulment and non-enforcement of arbitral awards when circumstances stipulated in law such as no jurisdiction of arbitration commissions, violation of due process, etc. occur.

The Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road jointly issued by the National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce on 28 March 2015 marks the comprehensive implementation of the Belt and Road Initiative. The signing ceremony of the Asian Infrastructure Investment Bank Agreement on 29 June 2015 marks the new development phase of the Initiative. There are over 60 nations along the belt and road. Once disputes occur in the economic and trade exchanges among these nations, international commercial arbitration will be the most important dispute resolution method. Therefore, a healthy and comprehensive international commercial arbitration system is an important judicial guarantee for the implementation of the Belt and Road Initiative.

For further development of China's international commercial arbitration, the following endeavors should be made: to continue to develop and improve arbitration-related legislation, to strengthen the judicial support and supervision



favorable to international commercial arbitration, to enhance theoretical research, talent training and the building of arbitration culture, to actively encourage reform of Chinese arbitration institutions, constantly update arbitration rules and practice, to proceed with a dynamic integration of internationalization and localization, to exploit the advantages of institutional administration to the full, enhance the service capabilities and levels, to keep improving the arbitration system and promoting the credibility of arbitration, to actively participate in rule-making in international arbitration, to enhance the power of influence and have a better say in international community, to give full play to the important role of China's international commercial arbitration in international commercial dispute resolution, to build China as an international and regional arbitration center, to facilitate economic and trade development and cooperation among China and other countries in the world, and to promote the healthy development of international economic order.