ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA

(2022~2023)

Chiefly edited by the China International Economic and Trade Arbitration Commission

EDITORIAL BOARD

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

Table of Contents

Foreword

As China's most representative permanent international arbitration institution, the China International Economic and Trade Arbitration Commission (hereinafter referred to as the "CIETAC" in short), with nearly 70 years of rich experience in handling international commercial disputes, has constantly promoted innovations in foreign-related arbitration systems and the development of the rule of law in arbitration in China. In recent years, the number and dispute amount of international commercial arbitration cases accepted by CIETAC have all ranked the top among the international arbitration institutions, with the nationalities of the parties covering 152 countries and regions and the arbitral awards being widely enforced globally, building up international credibility, influence and competitiveness of arbitration in China. Chinese arbitration institutions, represented by CIETAC, adhere to the guidance of Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, fully implement the guidelines of the 20th National Congress of the CPC, follow the principles of independence, impartiality and efficiency of arbitration, promote the building of a first-class international arbitration institution, and strive to make China a new destination for international arbitration.

On September 22, 2015, CIETAC released its *Annual Report on International Commercial Arbitration in China (2014)* for the first time in Beijing, which is the first annual summary of the development of international commercial arbitration in China (commonly referred to as foreign-related arbitration in China in the sense of general public opinions). The Chinese and English versions of the Annual Report on International Commercial Arbitration in China have received wide attention by domestic and international arbitration theoretical and practice circles for the past eight years. In order to further summarize the development of the rule of law in international

commercial arbitration In China, promote the improvement to China's international commercial arbitration system, industry development and information exchange, expand China's voice and influence on the international commercial arbitration stage, and provide reference for China's further development of its international commercial arbitration undertaking, CIETAC has decided to continue to prepare and release its *Annual Report on International Commercial Arbitration In China (2022-2023).*

Besides the preface and annual brief summary, the *Annual Report on International Commercial Arbitration In China (2022-2023)* consists of five chapters, namely "Overview on the Development of International Commercial Arbitration In China", "Identification and Review of Repetitive Arbitration", "Development Trend of International Commercial Arbitration Rules", "Practical Study on Arbitration of Legal Disputes in the Automotive Industry from the Whole-Process Perspective", and "Cases of Judicial Review of International Commercial Arbitration in China and Legal Issues Involved". This Annual Report adopts a research method combining empirical analysis and theoretical research and strives to reveal the highlights of the development of international commercial arbitration in China. More specifically, on the basis of the comprehensive analysis of the data about the international commercial arbitration in China in 2022 and the development of the Chinese arbitration legal system and practice, CIETAC synchronously tracks the research trends of domestic and foreign commercial arbitration theories, continuously discusses the legal issues involved in the judicial review of international commercial arbitration in China, studies, analyzes and summarize the recent development trends of international commercial arbitration rules, with focus on the identification and review of repetitive arbitration practices, and in particular surveys on the hot issues in the practice of arbitration for automobile industry.

The leaders of the research team of the *Annual Report on International Commercial*

Arbitration In China (2022-2023) are Arbitrator Du Huanfang, the Party Secretary and Vice President of the Law School of Renmin University of China, and Arbitrator SU Sa, the Vice Chairman of the CIETAC Institute of Arbitration. The key members of the research team are YANG Honglei, Level II Senior Judge, and LI Na, Level II Senior Judge Assistant of the Civil Adjudication Tribunal No.4 of the Supreme People's Court, LIU Shihu, Deputy Director of the Arbitration Division of the Public Legal Service Administration of the Ministry of Justice, Arbitrator ZHAO Jian, Senior Consultant of Zhong Lun Law Firm, Arbitrator LIU Jing, Senior Partner of Chang An Law Firm in Beijing, CHEN Xiaofeng and SHEN Yan, lawyers of Chang An Law Firm in Beijing, Arbitrator SUN Yanchen, President of Hylands Compliance Institute of Hylands Law Firm in Beijing, and WANG Xuequan, General Legal Counsel and General Manager of the Legal Department of BAIC Group. ZHONG Yingqi, a PhD candidate, ZHANG Xiaoran, a master student, and JIANG Yan, a master student of the Law School of Renmin University of China, participated in the writing of some of the content. The specific tasks are as follows: The preface and the brief summary are written by Du Huanfang and ZHONG Yingqi. Chapter One is written by Du Huanfang, LIU Shihu, ZHONG Yingqi, ZHANG Xiaoran and JIANG Yan, Chapter Two by LIU Jing, CHEN Xiaofeng and SHEN Yan, Chapter Three by ZHAO Jian, Chapter Four by SUN Yanchen and WANG Xuequan, and Chapter Five by YANG Honglei and LI Na. Upon completion of the first draft of the Annual Report, Du Huanfang and SU Sa drafted the consolidated text, and WANG Chengjie, Vice Chairman and Secretary-General of CIETAC, XU Yanbo, Deputy Secretary-General of CIETAC, and XIE Changqing & GU Yan, Vice Presidents of CIETAC Court of Arbitration, reviewed the draft.

The preparation of the *Annual Report on International Commercial Arbitration in China (2022-2023)* has been consistently supported by the Civil Adjudication Tribunal No.4 of the Supreme People's Court and the Public Legal Service Administration of the Ministry

of Justice, and facilitated by Law School of Renmin University of China, Chang An Law Firm in Beijing, Hylands Law Firm in Beijing, and BAIC Group Co., Ltd., in terms of document provision, preparation of the first draft, and mid-term review, etc. LIANG Yi, ZHANG Bei, and ZHAO Jinxin from the CIETAC Institute of Arbitration made great efforts in the project establishment, division of work and coordination, collection of typical cases and data, and text checking, etc. Editor SHEN Xiaoying and editor in charge MAO Jingcheng from the Rule of Law and Economics Publishing Branch of Law Press China, among others, carefully planned the editing and proofreading, binding, and layout design, as well as typesetting and printing of this Annual Report. Our heartfelt thanks at the same time!

The Research Team of the Annual Report on International Commercial Arbitration in China (2022-2023)

August 2023

Chapter One

Overview of the Development of International Commercial Arbitration in China

I. Data Analysis of International Commercial Arbitration Cases in China

A. Cases Handled by Arbitration Institutions Nationwide[1]

1. Caseloads and total value of cases

In 2022, China's cross-border trade and economic cooperation has turned better gradually, showing a positive recovery trend. The growth of economic and trade exchanges has also brought about new development opportunities for the arbitration industry. In general, China's arbitration sector in 2022 has basically recovered to the level before the COVID-19 pandemic, while adapting to the new economic situation and showing new characteristics.

In 2022, 277 arbitration institutions nationwide handled 475,173 cases, an increase of 59,284 over that in 2021 with a year-on-year growth of 14.25%; the total value of arbitration cases nationwide was 986 billion yuan, an increase of 126.7 billion yuan overthat in 2021 with a year-on-year growth of 14.74%. To be specific, there were 320,262 traditional commercial arbitration cases, a year-on-year growth of 19.11%; 89 arbitration institutions handled 154,911 cases online, a year-on-year growth of 5.40%

(see Figures 1-1 to 1-4).

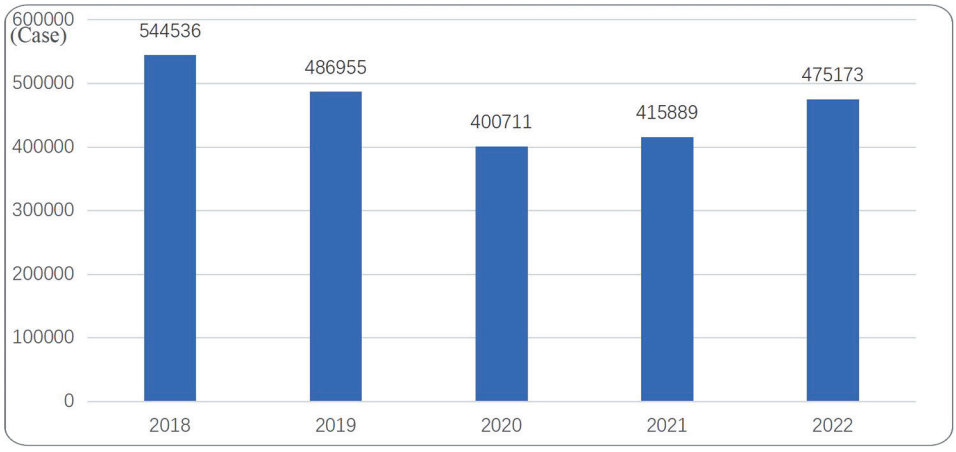

Figure 1-1 Caseloads of Arbitration Institutions Nationwide

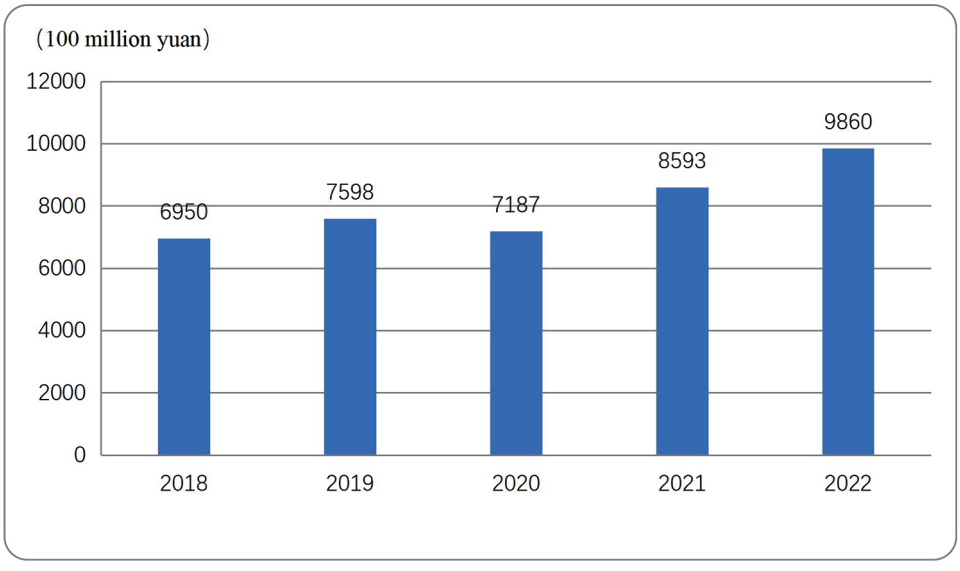

Figure 1-2 Total Value of Cases Handled by Arbitration Institutions Nationwide

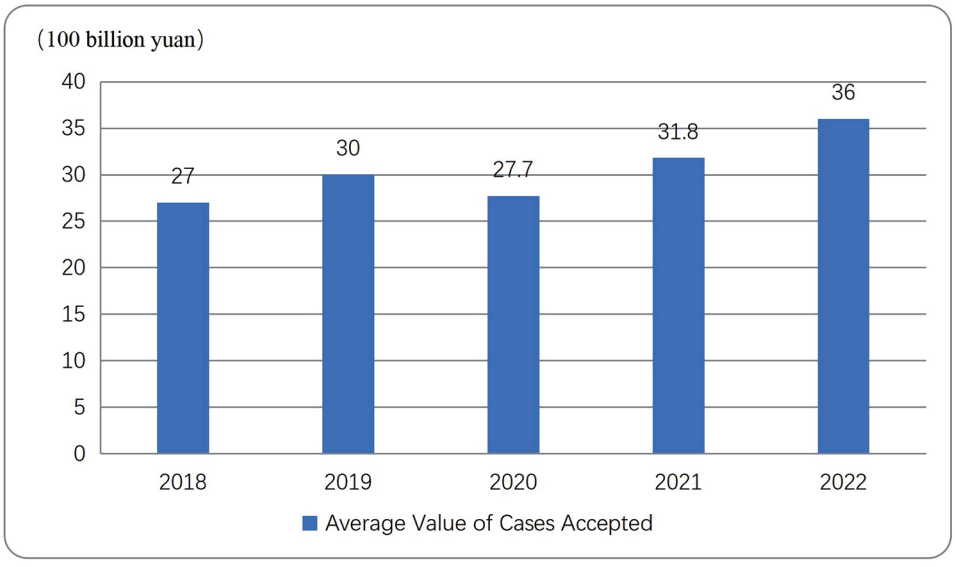

Figure 1-3 Average Value of Cases Handled by Arbitration Institutions Nationwide

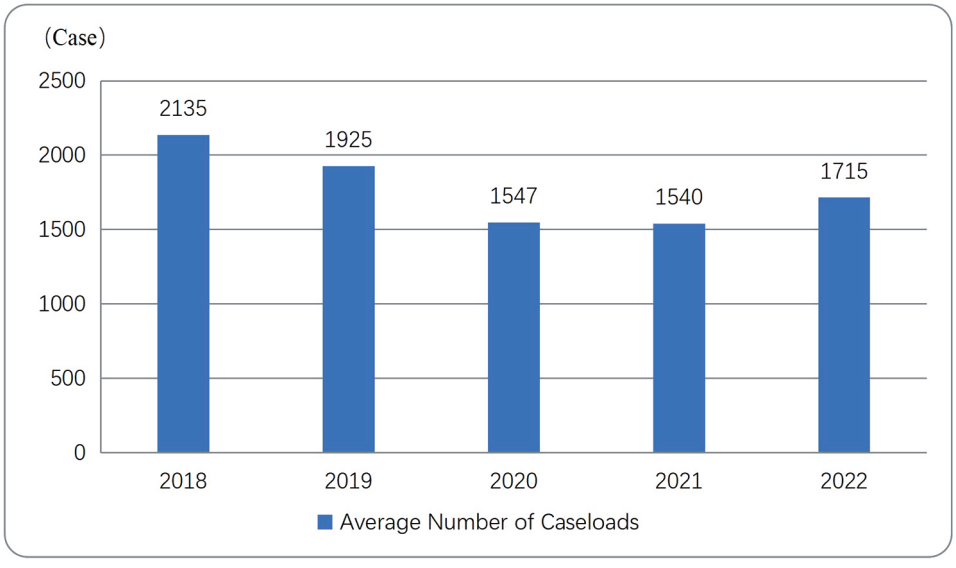

Figure 1-4 Average Number of Caseloads of Arbitration Institutions Nationwide

In 2022, among the 277 arbitration institutions in China, three institutions established by the China Chamber of International Commerce (namely the China International Economic and Trade Arbitration Commission, the China Maritime Arbitration Commission and the Cross-Straits Arbitration Center) handled 4,395 cases in total, accounting for 0.93% of the total number of cases in the whole country. The value of cases was 127.9 billion yuan, accounting for 12.97% of the total value of cases in the whole country.

Arbitration institutions (5 in total) established in centrally administered municipalities handled 22,829 cases, accounting for 4.81% of the total number of cases in the whole country. The value of cases was 222.4 billion yuan, accounting for 22.56% of the total value of cases in the whole country.

Arbitration institutions (27 in total) established in cities where the people's governments of provinces and autonomous regions are located handled 113,529 cases, accounting for 23.89% of the total number of cases in the whole country. The value of cases was 263.2 billion yuan, accounting for 26.70% of the total value of cases in the whole country.

Arbitration institutions (241 in total) established in other cities divided into districts handled 334,395 cases, accounting for 70.37% of the total number of cases in the whole country, and the value of cases was 372.4 billion yuan, accounting for 37.77% of the total value of cases in the whole country (See Figures 1-5 and 1-6).

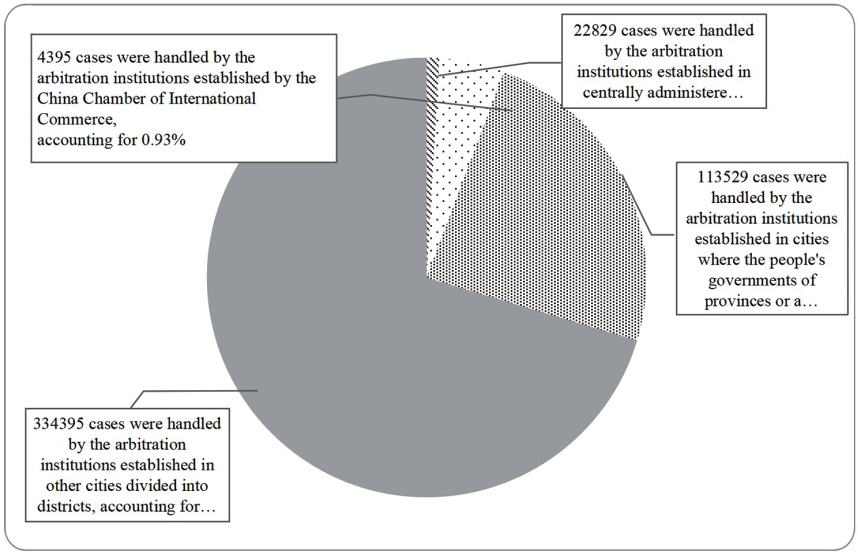

Figure 1 - 5 Proportion of Cases Handled

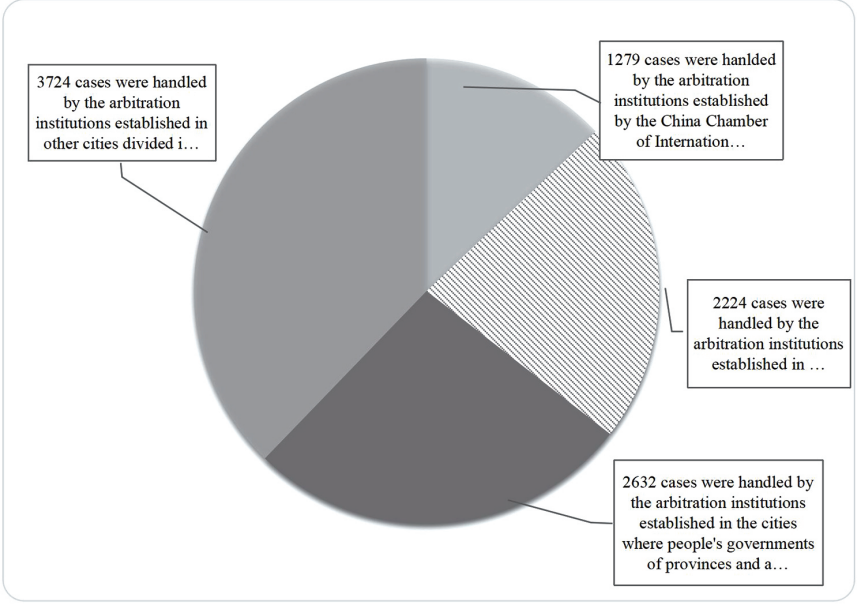

Figure 1-6 Proportion of the Value of Cases

2. Main types of cases handled

In terms of the number of various types of cases handled by arbitration institutions nationwide in 2022, the following order is as follows: 178,174 financial cases, accounting for 37.50% of the total number of cases in the whole country; 37,856 e-commerce cases, accounting for 7.97%; 28,613 sales cases, accounting for 6.02%; 27,860 real estate cases, accounting for 5.86%; 23,998 construction engineering cases, accounting for 5.05%; 21,807 property cases, accounting for 4.44%; 16,389 insurance cases, accounting for 3.45%; 15,743 leasing cases, accounting for 3.31%; 9,292 traffic accident compensation cases, accounting for 1.96%; 3,715 intellectual property cases, accounting for 0.78%; 3,354 equity transfer cases, accounting for 0.71%; 388 land transaction cases, accounting for 0.08%; 383 medical dispute compensation cases, accounting for 0.08%; and 232 agricultural production and operation cases, accounting for 0.05%.

The value of various types of cases are listed as follows: the value of financial cases is 265.7 billion yuan, accounting for 26.95% of the total value of cases nationwide; the value of construction engineering cases is 169.7 billion yuan, accounting for 17.21%; the value of cases of equity transfer is 118.3 billion yuan, accounting for 12.00%; the value of sales cases is 70.3 billion yuan, accounting for 7.13%; the value of real estate cases is 45.1 billion yuan, accounting for 4.58%; the value of land trading cases is 23.3 billion yuan, accounting for 2.37%; the value of leasing cases is 18.6 billion yuan, accounting for 1.89%; the value of surance cases is 7.4 billion yuan, accounting for 0.75%; the value of tellectual property cases is 7.3 billion yuan, accounting for 0.74%; the value of property management cases is 4.3 billion yuan, accounting for 0.44%; the value of cases of agricultural production and operation is 1 billion yuan, accounting for 0.10%; the value of e-commerce cases is 1 billion yuan, accounting for 0.10%; the value of cases of compensation for traffic accidents is 0.3 billion yuan, accounting for 0.03%; and the

value of cases of compensation for medical disputes is 0.7 billion yuan, accounting for 0.01%.

The types of cases handled by various arbitration institutions are as follows: 268 arbitration institutions handled construction engineering cases, accounting for 96.75% of the total number of arbitration institutions; 264 arbitration institutions handled sales cases, accounting for 95.31% of the total number of arbitration institutions; 251 arbitration institutions handled leasing cases, accounting for 90.61% of the total number of arbitration institutions; 235 arbitration institutions handled real estate cases, accounting for 84.84% of the total number of arbitration institutions; 227 arbitration institutions handled financial cases, accounting for 81.95% of the total number of arbitration institutions; 194 arbitration institutions handled property cases, accounting for 70.04% of the total number of arbitration institutions; 173 arbitration institutions handled equity transfer cases, accounting for 62.45% of the total number of arbitration institutions; 122 arbitration institutions handled insurance cases, accounting for 44.04% of the total number of arbitration institutions; 94 arbitration institutions handled land transaction cases, accounting for 33.94% of the total number of arbitration institutions; 83 arbitration institutions handled intellectual property cases, accounting for 29.96% of the total number of arbitration institutions; 34 arbitration institutions handled traffic accident compensation cases, accounting for 12.27% of the total number of arbitration institutions; 23 arbitration institutions handled e-commerce cases, accounting for 8.30% of the total number of arbitration institutions; 19 arbitration institutions handled agricultural production and operation cases, accounting for 6.86% of the total number of arbitration institutions; and 18 arbitration institutions handled medical dispute compensation cases, accounting for 6.50% of the total number of arbitration institutions.

3. Average number of cases handled

In 2022, the 277 arbitration institutions nationwide handled an average of 1,715 cases, an increase of 175 cases over 2021 with a year-on-year rise of 11.36%. The average value of cases was 3.6 billion yuan, an increase of 400 million yuan over 2021 with a year-on-year rise of 12.50%.

In 2022, 31 provinces, autonomous regions and centrally administered municipalities nationwide handled 470,778 cases, with a total value of 858.1 billion yuan. The average number of cases handled by arbitration institutions in provinces, autonomous regions and centrally administered municipalities was 15,186, an increase of 1,906 cases over 2021 with a growth of 14.35%. The average value of cases was 27.7 billion yuan, an increase of 4 billion yuan over 2021 with a growth of 16.88%.

In terms of the number of arbitration cases handled in provinces, the number of arbitration cases handled in seven provinces exceeded the national average, which was 335,310 cases in all, accounting for 70.57% of the total number of cases handled nationwide. To be specific, Zhejiang Province handled the highest number of cases with 91,542 cases, followed by Guangxi Zhuang Autonomous Region (66,387 cases), Guangdong Province (60,840 cases), Shandong Province (51,584 cases), Hubei Province (27,460 cases), Jiangsu Province (20,967 cases) and Fujian Province (16,530 cases) in sequence.

In terms of increase in the number of cases, Gansu Province saw the largest increase of 157.85%. Shandong Province (78.53%) and Hunan Province (65.42%) also saw a growth of over 50%.

In terms of the total value of cases handled in provinces, eight provinces exceeded the

national average, with a total value of 576 billion yuan, accounting for 58.42% of the national total. To be specifc, Guangdong Province saw the highest value, reaching 210.9 billion yuan, followed by Shanghai (105.5 billion yuan), Beijing (97 billion yuan), Shandong Province (40.2 billion yuan), Jiangsu Province (35.6 billion yuan), Hubei Province (29.7 billion yuan), Liaoning Province (28.6 billion yuan) and Zhejiang Province (28.5 billion yuan).

In terms of increase in the value of cases, Qinghai Province saw the largest increase of 21 times. Heilongjiang Province (71.15%), Jiangxi Province (69.39%), Sichuan Province (58.97%) and Jilin Province (53.13%) also saw a growth of over 50%.

4. Mediation, reconciliation and judicial supervision

In 2022, the number of cases settled through mediation and conciliation was 166,304, accounting for 34.94% of the total number of cases handled, increasing by 72,872 cases compared with 2021, up 77.99%.

In 2022, 120 arbitral awards from 25 arbitration institutions nationwide were set aside by people's courts, accounting for 0.03% of the total number of cases. Compared with 2021, the number of awards ruled to be set aside increased by 70, representing a growth of setting aside rate by 0.02%. 141 arbitral awards were ruled not to be enforced, accounting for 0.03% of the total number of cases. Compared with 2021, the number of cases ruled not to be enforced increased by 58, representing a growth of the rate of non-enforcement by 0.01% year-on-year. Specifically, there was a total of 8 arbitration institutions whose arbitration awards (5 in total)have been set aside or not enforced as ruled by the courts, an increase of 2 over the last year.

5. Handling of cases involving foreign elements, Hong Kong, Macao and Taiwan

In 2022, arbitration institutions (72 in total) handled a total of 2,888 cases involving Hong Kong, Macao and Taiwan as well as foreign countries, an increase of 197 compared with 2021, and the total value of foreign-related cases reached 119.9 billion yuan. Cases were mainly in Beijing, Shanghai, Guangdong, Zhejiang, Fujian and other eastern provinces and cities. To be specific, there were 1,228 cases involving Hong Kong, 199 cases involving Macao, 187 cases involving Taiwan, and other 1,274 foreign-related cases. There were 6 arbitration institutions which had handled more than 100 cases involving Hong Kong, Macao or Taiwan as well as foreign countries, namely, the China International Economic and Trade Arbitration Commission (hereinafter referred to as the "CIETAC" in short) with 642 cases, the Guangzhou Arbitration Commission (hereinafter referred to as the "GZAC" in short) with 635 cases, the Shenzhen Court of International Arbitration (hereinafter referred to as the "SCIA" in short) with 384 cases, the Beijing Arbitration Commission (hereinafter referred to as the "BAC" in short) with 221 cases, the Shanghai International Economic and Trade Arbitration Commission with 196 cases and the Hangzhou Arbitration Commission with 172 cases. To be specific, CIETAC handled 458 cases, the largest number of other foreign-related cases, accounting for 35.95% of all other foreign-related cases; the GZAC and the SCIA mainly handled the cases involving Hong Kong and Macao, with a total of 551 cases involving Hong Kong, accounting for 44.87% of all cases involving Hong Kong, and 134 cases involving Macao, accounting for 67.34% of all cases involving Macao.

B. Comparison of International Commercial Arbitration Practices between China and Foreign Countries

This Chapter intends to make a horizontal comparison of international commercial arbitration practice between China and the world's major arbitration institutions in 2022, and summarize the salient characteristics and development trends of

the international commercial arbitration practice in China. Considering that the international commercial arbitration in China mostly adopts the model of arbitration by institutions, the following major arbitration institutions are selected for comparison in this Chapter: CIETAC, the International Chamber of Commerce International Court of Arbitration (hereinafter referred to as "ICC" in short), the London Court of International Arbitration (hereinafter referred to as "LCIA" in short), the Arbitration institution of the Stockholm Chamber of Commerce (hereinafter referred to as "SCC" in short), the Singapore International Arbitration Centre (hereinafter referred to as "SIAC" in short), and the Hong Kong International Arbitration Centre (hereinafter referred to as "HKIAC" in short). This Chapter will make a comparative analysis of the annual reports of the above-mentioned international commercial arbitration institutions released through official channels, with focus on summary of the highlights and development trends of the international commercial arbitration practice in China in 2022.[2]

1.Number of cases accepted

In 2022, CIETAC accepted 4,086 cases, up 0.37% year-on-year, and the number of cases accepted witnessed three consecutive years of growth. 3,201 cases are being handled and 3,822 cases concluded.

There were a total of 642 cases involving 83 countries and regions, Hong Kong, Macao and Taiwan (including 83 international cases to which both parties are overseas parties), specifically, there were 32 countries along the "the Belt and the Road" involved, covering all ten ASEAN countries. There were 115 cases where English or Chinese-English bilingualism was agreed to apply. The degree of internationalization of cases has been improved significantly, and the number of foreign-related cases has increased greatly.

2 The *ICC Annual Report* has not been released officially at the time when this Chapter is written. July 10, 2023

There has been an increase in the number of cases where the parties have chosen to apply international conventions and foreign laws, including the *United Nations Convention on Contracts for the International Sale of Goods*, the laws of the Hong Kong Special Administrative Region of the PRC, the laws of Singapore, the laws of Uzbekistan, the laws of England and Wales and the laws of Mongolia etc., and have agreed on the application of *Incoterms 2000*, among others.

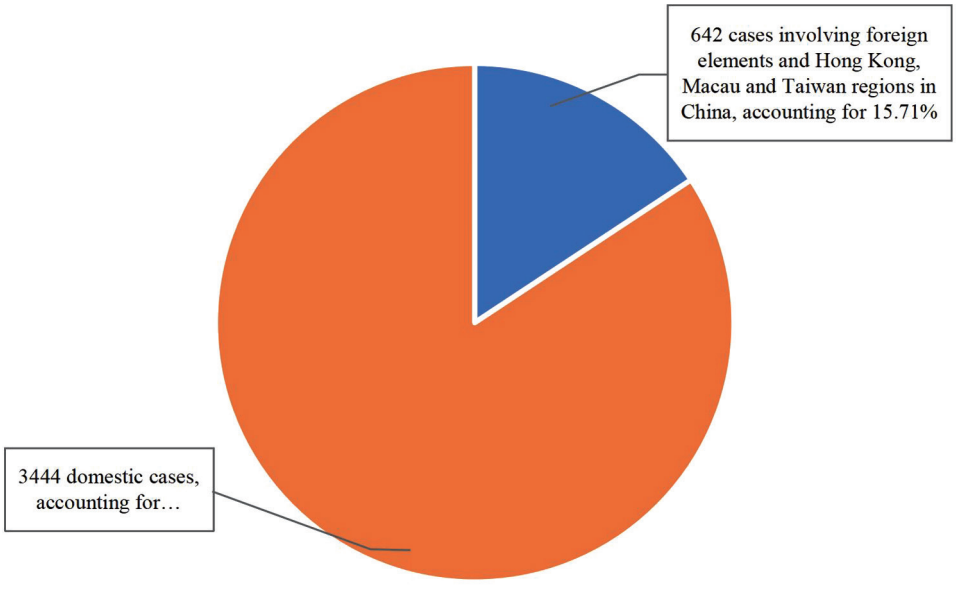

Figure 1 - 7 Comparison of the Number of Cases Accepted by CIETAC in 2022

(Unit: Case)

In 2022, SIAC accepted 357 cases, a 23.88% decrease year-on-year. Among the 357 cases, 88% (313) had international elements, while 12% (44) were pure Singaporean

domestic cases. The parties to these cases involved a total of 65 jurisdictions, and the applicable governing laws involved 28 jurisdictions. Specifcally, Singapore law (50.7%), English law (19.5%) and Indian law (4.2%) were frequently cited.

In 2022, LCIA accepted a total of 293 cases, representing a year-on-year decrease of about 9%. Among the 293 cases, 95% (278) had international elements, while 5% (15) were pure English domestic cases. The parties involved a total of 90 jurisdictions (excluding United Kingdom), among which English law was applicable to 85% of the cases, and other applicable laws cover a further 19 jurisdictions.

In 2022, SCC accepted a total of 143 cases, a decrease of 22 compared to 2021, representing a year-on-year decrease of 13.33%. Among the 143 cases, 67 (46.85%) cases had international elements, while 76 (53.15%) cases were Swedish domestic cases.

In 2022, HKIAC accepted a total of 344 arbitration cases, 83.1% of which involved foreign elements, including 32% of cases to which both parties were from outside the Hong Kong Special Administrative Region of the PRC and 5.8% of cases to which both parties were from outside Asia. In terms of the choice of governing law, the laws of the Hong Kong Special Administrative Region of the PRC remain the first ranking, followed by English law and Jersey law. In addition, the laws of the People's Republic of China, the State of Cayman Islands, the State of California, the United States, Seychelles, Singapore, Germany and other countries or regions were also applied.

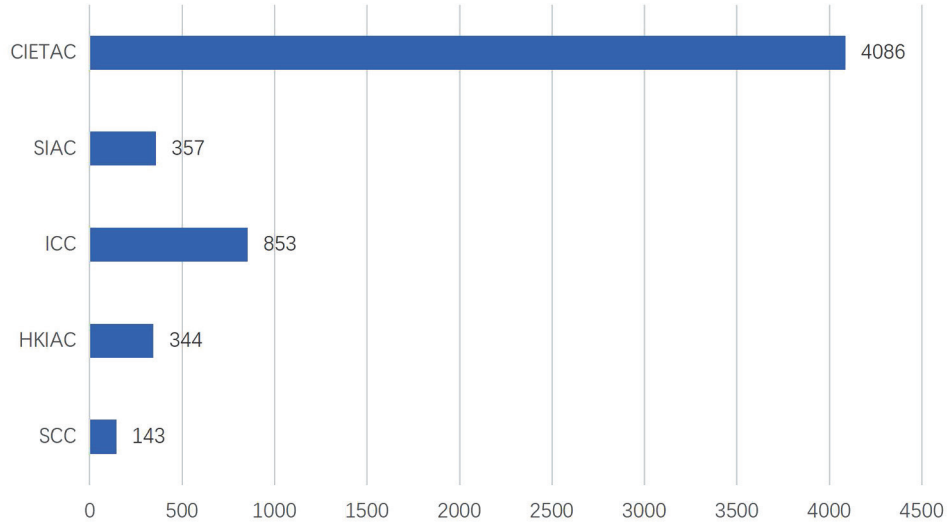

Figure 1 - 8 Comparison of the Number of Cases Accepted by Major Arbitration Institutions in 2022 (Unit: Case)

2. Parties to relevant cases

For international commercial arbitration, the level of internationalization, fame and recognition of an arbitration institution mainly depend on the internationalization of the parties to the case and the dispute concerned. In 2022, the information of the countries or regions from which the parties to relevant cases have come so far released by major international arbitration institutions is as follows:

The parties to cases accepted by CIETAC in 2022 involve 83 countries and regions, and the top ten sources of cases involving foreign elements are as follows: Hong Kong Special Administrative Region of the PRC, the United States, Germany, South Korea, Singapore,

British Virgin Islands, United Kingdom, Cayman Islands, Canada and Japan.

For the cases accepted by SIAC in 2022, the numbers of parties from India, the United States and China rank the top three, with 89, 87 and 74 respectively. Other parties are from the Cayman Islands, Malaysia, Hong Kong Special Administrative Region of the PRC, Indonesia, Thailand, South Korea, Vietnam, the United Kingdom, Australia and other countries and regions. Compared to 2021, India, China and the United States remain the top three in terms of the number of parties involved, while the number of parties from Malaysia, Thailand and Australia has significantly increased.

For the cases accepted by LCIA in 2022, the number of parties from Asia, Europe and the Middle East ranks top three. To be specific, the number of parties from Asian region increases significantly compared to 2021 and 2020, led by the largest number of parties from Singapore, the Mainland China and the Hong Kong Special Administrative Region of the PRC, accounting for 5%, 3.4% and 2.8% respectively. In 2022, the sources of parties become more diversified, but the most common parties are still from the United Kingdom, the United Arab Emirates, the Netherlands, Singapore, the United States and other countries.

Among the 143 cases accepted by SCC in 2022, 76 cases involve Swedish parties only, while the other 67 cases are international ones involving parties from 37 countries and regions. In addition to Sweden (198), the number of parties from Germany (21), Russia (14), Denmark and Austria (both 9) ranks high.

In 2022, the parties to the cases accepted by HKIAC are from 63 countries and regions. The countries or regions with the top ranking in terms of the number of parties are as follows: Hong Kong Special Administrative Region of the PRC, Mainland China, British Virgin Islands, Cayman Islands, Singapore, South Korea, the United States, Seychelles,

the United Kingdom and Australia.

3. Types of disputes

In 2022, the total number of types of cases accepted by CIETAC is 20, mainly including disputes over construction projects, electromechanical equipment, sale and purchase of goods, transfer of equity investment, service contracts, natural resources and finance, among which, the number of cases in respect of natural resources has witnessed a notable growth. The number of cases in respect of construction, renovation projects, contracting projects and real estate development and construction ranks the first, with 628 cases; the number of disputes over electromechanical equipment ranks the second, with 546 cases; the number of disputes over sale and purchase of goods, equity investment and transfer of equity, service contracts and natural resources maintains high (518, 453, 428 and 290 respectively), in which cases in respect of natural resources increase by 23.4%, and cases in respect of construction projects increase by 36.82%. In addition, CIETAC accepted 220 cases concerning financial disputes, 207 other cases, 194 cases concerning real estate disputes, and 117 cases concerning disputes in the cultural and entertainment industries.

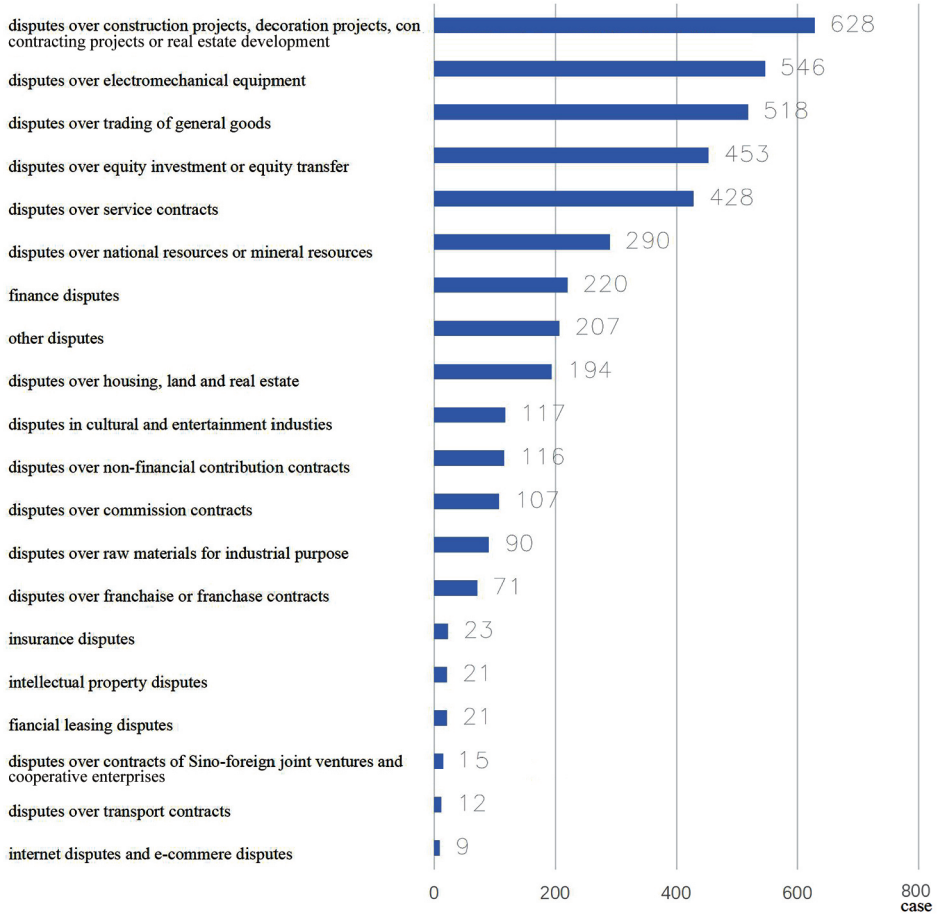

Figure 1 - 9 Types and Number of Cases Accepted by CIETAC in 2022

In 2022, the main types of cases accepted by SIAC are trade cases (21%), commercial cases (20%), other cases (20%), enterprise-related cases (15%), maritime cases (13%) and construction engineering/energy cases (11%).

In 2022, the main types of cases accepted by LCIA are cases of transportation/trade

in goods (37%), banking and finance cases (15%), energy/resources disputes (11%), specialized service disputes (9%), construction engineering/infrastructure cases (5%) and entertainment media cases (4%).

In 2022, the main types of cases accepted by SCC are delivery cases (22%), commercial acquisition cases (21%), service contract cases (19%) and corporate cases (11%), among others.

In 2022, the main types of cases accepted by HKIAC are banking and financial services cases (36.9%), corporate cases (17.7%), international trade/sale of goods cases (14%), maritime cases (12.5%), construction engineering cases (9.9%), specialized services cases (3.8%), real estate cases (1.5%), energy cases (0.9%), insurance cases (0.9%), individual cases (0.9%), intellectual property cases (0.6%) and others.

4. Seat of arbitration

The choice of the seat of arbitration is of great importance to international commercial arbitration, as it relates to the jurisdiction within which an arbitral award is subject to judicial review. In recent years, a number of seats of arbitration have steadily gained popularity around the world. The top five of these seats are London, Singapore, Hong Kong Special Administrative Region of the PRC, Paris and Geneva, with Beijing and Shanghai also ranking in the top ten. Beijing is a particularly attractive seat for the parties from the Asia Pacific region, the Europe region and the Middle East region. The most important factor to be considered in the process of choosing a seat of arbitration is the degree of support of the local courts and judicial policies for arbitration. Other factors to be considered include the neutrality of the local judicial system, the enforceability of an arbitral award and the enforceability of emergency arbitrators or interim measures. This demonstrates the increased focus of the parties choosing a seat of arbitration on the

outcome and enforceability of the arbitral awards issued by the seat of arbitration.

London continues to be the most popular seat of arbitrations in terms of the cases accepted by LCIA in 2022, with 88% of LCIA arbitrations taking place in London in 2022, a similar proportion to 2021 (85%). In addition to the United Kingdom, 12 other countries have been selected as the seat of arbitration, including Singapore, Qatar, Spain, Switzerland, Afghanistan, the United Arab Emirates, and Mauritius. Singapore and Qatar rank second in terms of the number of cases each with 6 (2%) choosing them as the seat of arbitration.

Among the cases accepted by SCC in 2022, 64% selected Stockholm as the seat of arbitration. Gothenburg and Malmo (cities in southern Sweden) ranked second (9%) and third (4%) respectively for the number of cases in which Gothenburg and Malmo were selected as the seat of arbitration. Overall, there were relatively few cases in which a place other than Sweden was chosen as the seat of arbitration.

Among the cases accepted by HKIAC in 2022, 97.7% selected the Hong Kong Special Administrative Region of the PRC as the seat of arbitration. In addition, parties also chose England and Wales or other locations as the seat of arbitration.

5. Arbitrators

Among the cases accepted by CIETAC in 2022, 83 cases were heard by 87 foreign arbitrators, and 115 cases agreed to be heard in English or in both Chinese and English.

There was a total of 340 appointments of arbitrators in SIAC in 2022, among which 145 appointments were initiated by SIAC. In 2022, SIAC nominated a total of 121 foreign arbitrators, mainly from the United Kingdom, Australia, the US, India, Malaysia, Canada and other countries. Among the 145 appointments initiated by SIAC, 67

appointments are for female, accounting for 46.2%.

There was a total of 289 appointments of arbitrators in LCIA in 2022, with 50% of the appointments initiated by the parties, an increase (44%) over 2021. About one third of the arbitrators were appointed directly by LCIA (compared to 42% in 2021). Arbitrators come from 49 different countries and regions, with 60% of them from the United Kingdom and 40% from other countries and regions, including the United States (27), Canada (14) and Germany (12), among others. Among the arbitrators appointed by LCIA, 45% are female and 55% are male.

There was a total of 187 appointments of arbitrators in SCC in 2022, among which 50 appointmetns were initiated by SCC. The vast majority of arbitrators are from Sweden (137 appointments), together with arbitrators from the United Kingdom (11 appointments), Germany (7 appointments) and Finland (6 appointments). Among all the appointments, 34% are female and 66% are male.

There was a total of 159 appointments of arbitrators in HKIAC in 2022. Among which, 43 appointments are for female, representing 27% of the total number of appointments. The majority of arbitrators are from the following countries or regions: Hong Kong Special Administrative Region of the PRC (32.7%), England (18.2%), Australia (9.4%), Singapore (5%), France (4.4%), Canada, Mainland China and Malaysia (both 3.2%), the United States (2.5%), Sweden (1.9%), Denmark (1.3%), Germany and New Zealand (both 0.6%).

6. Amount in dispute in arbitration

In 2022, the total amount of arbitration cases accepted by CIETAC reached 126.9 billion yuan, exceeding the threshold of 100 billion yuan for five consecutive years, up

2.99% year-on-year. There were 188 cases with disputes involving a total amount of over 100 million yuan, among which there were 17 cases with disputes involving a total amount of not less than 1 billion yuan, up 6% year-on-year. The amount of dispute in the foreign-related cases reached 37.4 billion yuan, while the amount of dispute in the domestic cases reached 89.5 billion yuan, up 36% year-on-year. The amount of dispute in the cases to which both parties are foreign ones reached 5.4 billion yuan, up 47% year-on-year.

In 2022, the total amount in dispute of the cases accepted by SIAC was US $5.61 billion, and the average amount in dispute of the cases was US $21.43 million. The highest amount in dispute was US $627 million.

In 2022, there was a significant increase in cases with amounts below US $1 million (up 4%) and cases with amounts ranging from US $5 million and US $10 million (up 3%), while there was a notable decrease in cases with amounts between US $20 million and US $50 million (down 7%) in 2022 compared with 2021.

In 2022, the total amount in dispute of the cases accepted by SCC was EUR1.6 billion, including the cases to which the normal rules apply, the cases to which the expedited arbitration rules apply and emergency arbitration cases.

The total amount in dispute in cases accepted by HKIAC was HK$43.1 billion (approximately US$5.5 billion), with the average amount of cases of HK $180.6 million (approximately US $23.2 million).

7. Summary

The following basic conclusions can be reached through a statistical analysis of the annual reports and case data of the above major international commercial arbitration bodies:

Firstly, in terms of the number of cases accepted, the number of cases accepted by CIETAC showed an upward trend in 2022 and in the recent three consecutive years, while the number of cases accepted by SIAC, LCIA, HKIAC and SCC decreased, with HKIAC experiencing the largest decrease. Affected by the pandemic and the global economic environment, while the number of cases accepted by other international arbitration bodies declined, CIETAC saw a growth against the trent. It can be seen that the influence and representativeness of CIETAC in ternational commercial arbitration have further expanded, not only relative to other domestic arbitration bodies but also relative to other internationally renowned arbitration institutions, and that CIETAC is expected to play a more important role in the field of international commercial arbitration in the future.

Secondly, in terms of the types of disputes, the types of cases accepted by the international commercial arbitration institutions in China are still complex and diverse, but the main type of disputes and the largest number of cases involve traditional types of disputes, such as construction project disputes, electromechanical equipment disputes, disputes over trading of general goods, equity investment disputes and equity transfer disputes. On the other hand, with the strengthening of the concept of environmental protection and the development of the digital economy, the number of disputes in the fields of natural resources, Internet, entertainment industry and intellectual property are also gradually increasing. This growing trend not only reflects higher requirements for and challenges to the professionalism of arbitration institutions and arbitrators, but also shows the fact that CIETAC arbitration services are keeping pace with the times.

Thirdly, in terms of the amount in dispute, the total value of arbitration cases accepted by CIETAC again exceeded the threshold of 100 billion yuan, with the number of cases of large value exceeding 100 million yuan being particularly prominent. In contrast,

the total value of cases accepted by HKIC and SIAC decreased. The significant increase in the value of accepted cases also indirectly reflects that the international commercial arbitration institutions in China has not only gradually increased the number of cases accepted, but also steadily improved the quality of their handling of cases, with their service quality and professionalism increasingly recognized by the parties.

Fourthly, from the above-mentioned considerations such as the number of cases accepted, amount in dispute, parties to cases, and seat of arbitration, it can be seen that the international influence of China's international commercial arbitration institutions is gradually expanding in terms of the degree of internationalization. As a flag of the international commercial arbitration in China, CIETAC has been increasingly recognized by more and more parties to international commercial disputes. In addition, the international commercial arbitration institutions in China have built close institutional ties with international dispute resolution institutions and organizations around the world, actively participated in the development of international rules in the field of international arbitration, built bridges of cooperation, and demonstrated the influence and new responsibilities of Chinese arbitration institutions in ternational arbitration exchange and cooperation.

II. The Ministry of Justice Released Guiding Cases on Arbitration

On January 11, 2023, the Ministry of Justice released three guiding cases on arbitration. [3]The cases released this time mainly focus on areas closely relating to people's production and life such as sale of goods, house leasing and intellectual property rights, fully reflect

3 The *Ministry of Justice Released Guiding Cases on Arbitration* released on the official webside of the Ministry of Justice on January 11, 2023, http://www.moj.gov.cn/pub/sfbgw/gwxw/xwyw/202301/t20230111_470637.html

the advantages and characteristics of arbitration in resolving disputes efficiently and conveniently, and embody the responsibilities of arbitration institutions in serving the overall situation, which are relatively typical and exemplary.

Firstly, a guiding case on arbitration for the dispute over the contract for sale of goods. Resolving the dispute between the claimant and the respondent over a contract for sale of goods through arbitration and actively organizing mediation in arbitration may simultaneously demonstrate the advantages of arbitration in professionalism in hearing contract disputes and the advantages of mediation in dispute resolution. In a case arbitrated by Shanghai Arbitration Commission ("SHAC") concerning the dispute over a contract for sale of goods between the claimant and the respondent, after SHAC accepted the case, the arbitration tribunal actively organized mediation for the parties concerned, and in accordance with *SHAC's Special Measures for Improving the Convenience of Arbitration During the Period of COVID-19 Pandemic to Relieve the Parties Concerned*, finally defined the way of sharing the arbitration costs and the time limit for payment of the remaining purchase price in a mediation agreement so as to successfully resolve the dispute.[4]

Secondly, a guiding case on arbitration for the dispute over a property lease contract. Under the severe situation of the COVID-19 pandemic, there were difficulties in offline court hearings, and online dispute resolution can effectively help achieve the dual values of fairness and efficiency. In a case arbitrated by Guangzhou Arbitration Commission ("GZAC") on the dispute over a property lease contract between a state-owned enterprise as the claimant and a resident of Hong Kong Special Administrative Region

4 A case arbitrated by SHAC of the dispute over a contract for sale of goods between XXX Building Materials Company and XXX Construction Company (Case No.: SHGNZC 1645584177).

of the PRC as the respondent, a dispute arose between the parties over the overdue payment of the rent and comprehensive management fees of the shops involved. Fully respecting the free will of the parties, GZAC actively coordinated with the claimant and the respondent for mediation. As the respondent and a person not involved in the case who lived abroad jointly operated the shop in question, the arbitral tribunal conducted several online mediations with the parties through the Online Dispute Resolution (ODR) platform of GZAC, and finally made clear in the mediation agreement that the claimant reduced part of the liquidated damages for the respondent and agreed on the proposal of the respondent on payment by installments, and the person not involved in the case also agreed to make payments together with the respondent and bear joint and several liabilities, which achieved a win-win result for all the parties.[5]

Finally, a guiding case on arbitration of the dispute over a copyright contract. This guiding case fully reflects the role of mediation in arbitration, implements the concept of promoting dispute resolution and serving and safeguarding steady economic and social development. In this case, the respondent and the claimant agreed that the respondent would license the claimant to use the right of information network communication of animation works via internet media. Later, a dispute arose from the performance of the license agreement, and the claimant applied to Wuhan Arbitration Commission for arbitration, requesting the court to rule that the respondent should continue to perform the license agreement. The arbitral tribunal comprehensively considered the background of this case, the basis of cooperation between the parties and other factors, and by virtue of its professional ability and mediation skills, conducted mediation of the dispute in question. The license agreement in question was rescinded after mediation, and the issue

5 A case arbitrated by GZAC of the dispute over a property lease contract between a state-owend enterprise and a Hong Kong (China) resident (Case No.: GDCWZC 1638754660)

of individual authorization for part of the works was resolved by the parties separately.[6]

III. The Supreme People's Court ("SPC") Released Guiding Cases on Arbitration

The SPC released the 36th batch of six guiding cases on December 27, 2022, all of which are cases of arbitration-related judicial review, covering many important legal issues in arbitration-related judicial review such as the determination of the validity of an arbitration agreement, the application for setting aside of an arbitral award, etc. This batch of guiding cases aims to strengthen the guidance on arbitration-related judicial review and ensure uniform judgement criteriam, which will have a significant impact on the future development of arbitration in China, and will also attract great attention from the international arbitration community.

A. Cases Relating to Judicial Review of Validity of Arbitration Agreements

In the case[7] Yunyu Limited v. Shenzhen Zhongyuancheng Commercial Investment Holdings Co., Ltd. for confirmation of validity of an arbitration agreement, the guiding opinion focused on analyzing the existence of the arbitration agreement from the perspectives of independence of the arbitration agreement and mutual consent to the arbitration. The two parties had disputes over the validity of the arbitration agreement for the property rights transaction contract in question. Zhongyuancheng filed an arbitration application with SCIA under the contract, while Yunyu Company

6 A case arbitrated by Wuhan Arbitration Commission on the dispute over a copyright contract between a cultural company as the claimant and an animation company as the respoendent (Case No. HBGNZC 1655341267).

7 Yunyu Limited Company v. Shenzhen Zhongyuancheng Commercial Investment Holdings Co., Ltd. for determination of validity of an arbitration agreement, the SPC Civil Judgment (Zui Gao Fa Min Te [2019] No.1) and the SPC Guiding Case No.196.

and other parties filed lawsuits respectively before Shenzhen Intermediate People's Court of Guangdong Province, applying for confirmation of the non-existence of the arbitration agreement. The SPC elaborated on its position from two aspects: (a) Where a party requests confirmation of the non-existence of an arbitration agreement on the grounds that the arbitration clause has not been established, this is a case of application for confirmation of the validity of an arbitration agreement, and the people's court shall file case for examination. (b) the independence of an arbitration agreement is a widely-recognized basic legal principle, which means that the existence and validity of an arbitration agreement and the master contract are separable and independent of each other. Where the parties negotiate an arbitration clause and reach an agreement to submit disputes for arbitration at the time of conclusion of the contract, the existence and validity of the arbitration clause will not be affected by whether the contract has been established or not. (c) The existence of an arbitration clause mainly refers to whether the parties have reached an agreement to refer disputes for arbitration, i.e., whether an arbitration agreement has been reached. In this case, we can see that the parties have always jointly recognized to refer disputes for arbitration. Therefore, it should be determined that a valid arbitration clause exists between the parties, and the disputes between the parties shall be referred to SCIA for arbitration.

In the case[8] Shenzhen Shizheng Gongying Investment Holdings Co., Ltd.("Shizheng Gongying")v. Transportation Bureau of Shenzhen Municipality, for determination of validity of an arbitration agreement, the Court provided interpretation on the validity of the arbitration agreement in repetitive arbitration. The parties differed on whether the arbitration agreement was valid in the context of a new arbitration proceeding. The

8 Shenzhen Shizheng Gongying Investment Holdings Co., Ltd. v. Transportation Bureau of Shenzhen Municipality, for determination of validity of an arbitration agreement, the Civil Judgment (Yue Min Zhong [2020] No.2212) issued by the Higher People's Court of Guangdong Province, and the SPC Guiding Case No.197.

Higher People's Court of Guangdong Province held that: although this case entered into a new arbitration proceeding, it is still the same dispute. Shizheng Gongying did not object to the validity of the arbitration agreement during the arbitration proceeding and confirmed that it had no objection to the arbitration proceeding, and its act shall still be valid in the context of the new arbitration. In accordance with Article 13 of *Interpretation of the SPC on Several Issues Concerning Application of the Arbitration Law of the People's Republic of China*, which provides that "according to the provisions of Article 20.2 of the Arbitration Law, if a party concerned fails to challenge the validity of an arbitration agreement before the first hearing in the arbitration tribunal, and then applies to the people's court for confirming the invalidity of the arbitration agreement, the people's court shall not accept such application", it was appropriate for the court of first instance to reject the application of Shizheng Gongying for the objection to the validity of the arbitration agreement.

B. A Case Involving Judicial Review of Setting aside of an Arbitral Award

Firstly, an arbitral award shall be set aside on the grounds of the absence of an arbitration agreement. In the case[9] Industrial and Commercial Bank of China Limited ("ICBC") Yueyang Branch v. LIU Youliang, for setting aside of an arbitral award, the parties applied to Yueyang Arbitration Commission for arbitration for their dispute over project prices under the *Construction Contract for a Decoration Project* and the supplementary contract. On December 22, 2017, Yueyang Arbitration Commission ruled that ICBC Yueyang Branch shall pay LIU Youliang the project prices that were due and payable as well as liquidated damages. ICBC Yueyang Branch then applied to Yueyang Intermediate

9 ICBC Yueyang Branch v. Liu Youliang, for setting aside of an arbitral award, Civil Judgment (Xiang 06 Min Te [2018] No. 1) issued by the Yueyang Intermediate People's Court, Hunan Province, and the SPC Guiding Case No.198.

People's Court in Hunan Province for setting aside of the arbitral award. The Court held that the arbitration agreement is an agreement of the parties to voluntarily refer all or specified disputes between them in respect of specified legal disputes, whether contractual or non-contractual, that have arisen or may arise between them to arbitration. According to the arbitration clause in the *Construction Contract for a Decoration Project* signed by and between ICBC Yueyang Branch and Baling Company, any dispute arising from the settlement and payment of project price shall be settled through arbitration. However, LIU Youliang, as the actual constructor, was not a party to the *Construction Contract for a Decoration Project*. LIU Youliang and ICBC Yueyang Branch or Baling Company had not reached any agreement on arbitration, so he was not bound by the arbitration clause of the Contract. There was no arbitration agreement between ICBC Yueyang Branch and LIU Youliang. Therefore, there was no legal basis for Yueyang Arbitration Commission to resolve the dispute over project price between ICBC Yueyang Branch and LIU Youliang by means of arbitration based on LIU Youliang's application. The Court upheld the request for setting aside of the arbitral award.

Secondly, an arbitral award shall be set aside on the grounds that it is against the public interest. In the case[10] GAO Zheyu v. Shenzhen Yunsilu Innovation and Development Fund Enterprise ("Yunsilu") and LI Bin, for setting aside of an arbitral award, disputes arose between the parties out of the payment of equity transfer price and return of Bitcoin assets under the contract. The case was accepted by Shenzhen Arbitration Commission. Upon hearing, the arbitral tribunal held that GAO Zheyu's failure to deliver the Bitcoin that both parties mutually agreed on and deemed as of property significance as agreed in the contract in question constituted a breach of contract and

10 GAO Zheyu v. Shenzhen Yunsilu Innovation and Development Fund Enterprise ("Yunsilu") and LI Bin, for setting aside of an arbitral award, Civil Judgment (Yue 03 Min Te [2018] No. 719) issued by Shenzhen Intermediate People's Court in Guangdong Provice, and the SPC Guiding Case No. 199

thus compensation should be made. The arbitral tribunal ordered the Respondent to pay the equity transfer price, the money equivalent to the value of Bitcoin and liquidated damages, and ordered to change the equity held by Yunsilu, the Claimant, into the name of GAO Zheyu, the Respondent. GAO Zheyu argued that this arbitral award was against the public interest and requested the people's court to set aside the award. Shenzhen Intermediate People's Court in Guangdong Provice held that, according to the *Notice of the People's Bank of China, the Ministry of Industry and Information Technology, the China Banking Regulatory Commission, the China Securities Regulatory Commission and the China Insurance Regulatory Commission on Preventing Bitcoin Risks* (Yin Fa [2013] No.289), Bitcoin does not have the same legal status as a currency, whch cannot and should not be circulated in the market as a currency. In 2017, seven ministries and commissions including the People's Bank of China reiterated the above provisions in the *Announcement on Preventing the Risks of Token Offering and Financing*. The above Documents in essence prohibit the cashing, trading and circulation of Bitcoin, and the speculation in Bitcoin is suspected of illegal financial activities, disrupts the financial order, and affects financial stability. As the award issued by Shenzhen Arbitration Commission is not in line with the guidelines of the above Documents and goes againt the social and public interests, it shall be set aside.

IV. Recent Research Developments on International Arbitration at Home and Abroad

Consolidating the research literatures on international commercial arbitration in English and Chinese in various Chinese and English databases, national libraries and paper journals in 2022, this Chapter sorts out and summarizes the major research developments in ternational arbitration research at home and abroad since 2022 and comments them.

A.Domestic Research Developments

The research achievements on international arbitration in 2022 by domestic academia can mainly be divided into three aspects. The first is focusing on the improvement and development of the international commercial arbitration system, involving new issues such as third party funding for arbitration, reform of the arbitration institution system, arbitrability of specific cases, and diversified dispute resolution mechanisms, etc., and traditional issues such as judicial review of arbitration are also studied at the same time. The second is studying the establishment of a sports arbitration mechanism against the background of the revision and promulgation of the Sports Law. The third is focusing on investment arbitration, which mainly centers on the reform of the investor-State dispute settlement mechanism and the difficult issues in vestment arbitration.

1.A study on third-party funding for arbitration

In recent years, third-party funding has gradually expanded from litigation to arbitration, especially in the area of international investment arbitration, providing investors with financial needs with opportunities to access to justice. [11]With the legislative reforms in Singapore and the Hong Kong Special Administrative Region of the PRC, third-party funding as a way to bear dispute resolution costs has emerged in the commercial arbitration market in the Asia-Pacific region. At present, the rapid development of commercial arbitration in Mainland China has driven the growth of dispute resolution cost financing demands, and the introduction of third-party funding is irresistible.[12]

11 *Approaching Justice: Regulation of Risks of Third-party Funding for International Investment Arbitration* witten by TANG Xia and published on *Journal of South China Normal University (Social Sciences Edition)*, Issue No.2, 2022, pp. 34-45.

12 *Dual Regulatory Model for the Third-party Funding Mechanism* witten by HOU Peng and published on *Law Review*, Issue No.3, 2019, pp. 130-139.

One view is that the demand for targeted financing for arbitration proceedings has emerged as a result of the increasing level of legal skills and financial capital as required by arbitration proceedings for the parties. Third-party funding, as a financial instrument specially applied in the dispute resolution legal services market, exactly satisfies the mutual needs of funders and parties, and therefore is developing and becoming popular in ternational investment arbitration and commercial arbitration. The advantages of third-party funding lie in the following aspects: (a) it provides strong material support for the parties to the dispute. The participation of third-party funding can provide financial guarantee for the weaker party to seek justice, giving full play to the due effectiveness of the dispute resolution mechanism. (b) it shares enterprises' operation risks. Third-party funding for investment arbitration can ensure that the arbitration proceedings will not have excessive adverse impact on the daily business activities of the parties, especially small and medium-sized enterprises; and (c) it provides legal and technical assistance to the parties. Monitoring by the funding party over a case has strengthened the action responding team of the funded party, improved the ability of the funded party to manage arbitration proceedings, and further promoted the settlement of disputes. It is just because that the funding from a third party is conducive to enhancing the willingness of the parties for arbitration and sharing the risk of losing the case. Therefore, there is a growing number of international investment arbitration cases in which investors are funded by third parties. [13]The social value of the third-party financing lies in helping the parties to realize their right of seeking legal remedy and in optimizing the legal environment for regional dispute settlement, hence it is necessary for China to develop third-party financing. The system for funding arbitration by third parties shall be fully developed with a view to protecting the legitimate rights of economically disadvantaged

13 *On the Financing of International Investment Arbitration by Third Parties and Its Regulations* written by LIU Jingdong and LI Qingyuan and published on *Academic Exchange*, Issue No. 12, 2020, pp. 68-78.

groups and promoting the substantial equality between the two parties to arbitration. It is required to adopt restrictive measures such as promoting the risk sharing between funding parties and funded parties, ensuring the full disclosure of information by funding parties, and scientific evaluation of reasonable access conditions, so as to give full play to the function of arbitration, stick closely to arbitraiton's value core and reasonably safeguard arbitration autonomy.[14]

Another view is that the third-party funding not only impacts the contractual nature of arbitration, but also affects the autonomy of will. Insufficient attention paid to disclosure of third-party funding under current practices[15], binding of confidentiality clauses of the funding agreements and the mixed identity of arbitrators may exacerbate the conflicts of interests between funders and arbitrators and hinder the effective resolution of investment disputes. In order to promote the sustainable development of the system of third-party funding for arbitration, with respect to the risk of conflicts of interest caused by the funding provided by a third party, some scholars have proposed that it is necessary to clarify the claimant's compulsory disclosure obligation, empower the arbitral tribunal to adjust the arbitration fees to force the claimant to disclose the funding provided by a third party, and regulate the disclosure and appointment of arbitrators. [16]The standard of proof shall be applicable to the disclosure or non-disclosure of the funding agreements, and disclosure will only be directed upon the satisfaction of particularity, relevance and

14 *The Institutional Establishment of the Third-Party Funding for Commercial Arbitration* written by WANG Chao and published on *International Business Research*, Issue No. 4, 2019, pp.45-54.

15 *Research on the Protection and Restrictions of Autonomy of Will for Third-Party Funding for Arbitration witten by LI Xiansen and published on Commercial Arbitration and Mediation*, Issue No. 4, 2022, pps 5-26.

16 *Difficulties and Solutions to the Lack of Disclosure Rules on Funding by Third Parties in International Investment Arbitration* witten by TANG Xia and published on *Journal of Henan University (Social Sciences Edition)*, Issue No. 5, 2022, pp. 53-58.

materiality. [17]With respect to the legislative gap of rules in China with respect to the third-party funding, some scholars believe that China should enact laws to clarify the legality of the third-party funding for arbitration, and emphasize the accommodating role of soft law in regulating the third-party funding. In terms of the development of specific systems, it is recommended to optimize the rules design of the information disclosure system for the funded party with respect to the scope, property, timing and form, etc. of information disclosure.[18]

2.A study on the reform of standardization of arbitration institutions

The first issues is on the articles of association of an arbitration institution. In order to strike a balance between government support and the independence of arbitration institutions, some scholars have proposed that the basic matters of the articles of association of an arbitration institution, the effectiveness of articles of association of an arbitration institution and the modes of external supervision over an an arbitration institution shall be stipulated in laws, so as to conduct effective public supervision of the articles of association of an arbitration institution. [19]The second issue is on information transparency of arbitrators. A roster of arbitrators is an important medium for arbitrators to disclose information. However, the roster of arbitrators of different commercial arbitration institutions differs widely in the quantity of information disclosed, the types of information and the extent of disclosure. It is necessary for China to attach

17 *Third-party Funding for Arbitration: Challenges to and Precautions Against Arbitrator Independence witten* by TAN Chenyi and published on *International Business Research*, Issue No. 1, 2019, pp. 78-85.

18 *Regulation of Funding by Third Parties in International Commercial Arbitration – A Perspective from the Information Disclosure Obligation of the Funded Party* written by CHEN Yazheng and FENG Shuo and published on *Commercial Arbitration and Mediation*, Issue No.5, 2022, pp. 59-74.

19 *Review and Improvement to the System for Articles of Association of Commercial Arbitration Institutions in China* witten by LONG Yingxiang and published on *Journal of Legal and Commercial Research*, Issue No. 1, 2023, pp.117-129.

importance to the building of an information disclosure system for arbitrator as a whole. In terms of legislation, a specific clause shall be adopted to stipulate the information disclosure system for arbitrators; in terms of justice, the specific scope of information disclosure by arbitrators shall be further defined in the form of judicial interpretations and guiding cases of the SPC; and in terms of arbitration practice, arbitration rules shall specify the timing, content, form and scope of notice of information disclosure by arbitrators, and specify what kind of disclosure matters constitute a cause for recusal of arbitrators.[20]

3.A study on the arbitrability of certain types of cases

Firstly, the arbitrability of intellectual property cases. The confirmation of the validity of intellectual property rights involves the decision of the administrative body, and thus has certain attributes of public policies. Some scholars have pointed out that the private property of intellectual property rights provides an important theoretical basis and normative starting point for arbitration of disputes over the validity of intellectual property rights, and that the granting of intellectual property rights by the State, as well as the consideration of public policies in the handling of intellectual property disputes, are not sufficient to negate the arbitrable nature of disputes over the validity of intellectual property rights. [21]China shall synergistically advance the arbitration of disputes over the validity of intellectual property rights from multiple dimensions such as arbitration practice, judicature, administration and legislation, and promote the establishment of an arbitration regime and system for intellectual property rights that

20 *Arbitrator Selection Dilemmas and Solutions: a Perspective of the Legal Relationship between Arbitrators and Parties [J]* written by DU Huanfang and LI Xiansen and published on *Wuhan University International Law Review*, Issue No. 2, April 2020, pp.39-59.

21 *The Theoretical Basis and Path of Realization of Arbitration of Disputes over the Effectiveness of Intellectual Property Rights* written by SUN Zihan and published on *Modern Jurisprudence*, Issue No.1, 2023, pp.194-208.

is in line with the national situation of China and with Chinese characteristics in due time.[22]

Secondly, the arbitrability of anti-monopoly cases. In existing judicial practice, there is still a tendency to deny the arbitrability of anti-monopoly disputes on the grounds of public policies. In response to this phenomenon, some scholars have proposed that, under the distinction between purely domestic arbitration and foreign-related arbitration, the arbitrability of anti-monopoly disputes in domestic arbitration should be judged by reference to China's competition and industrial policies, and that the arbitrability of anti-monopoly disputes in foreign-related arbitration should be judged by reference to international public policies and by taking into account the degree of relevance of the case to China.[23]

Thridly, the arbitrability of disputes over administrative agreements. Article 26 of the Provisions of the SPC on Several Issues Concerning the Trial of Cases Involving Administrative Agreements prohibits the application of arbitration to solve the disputes over administrative agreements in principle. However, some scholars have pointed out that the application of arbitration to disputes over administrative agreements is determined by the nature of the disputes, and the contractual nature of administrative agreements provides a support for the equal settlement of disputes arising from the agreed contents. [24]

22 *The Theoretical Basis and Path of Realization of Arbitration of Disputes over the Effectiveness of Intellectual Property Rights* written by SUN Zihan and published on *Modern Jurisprudence*, Issue No.1, 2023.

23 *On the Arbitrability of Anti-monopoly Disputes and the Implementing Mechanism* written by HU Chenghang and published on *Journal of International Economic Law,* Issue No.1, 2023, pp.124-140.

24 *A study on the Mechanism of Arbitration Applicable to Disputes over Administrative Agreements* written by LI Huimin & TANG Weiran and published on *Hebei Jurisprudence*, Issue No.1, 2023, pp.57-72.

4.A study on the mechanism for diversified settlement of disputes

The mechanism for settlement of international commercial disputes, represented by mediation, arbitration and judicature, reflects the development level of a country's rule of law and market economy, and embodies a country's business environment and ability to participate in global governance. With the establishment of the International Commercial Court and the participation of international commercial arbitration and mediation institutions in the development of a "one-stop" platform for diversified settlement of international commercial disputes, the mechanism for diversified settlemet of international commercial disputes has transitioned from top-level design and theoretical research to a new stage at the practical level. Some scholars have probed into the value, interactive model and challenge in respect of arbitration, mediation and litigation in practice, and thus put forward development proposals in the aspects of judicial debugging, foresight, human resource development and extraterritorial enforcement, among others. [25]Some scholars have also pointted out that it is necessary to conduct in-depth research and exploration into promoting the practice and development of the "troika" including mediation, arbitration and litigation in the foreign-related commercial field in China, learn from foreign mechanisms for settlement of international commercial disputess and practices, and promote the source control of foreign-related commercial conflicts and disputes. [26]Some scholars have proposed that optimizing the rules of the International Commercial Court, innovating

25 *System Building and Development Orientation of the Mechanism for Settlement of Commercial Disputes for the "Belt and Road Initiative"* written by YANG Bochao and LI Dan and published on *Business Research*, Issue No. 3, 2022, pp. 80-88.

26 *Empirical A study on the Diversified Resolution Mechanism for Foreign-related Commercial Disputes under the Background of the "Belt and Road Initiative"* written by SHEN Fangjun and published on *Application of the Law*, Issue No. 8, 2022, pp. 55-65.

the admittance system of the international commercial arbitration institutions, and testing the commercial reservation and ad hoc arbitration system in Guangdong-Hong Kong-Macau Greater Bay Area is an important path to promote the development of the cross-border commercial mediation mechanism, which will help effectively connect with international rules and improve the credibility and enforcement of China's leading role in the Belt and Road Initiative.[27]

5.A study on judicial review of arbitration

The review mechanism for arbitral award is an important part of arbitration-related judicial review. The first is the mechanism for setting aside arbitral awards. With respect to public policy issues, in an international investment arbitration, the Court of the host country may find that there is a serious error in application of law in the amount of damages in an award that constitutes a violation of the public policies of the host country, and may set aside the entire arbitral award. Some scholars believe that this practice has a legitimacy problem. Even if there is a problem in the part of damages in the award, this is a problem of wrong identification of facts or wrong legal interpretation in substantive issues, which cannot be remedied through the mechanism for setting aside international investment arbitral awards. [28]As for the principle of nullity of ultra vires, some scholars point out that whether an arbitral tribunal constitutes "ultra vires" from the substantive law dimension needs to be analyzed case by case, and the identification standards of limitation, strictness and objectivity should be followed.

27 *Building of a Diversified Mechanism for Settlement of International Commercial Disputes under the "Belt and Road Initiative—Taking the Guangdong-Hong Kong-Macau Greater Bay Area as a Pilot Project* written by KE Jingjia and published on *Hong Kong and Macao Studies*, Issue No.1, 2023, pp.51-65.

28 Response to and Enlightenment of Improper Application of Public Policies in the Mechanism for Setting aside International Investment Arbitration Awards written by CHENG Hua'er on Jiangxi Social Science, Issue 8, 2022, pp.150-157.

[29]The second is the recognition and enforcement of arbitral awards. With respect to the obstacles of state immunity, some scholars believe that when drafting the waiver of immunity clauses, the counterparty to an arbitration agreement should consider the agreed choice of court agreement, the state immunity positions of the state accepting the dispute and other auxiliary measures that ensure the performance of the contract. [30]With respect to the conflict between bankruptcy proceedings and enforcement of arbitral awards, in the context of bankruptcy, an arbitral award often cannot be enforced independently but can only be enforced together with other creditors by means of declaring creditor's rights. Some scholars point out that it is necessary to clarify the principles and rules for handling the overlapping relationship between bankruptcy proceedings and enforcement of arbitral awards as soon as possible to guide the judicial practice. [31]As for the arbitral awards that have been set aside, some scholars point out that the New York Convention only unifies the recognition and enforcement of arbitral awards but does not adjust the setting asdie of awards, thus resulting in complicated practices of various countries and reducing the consistency, security and predictability that the New York Convention pursues. [32]As to the issue of judicial review of repetitive arbitration, some scholars put forward that the effectiveness of a repetitive arbitratral award can be denied by expressly including repetitive arbitration into the statutory causes

29 *Who Will Supervise the Judges: Relief for Ultra Vires Awards in International Arbitration* written by XU Shu and published by the *Contemporary Jurisprudence*, Issue No. 1, 2022, pp. 149-160.

30 *A study on the Validity of State's Waiver of Immunity Clause in International Arbitration* written by DU Huanfang & DUAN Xinrui, published on *Chinese Review of International Law*, Issue No. 2 2022, pp. 53-70.

31 *The Impact of Bankruptcy on the Recognition and Enforcement of International Commercial Arbitral Awards — — Perspective from the Application of Article 5 of the New York Convention* written by FAN Xiaoyu and published on the *Journal of International Economic Law*, Issue No. 3 2022, pp. 141-156.

32 *A study on the Recognition and Enforcement of International Commercial Arbitral Awards Set aside* written by GUO Shiwen and publishe on Journal of Southeast University (Philosophy and Social Sciences Edition), Issue No. 2 2022, pp. 98-102.

for "violation of procedures", or by separately stipulating the causes for judicial review of repetitive arbitration.[33]

6.A study on sports arbitration

With the revision to and promulgation of the *Sports Law*, the establishment of independent sports arbitration institutions in China has gradually been put on the agenda. At present, the *Sports Law* limits the scope of sports arbitration to disputes arising in competitive sports activities, such as doping management disputes, athlete registration, exchanges, etc., in order to realize a reasonable division of labor between civil and commercial arbitration and labor arbitration. [34]At present, the research on sports arbitration in China is mainly carried out in the following two aspects: Firstly, suggestions on improving the sports dispute resolution mechanism in China. Some scholars put forward that, in view of the limitation of the scope of sports arbitration in the *Sports Law*, China should promote the establishment of a multiple resolution mechanism for sports disputes, and create a dual structure of internal resolution mechanism and external resolution mechanism for sports disputes. [35]Some scholars have also proposed specific paths to improve the overall mechanism for sports arbitration: (a) to refine and establish an arbitration proceedings integrating general, appellate, and ad hoc arbitration proceedings; (b) to fully respect the party's autonomy of will

33 *The Methods and Applicable Reasons for Judicial Review of Repetitive Arbitration* written by WANG Bei and published on the *Journal of Jurisprudence*, Issue No. 5, 2022, pp. 132-145.

34 *Legislation Choice and Assumption of Systematization of Sports Arbitration in China — — With a Comment on the Sports Law of the People's Republic of China (Revised Draft)* written by JIANG Shibo, WANG Yanting & WANG Ruikang and published on *Journal of Xi'an Institute of Physical Education*, Issue No. 2, 2022, pp. 180-188.

35 *Establishment of the Multiple Resolution Mechanism for Sports Disputes in China under the Background of the Building of a Sports Power — — With a Comment on the Chapter of Sports Arbitration in the Revised Sports Law* written by LIU Yun and published on *China Sports Science and Technology*, Issue No. 9, 2022, pp. 88-95.

in the selection and appointment of arbitrators; (c) to provide the pre-emergency arbitration proceedings in the sports arbitration proceedings; and (d) to implement the mechanism of "Arbitration and litigation" for sports arbitration. [36]Secondly, the study of international experience on sports arbitration mechanism. The existing international and domestic sports dispute resolution systems are basically embodied as a three-tier progressive structure with the Global Association of International Sports Federations and national associations, the independent sports arbitration institution and the domestic courts as the main body. [37]Some scholars have explored the institutional basis of citing precedents by the arbitral tribunal of the Court of Arbitration for Sports (hereinafter referred to as CAS in short), [38]studied the articles of ad hoc measures in sports arbitration, [39]and suggested that the Shanghai Arbitration Center of CAS should be taken as the starting point to strengthen the connection with the Court of Arbitration for Sports, [40]so as to realize the local transformation of extraterritorial experience.

7.A study on investment arbitration

Firstly, the study on the reform of investor-state dispute resoluation mechanism.

36 *A study on the Path for Developing Sports Arbitration Procedure in China under the Newly Revised Sports Law — Based on a Survey of Sports Arbitration Procedure in South Korea, Japan, Turkey and other Countries* written by HUANG Shichang & YAN Ziang and published on *Sports and Science*, Issue No. 5, 2022, pp. 9-18.

37 *Establishment of An Independent Sports Arbitration System under the Background of Legal Revision* written by LI Zhi and published on *Jurisprudence*, Issue No. 2, 2022, pp. 162-175.

38 *The Formation and Prospects of the Precedent-Following System of the International Court of Arbitration for Sport (ICS) - Taking Doping Cases as an Example* written by GUO Shuli, WANG Di and published on *Journal of Beijing University of Physical Education*, Issue No. 11, 2022, pp. 70-83.

39 *A study on the Application of Ad Hoc Measures in International Sports Arbitration* written by SANG Yuanke and published in *Commercial Arbitration and Mediation*, Issue No. 3, 2022, pp. 5-16.

40 *Thoughts on Enhancing the Discourse Right of International Sports Arbitration of China* written by JIANG Shibo & ZHU Haijie and published on *Journal of Wuhan University of Physical Education*, Issue No. 1, 2022, pp. 20-27.

Investor-state dispute resoluation mechanism (ISDS mechanism) has played a pivotal role in resolving international investment disputes, but at the same time, it has been widely criticized for its inherent defects such as inconsistent awards and lack of correction mechanism, lack of independence and impartiality of arbitrators, and neglect of the public interest and domestic regulation rights of the host countries. In July 2022, the *Proposals for Amendment of the ICSID Rules* (hereinafter referred to as the Proposals in short) entered into force. The Proposals provide targeted reforms around some of the existing issues of the internation investment arbitration mechanism (e.g. disclosure rules in third-party funding, enhancing efficiency, reducing arbitration costs, and recusal of arbitrators), which will have a significant impact on the practice of States and other stakeholders.. As for the solutions to overcome the drawbacks of the ISDS mechanism, current scholars put forward three reform schemes, namely, International Investment Court appeal mechanism, permanent multilateral appeal mechanism and ad hoc appeal mechanism. [41]As for the scope of review under the appeal mechanism, some scholars put forward that the scope of appeal review of international investment arbitration should include "de jure review", "limited de facto review" and the situations provided in Article 52 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. [42]As for the reform and development of the investment arbitration mechanism in China, some scholars believe that China should be cautious about the reform rules on appeal review of investment arbitration and make a plan in China's interest as soon as possible. On the one hand, it is required to promote the commercialization of investment arbitration, drive diversified provisions on investment

41 *New Development of the Reform of the Appeal Mechanism for Settlement of Investor-State Disputes and China's Response* written by WANG Dan & LIU Jingdong and published on *Cross-strait Legal Science*, Issue No.1 2023, pp. 78-85.

42 *The Proposal on the Scope of Appeal Review of EU Investment Arbitration and China's Response* written by OU Jiwei & TAO Lifeng and published on *Journal of International Economic Law*, Issue No.3 2022, pp. 116-125.

arbitration agreements and endow the parties with the right to choose arbitrators flexibly. [43]On the other hand, we should promote the development of alternative dispute resolution methods, [44]and actively explore the establishment of a dispute resolution mechanism between investors and states which integrates various methods such as dispute prevention, consultation, mediation, arbitration, and litigation. [45]Some scholars suggest taking the promulgation of the *Arbitration Law (Revision) (Draft for Comments)* as an opportunity to ensure the arbitrability of investment disputes, make room for internal appeal, and facilitate the recognition and enforcement of arbitral awards, so as to effectively ensure the smooth development and sound operation of future investment arbitration in China.[46]

Secondly, the study on difficult issues in vestment arbitration. Such issues as state counterclaim, corruption and economic sanctions may have an important impact on the jurisdiction, substantive hearing, and recognition and enforcement of awards of investment arbitration, giving rise to difficult legal issues. With respect to the issue of state counterclaim, existing international investment treaties lack comprehensive and specific provisions concerning the jurisdiction, admissibility and causes of action of state counterclaim, and most of the counterclaims of states are rejected by arbitral tribunals on the ground of lack of jurisdiction or admissibility. Some scholars have proposed the

43 *The Guarantee of Autonomy of Will in International Investment Arbitration and the Path of Commercial Development* written by LI Xiansen and published on *Journal of International Law*, Issue No.4 2022, pp. 84-115.

44 *Mediation and China's Response in the Reform of the Resolution Mechanism for Disputes over International Investment* written by LIAN Junya and published on *North Jurisprudence*, Issue No.3 2022, pp. 121-134.

45 *China-ASEAN Investment Dispute Settlement Mechanism in the Context of RCEP* written by WANG Yanzhi and published on *Journal of Political Science and Law*, Issue No.6 2022, pp. 86-96.

46 *On the Important Development of China's Arbitration Legal System Compatible with "Investment Arbitration" — Discussion on the Relevant Provisions of the Arbitration Law (Revision) (Draft for Comments)* written by YU Zhanmin and published on *Journal of International Economic Law*, Issue No.4 2022, pp. 141-153.

development of systematic rules for state counterclaims, so as to promote the balance of interests between investors and the states. [47]With respect to corruption, existing arbitration practices have the following deficiencies: identification of corruption is based on the facts rather than the law; there are no uniform proof criteria for identifying corruption; and there are no consistent criteria in determining whether corruption affects the legitimacy of investment and in determing the liability which is heavier on the investor rather than on the host country. In the legal order of international investment, we shall pay attention to redressing the imbalance of interests in dealing with corruption so as to effectively combat corruption on a fairer basis. [48]With respect to economic sanctions, arbitral tribunals may decline jurisdiction and refuse to accept disputes on the ground that the investment violates UN sanctions, and enforcement of an award may also be delayed as a result of the sanctions. In addition, it is highly uncertain whether economic sanctions violate the substantive treatment standard of investment protection and whether the host State can invoke the national security exception contained in the treaty, or resort to force majeure, emergency measures and countermeasures under customary international laws. [49]As to the issue of state-owned enterprises, the lack of positioning of Chinese state-owned enterprises ("SOEs") as investors under bilateral investment treaties is one of the major reasons for the unclear status of SOEs in vestment arbitration. Therefore, it is necessary to promote the revision to the *Convention on the Settlement of Investment Disputes between the State* and Nationals of Other Countries and

47 *The Dilemma of State Counterclaim Application in International Investment Arbitration and Its Resolution* written by SANG Yuanke and published on *Journal of Maritime Law of Chin*a, Issue No. 1 2023, pp. 102-112.

48 *On the Impact of Corruption Allegations on International Investment Arbitration – Based on Case Studies of Countries along the "Belt and Road Initiative"* written by SONG Junrong and published on *Chinese Review of International Law*, Issue No. 3, 2022, pp.110-128.

49 *The Impact of Economic Sanctions on International Investment Arbitration – An Analysis Based on ISDS Practice* written by FAN Xiaoyu & QI Tong and published on *Chinese Review of International Law*, Issue No. 5, 2022, pp.69-86.

the reform of domestic SOEs, so as to strengthen the overall shaping of the identities of SOEs as private investors, and seek more long-term and effective legal protection for the overseas investment interests of China's SOEs.[50]

Thirdly, the study on the application of the govering law in vestment arbitration. As for the relationship between the international law and the domestic law of the host country, some scholars believe that the arbitral tribunal should recognize and respect the public interest embodied in the domestic law of the host country in application of the governing law, and achieve the balance of the application of the governing law through three dimensions: formal judgment, substantive deconstruction and procedural safeguard. [51]As for the method of judges' interpretation of law, some scholars believe that in principle, the parties should claim and prove the law they are based on, while the supplementary role of "iura novit curia" is not excluded. The application of "iura novit curia" is a power, not an obligation, of the arbitral tribunal. The arbitral tribunal should generally exercise this power prudently and appropriately only when there are sufficient and justified reasons. [52]As for the function of amicus curiae opinions, some scholars point out that amicus curiae opinions can have a certain degree of "substantial impact" on an arbitral award, the effect of which is ralting to the reference nature of amicus curiae opinions and the tribunal's discretion. With the perfection of the rules on the participation of amicus curiae in the investment arbitration, the accumulation of the experience of participation of amicus curiae and the tribunal's pursuit of legitimacy of arbitral awards, more and

50 *A study on the Applicant Qualification of State-owned Enterprises in ICSID Arbitration under the Perspective of the "Belt and Road Initiative"* written by ZHANG Cheng & YANG Jiaqi and published on *Journal of Northwest University for Nationalities (Philosophy and Social Sciences Edition)*, Issue No. 5, 2022, pp.76-89.

51 *On the Balanced Application of the Governing Law in International Investment Arbitration* written by SONG Yang and published on *Modern Jurisprudence*, Issue No. 3, 2022, pp.194-205.

52 *Lura Novit Curia in International Investment Arbitration* written by CUI Qifan and publsiehd on *Journal of International Economic Law*, Issue No.4, 2022, pp. 80-94.

more amicus curiae opinions will have more substantial impact on arbitral awards.[53]

B.Research Trends Abroad

The research achievements on international arbitration abroad in 2022 can be divided into three aspects: Firstly, the research around the new issues arising from arbitration practice, such as international commercial arbitration and economic sanctions, arbitration and criminal procedures, and diversified dispute resolution mechanism. Secondly, the reform of investor-state dispute settlement mechanism is the same focus as at home. Thirdly, the traditional issues of international commercial arbitration are studied in depth, such as the basic theory of international commercial arbitration, the improvement to the procedure of international commercial arbitration, the application of law in arbitration and the recognition and enforcement of arbitral awards.

1. A study on arbitration and economic sanctions

Economic sanctions, especially unilateral sanctions, have developed over the past few years into a major tool of economic warfare. These measures involve arbitrability and the application of law in ternational commercial arbitration, and also have a negative impact on the recognition and enforcement of arbitral awards. Some scholars believe that economic sanctions cause many procedural difficulties to the effective enforcement of international arbitral awards, and also pose risks to the performance of substantive terms of contracts. [54]However, some scholars are optimistic, believing that arbitration rules

53 *An Empirical A study on the Impact of Amicus Curiae Opinions on International Investment Arbitral Awards: A Case Study Based on ICSID Cases* written by SHAN Juming and published on *Chinese Review of International Law*, 1 2023, pp.107-128.

54 *International Commercial Arbitration and Economic Sanctions* written by Andrey Kotelnikov in Alexander Trunk, Marina Trunk-Fedorova, & Azar Aliyev, eds. and published in the Law of International Trade in the Region of the Caucasus, Central Asia and Russia: Public International Law, Private Law, Dispute Settlement, Brill E-Book Collection, 2023.

and the courts's administration authority of cases can effectively manage the confusion caused by sanctions, and that international commercial arbitration will come into wider application in an environment where sanctions are prevalent. [55]Some scholars have studied the nature of private international law of sanctions laws and their influence on the enforcement of foreign arbitral awards, concluding that sanctions laws should not be used as an instrument to implement state policy in private civil and commercial law matters, and it is necessary to specify the legal restrictions on the private enforcement of sanctions laws and ensure that sanctions laws will not impair the functions of the *New York Convention*.[56]

2. A study on arbitration and criminal procedure

Firstly, on the money laundering involved in the dispute. At present, there is no firm legal basis as to whether arbitrators are authorized to hear money-laundering issues on their own initiative to combat money-laundering activities. Some scholars claim that the suggestion made by the Financial Action Task Force on Money Laundering shall be adopted, i.e., international commercial arbitrators shall take the initiative to deal with issues of money laundering. [57]Secondly, on the corruption in vestment arbitration. In practice, this issue mainly arises in the context of recognition and enforcement of arbitral awards. It was pointed out that how domestic courts deal with the relationship between fraud, corruption and public policies was particularly important in the recognition and enforcement of arbitral awards involving allegations of corruption, and that a balance of

55 Hamish Lal & Casey Brendan, EU, UK & US "Sanctions": Procedural and Substantive Impact on International Arbitration?, 16 Dispute Resolution International 109 (2022).

56 Beibei Zhang, & Wei Shen, When International Commercial Arbitration meets China's sanction laws: living together but remaining apart?, 13 Journal of International Dispute Settlement 665 (2022).

57 Todor Kolarov, International commercial arbitrator addressing money laundering sua sponte, 25 Journal of Money Laundering Control 637 (2022).

interests between the arbitral institutions, the government and the private sector must be struck.[58]

3. A study on diversified dispute resolution mechanisms

Diversified dispute resolution mechanisms, which combine the flexibility of mediation and the strictness of arbitration or litigation, are very attractive for dispute resolution. [59]As for commercial mediation, more and more attention is paid to the role of commercial mediation, advocating mediation in the early stage of a dispute, and arbitration or litigation if mediation fails. Some scholars advocate to place the commercial mediation process in a legal and regulatory context, and efforts should be made to strive to provide an international and overall guide for the mediation process. [60]As for commercial arbitration, although an international commercial arbitration agreement is not the only means to resolve transnational commercial disputes, it still plays a leading role in coordinating the transnational commercial dispute resolution rules. [61]As the objects and contents of disputes become more and more complex, there will be "hybrid investment disputes" or "hybrid commercial disputes". The key issue to be addressed is to provide adequate protection for commercial entities. In particular, in the process of investment dispute resolution, public authorities should focus on how to

58 Pontian N. Okoli, Corruption in international commercial arbitration - Domino effect in the energy industry, developing countries, and impact of English public policy, 15 Journal of World Energy Law and Business 136 (2022).

59 Anselmo Reyes & Weixia Gu, eds., Multi-tier Approaches to the Resolution of International Disputes: A Global and Comparative Study, Cambridge University Press, 2021.

60 Ronán Feehily, International Commercial Mediation: Law and Regulation in a Comparative Context, Cambridge University Press, 2022.

61 Samuel Maireg Biresaw, Appraisal of the Success of the Instruments of International Commercial Arbitration Vis-A-Vis International Commercial Litigation and Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Resolution, 2 Journal of Dispute Resolution 1 (2022).

enforce arbitral awards against countries in breach of investment obligations.[62]

4. A study on investment arbitration

Internationally, the reform and development of investment arbitration is regarded as one of the important issues in the study of arbitration theory and practice. Compared with domestic research, the international academic community's attention to investment arbitration is not only limited to the investor-state dispute resolution mechanism issues, but also takes investment dispute resolution as a starting point to study the contribution of international investment dispute resolution to improving the application consistency between domestic investment law regulation system and international investment law from the perspective of the development of investment law.

Firstly, the reform of investor-state dispute resolution mechanism. Currently, international research mainly focuses on bias in arbitral decision-making, close relationship between lawyers and arbitrators, lack of diversity in arbitration, excessive compensation and other issues. [63]Secondly, improving laws and regulations on corporate investment. Some scholars study how to incorporate the latest development of investment dispute resolution mechanism into international laws and domestic laws on corporate responsibilities, such issues as due diligence of parent companies and legal effect of companies' voluntary commitments, so as to make full use of the opportunity of reform of investment dispute resolution mechanism to reflect investors' responsibilities, which is conducive to promoting the improvement to enterprises' due diligence and commercial conduct laws and regulations. [64]Thirdly, the

62 Olena M. Honcharenko, et al., International Commercial Arbitration as a Modern Self-Regulation Tool in Hybrid War, 68 Acta Universitatis Carolinae Iuridica 123 (2022).

63 Daniel Behn, Ole Kristian Fauchald, & Malcolm Langford, eds., The Legitimacy of Investment Arbitration: Empirical Perspectives, Cambridge University Press, 2022.

64 Tomoko Ishikawa, Corporate Environmental Responsibility in Investor-state Dispute Settlement: The Unexhausted Potential of Current Mechanisms, Cambridge University Press, 2022.

consistency of law application for investment arbitration. There exists the problem of inconsistency of arbitral awards in dispute resolution between investors and states for a long time. Nowadays, there are many researches on the summarization and induction of international investment law rules as a reference on the application of law in vestment dispute resolution. [65]Some scholars have commented on the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* one by one, and explained it in light of the recent arbitration practice. In addition, the International Institute for the Unification of Private Laws will launch a project in 2023 to make commentary on arbitral awards based on the content of investment contracts and the evolution of the general international investment law. In the absence of indication of the applicable law by the parties, it shows how the rules of good faith, renegotiation clauses and reckoning of damages, among others, can be used as tools of legal interpretation.[66]

5. A study on basic theoretical problems of international commercial arbitration

There remains continuous concern and research on the basic theoretical problems of arbitration in the international academic community. Firstly, the legal basis for choosing arbitration as a means of dispute resolution. Some scholars point out that the prerequisite for referring a dispute to international commercial arbitration is the advantages of arbitration over courts, which provides a more acceptable and concise procedure for the settlement of a dispute established by the parties to the dispute However, when applying to a court of a country, the parties will face risks and difficulties in not knowing the procedural law of the foreign country concerned and having to resort

65 Charalampos Giannakopoulos, Manifestations of Coherence and Investor-State Arbitration, Cambridge University Press, 2022.

66 María Chiara Malaguti, Principios UNIDROIT a través de los laudos de arbitraje internacional de inversiones: UNIDROIT principles through international investment arbitration awards, 15 Cuadernos de Derecho Transnacional 10 (2023).

to the language of the court. [67]Secondly, the essence of the international commercial arbitration system. Some scholars analyze the context and definition of "international commercial arbitration" by combining the general theoretical nature and the practice of dispute resolution, and point out that the best approach for the reform of international commercial arbitration is to adopt unified arbitration rules. [68]Thirdly, an arbitration agreement and its validity. In the legal framework for international commercial arbitration, it is commonly held that, by being in writing, an arbitration agreement is a formal matter of law. It has been suggested, however, that recent domestic and international legal frameworks reflect a softening, relaxation or broadening of the form of an arbitration agreement in favour of consensualism.[69]

6. A study on improving international commercial arbitration proceedings

Firstly, the application of law in arbitration proceedings. One argument is that arbitration proceedings must be governed by the law of the seat of arbitration; a potential problem, however, is that this could potentially allow excessive intervention by the courts, undermining the efficiency of the arbitration. Another argument is that arbitration proceedings should not be based on the legal system of the seat of arbitration but rather should focus on the principle of autonomy of will of parties. In response, some scholars emphasize that the supervision and intervention of the courts are indispensable to support the arbitration proceedings and their awards. Such intervention should not be regarded as interference, but rather a form of support for the parties to arbitration. [70]] Secondly, the obligation of confidentiality. Some scholars have studied the obligation of

67 S. Kravchuk, Legal prerequisites for consideration and settlement of disputes in international commercial arbitration, Uzhhorod National University Herald. Series: Law, 2022.

68 Serhij Kravtsov, The Definitive Device of the Term 'International Commercial Arbitration, 12 Juridical Tribune / Tribuna Juridica 346 (2022).

69 Arbër Ademi, Form of the International Commercial Arbitration Agreement, 38 Vizione 181 (2022).

confidentiality from the perspectives of its meaning, methods and protection of the right to privacy, among others. As a means of dispute resolution, one of the most important advantages of arbitration is the protection of confidential information of the disputing parties. However, confidentiality requirements in arbitration are not absolute in all cases. Restricting arbitrators' access to confidential information should not violate the parties' right to a fair trial, nor should it prevent arbitrators from rendering a fair award. [71]Some scholars have proposed that the practical solutions for the protection of confidential information in arbitration consist of three strategies: restricting access to confidential information, preventing disclosure of confidential information during the arbitration process and preventing disclosure of confidential information in an arbitral award, thus suggesting that important confidential information could be provided to the arbitrators or only to the presiding arbitrator. [72]Thirdly, the selection of arbitrators. Independence, impartiality and openness are the basic principles of international commercial arbitration proceedings, so is the selection of arbitrators. In international commercial arbitration, although repetition of arbitrators may lead to bias in the award, some scholars point out that there is still room for discussion as to whether the familiarity of the case brought about by repetition of arbitrators necessarily leads to bias. [73]Some scholars have studied the arbitrators' conduct patterns. Arbitrators are generally appointed on a part-time basis and are not subject to administrative licensing requirements. The context of this

70 Gustavo Yanez, Legitimacy and Legality within the Seat and Delocalisation Theory of International Commercial Arbitration, 5 De Lege Ferenda 66 (2022).

71 Ali Erdem AH N, Duty of Confidentiality in International Commercial Arbitration: Does the Modern World Still Need This Concept?, 13 Law & Justice Review 19 (2022).

72 Reza Maboudi Neishabouri & Seyed Alireza Rezaee, The Analytical Study of Practical Solutions for the Protection of Confidential Information in Arbitration, 38 Iranian Journal of Information Processing & Management 57 (2022).

73 Anastasia Christina Kalantzi, Conflicts of Interest in International Commercial Arbitration, 15 Erasmus Law Review 45 (2022).

situation is significantly different from that of traditional studies on the social conduct of a profession. This has to do with the particularity of the arbitration market and the regulated competition permitted by the New York Convention. However, this is also the reason for maintaining the fundamental feature of the principle of autonomy of will of the parties in ternational commercial arbitration. [74]Fourthly, the consistency of arbitral awards. Although there is no binding precedent doctrine applicable to international commercial arbitration yet, arbitral tribunals frequently cite the awards rendered by other arbitral tribunals so as to avoid any inconsistencies in similar cases. This phenomenon is becoming more and more evident in arbitral practice. Therefore, it is necessary to establish an appeal mechanism for arbitration or a review mechanism for international commercial arbitral awards.[75]

7. A study on application of law to international commercial arbitration

Firstly, the issue of the governing law for the arbitration proceedings. In general, the law to be applied to the arbitration proceedings is a choice made by the parties, either through specific agreement on the arbitration clause to the arbitration rules of a particular arbitral institution or other agreed proceeding rules of procedure, or through the determination of procedural law by an arbitral tribunal or by another authorized body in a country, usually the law of the seat of arbitration. [76]Secondly, the governing law for a dispute. In an international commercial dispute, the contract of the parties and the governing law are not the sole source of obligations. Reviewing cases of

74 João Ilhão Moreira, Arbitration Vis - à - vis Other Professions: A Sociology of Professions Account of International Commercial Arbitrators, 49 Journal of Law & Society 48 (2022).

75 Ahmed M. Elsawi, Conflicting Decisions in International Commercial Arbitration, 1 Global Business & Economics Anthology 1 (2022).

76 Yurii Bilousov & Volodymyr Nahnybida, Applicable Procedural Law in International Commercial Arbitration, 31 Studia Iuridica Lublinensia 51 (2022).

international construction dispute arbitrations, it may be noted that some arbitrators find that commercial custom and international building rules are acceptable as the basis of law, but do not accord the two the same authority as rules of substantive law. The majority opinion is to accord commercial custom and practice the same authority as rules of substantive law, while limiting the invocation of the international building rules. [77]Thirdly, the legal interpretation in arbitration process. In practice, arbitrators' interpretation may go beyond the provisions of the law. Some scholars think that this can be supported by dynamic theory of legal interpretation, thus providing guidance for the study of the application of commercial law principles, amicable settlement and the particular nature of the interpretation of public order in ternational commercial arbitration.[78]

8. A study on the recognition and enforcement of arbitral awards

So far, domestic courts take a relatively relaxed attitude towards the recognition and enforcement of foreign arbitral awards. From the perspective of empirical research, some scholars have surveyed the rulings on the recognition, enforcement and setting aside of international commercial arbitral awards made by courts in 74 jurisdictions including the United Kingdom, the United States, France, Germany, Japan, Kenya and Argentina from 2010 to 2020. Overall, foreign arbitral awards were recognized and enforced in 73% of the cases, whereas in 23% of the cases, courts set aside the awards. There was no significant difference among

77 Haytham Besaiso & Peter Fenn, How International Construction Arbitrators Make Their Decisions: Status of Commercial Norms and International Construction Law, 148 Journal of Construction Engineering & Management 1 (2022).

78 Joanna Lam, Legal interpretation and adjudicatory activism in international commercial arbitration, Oxford University Press, 2022.

jurisdictions. [79]Existing researches emphasize the role of autonomy of will of the parties and public policies in the discretion in determining whether a foreign arbitral award should be recognized and enforced. On the one hand, the principle of autonomy of will of the parties is the cornerstone of the enforcement of an arbitral award. Arbitration institutions shall adhere to the contractual principle of consensus between the parties rather than allowing the parties to waive the award on the grounds of imprudence. [80]On the other hand, the courts of a country, when deciding to recognize and enforce awards under international commercial arbitration agreements, are increasingly refusing to recognize and enforce such awards on the grounds of public policies. Some scholars believe that the way to overcome this inconsistency is to promote a more unified understanding and standard of "public order" among the member states of the New York Convention, and more clearly regulation should be made on such issue. [81]Some scholars have also studied the EU's practice of using the public policy exception. Currently, the task of balancing the relationship between public policy exception and foreign arbitral awards is mainly undertaken by domestic courts. As public policy exception serves as a mechanism for post-award review and binding on arbitral tribunals, courts should narrow the scope of public policy exception and determine the content of public policies in a more coherent and structured manner, so as to safeguard

79 Roger P. Alford, Crina Baltag, Matthew E.K. Hall & Monique Sasson, Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards, 39 Journal of International Arbitration 299 (2022).

80 Rashri Baboolal - Frank, A review of judicial enforcement of arbitral awards in South Africa, 40 Conflict Resolution Quarterly 271 (2022).

81 Iryna Malinovska, Natalya Yarkina & Oleksandra Filiuk, “Public Order” as Grounds for Refusal in the Recognition and Enforcement of a Decision in International Commercial Arbitration: Ukrainian Realities and International Experience, 5 Access to Justice in Eastern Europe 154 (2022).

the validity of arbitral awards in particular disputes and promote the sustainable development of international commercial arbitration.[82]

82 A. de Zitter, The Impact of EU Public Policy on Annulment, Recognition and Enforcement of Arbitral Awards in International Commercial Arbitration [PhD thesis]. University of Oxford, 2019.

Chapter Two

Identification and Review of Repetitive Arbitration

I. Raising of the Issue

Repetitive arbitration is an important issue in the field of arbitration and the judicial review thereof. The concept of repetitive arbitration has not been explicitly mentioned in Chinese legislations and judicial interpretations concerning arbitration. Article 9 of the *Arbitration Law of the People's Republic of China* (hereinafter referred to as the Arbitration Law in short) is generally considered in practice as the legal basis for the prohibition of repetitive arbitration, [1]which stipulates "the finality of an arbitral award. After an award has been made, if a party reapplies for arbitration or requests a hearing before a people's court upon the same dispute, the arbitration commission or people's court shall not accept the application." Some arbitration institutions also expressly stipulate the finality of an arbitral award in their arbitration rules. For example, Article 49.9 of the China International Economic and Trade Arbitration Commission Arbitration Rules (2015 Edition) provides that: "The award is final and binding on both parties. Neither party may bring a lawsuit before a court or make a request to any other organization

1 See Civil Ruling (Jing 04 Min Te [2016] No. 23), in which the Beijing Fourth Intermediate People's Court held that: "Article 9 of the *Arbitration Law of the People's Republic of China* provides that: 'An arbitration award shall be final and binding. After an award has been made, if a party reapplies for arbitration or requests a hearing before a people's court upon the same dispute, the arbitration commission or people's court shall not accept the application.' The aforesaid provision is the direct legal basis for ne bis in idem in the arbitration proceeding … "(Note: all cases were from PKULaw Database).

for revising the award." [2]Ne bis in idem or the prohibition on repetitive arbitration has basically become a consensus in the practice of arbitration.

The problem is that the Arbitration Law and related judicial interpretations have not further specified what constitutes "the same dispute" and how to determine it in Article 9 of the *Arbitration Law*, which has led to different opinions in practice on what constitutes repetitive arbitration. After the *entry into force of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* (hereinafter referred to as the Judicial Interpretation of the Civil Procedure Law in short), in practice, repetitive arbitration has been judged by referring to Article 247 of the *Judicial Interpretation of the Civil Procedure Law* [3]which stipulates that: "(1) the parties involved in the latter lawsuit are the same as those involved in the former lawsuit; (2) the latter lawsuit and the former lawsuit have the same subject matter; or (3) the latter lawsuit and the former lawsuit have the same claims, or the claims in the latter lawsuit essentially deny the judgment of the former lawsuit." According to the mainstream opinions, the parties, subject matter and the claim are three elements. Relatively speaking, the subject matter of litigation is of decisive significance. The term "the same parties" includes not only formal parties, but also the undertaker or successor,

2 Furthermore, Article 12 of the *Arbitration Rules of Guangzhou Arbitration Commission (2021 Edition)* provides "the finality of an arbitral award. After an arbitral award is made, the parties may not apply for arbitration or file a hearing before a people's court with respect to the same dispute." See the official website of Guangzhou Arbitration Commission: https://www.gzac.org/zcgz/526.

3 See Civil Ruling (Jing 04 Min Te [2019] No. 159), in which the Beijing Fourth Intermediate People's Court stated that: "… … since the term" the finality of an award" is not more precisely legally defined, the tribunal made analysis and judgment of the dispute between the parties to the arbitration by referring to Article 247 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China regarding what constitutes a repetitive action in civil proceedings. Article 247 of the aforesaid Interpretation provides for the principle and judgment criteria of "ne bis in idem" in civil proceedings, which, as well as the principle of "finality of ab award", in essence deny that both parties to a dispute may conduct repeated litigation or arbitration for the same dispute, so there is no improper reference made by the tribunal … … "

etc. in an action under exceptional circumstances. [4]The claims, on the other hand, have more significance in judging the form. According to the logical relationship among these three elements, only when the subject matter in the latter lawsuit and that in the former lawsuit is the same, does the court need to further judge whether the claims are the same or whether the judgment results of the former lawsuit are substantially negative; if the subject matters in the former and latter lawsuits are different, the latter lawsuit does not constitute a repeated lawsuit and there is no need to make an in-depth examination at the level of claims.[5]

The resulting problems are what is the subject matter of arbitration and how to determine whether the subject matter of arbitration in the former case and that in the latter case are the same. In addition, there are considerable controversies in theory and practice on whether new facts occurred can constitute an exceptional circumstance of "the finality of an arbitral award", whether issues of repetitive arbitration are only within the scope of the substantive review by the Arbitral Tribunal, whether the court has the authority to review and how to review issues of repetitive arbitration, etc. These problems can be seen in the following four cases.

Example 1: In the former case, the plaintiff sued for unjust enrichment and requested the defendant to return the relevant money. The court of first instance held that the parties did not have a legal relationship of unjust enrichment, and the plaintiff's claim had no legal basis. Therefore, the court dismissed the plaintiff's claim. The plaintiff

4 The Determination of "the Same Parties to the Latter Lawsuit and the Former Lawsuit" in the Application of the Principle of Ne Bis in Idem, set out in the Minutes of the Judges Meeting of the Second Circuit Court of the Supreme People's Court (Series I), People's Court Press, 2019 Edition, P. 273.

5 Theory of Subject Matter of Civil Action under a New Paradigm written by CHEN Hangping, LU Pei, CHAO Zhixiong and SHI Mingzhou and published by China Legal Publishing House in 2020, P. 45.

appealed, but the court of second instance dismissed the appeal and upheld the original judgment.

In the latter case, with respect to the same fact, the plaintiff sued on the ground of a contract of mandate. The court of first instance held that the latter case had the same parties, the same subject matter and the same claims as those of the former case, constituting repetitive proceedings, and therefore ruled to dismiss the suit. The plaintiff appealed. The court of second instance held[6] that although the latter case and the former case involved the same dispute fact, and although the litigation subjects and claims were the same, the parties concerned sued with different legal relationships and different subject matters, which did not meet the circumstances for the application of the principle of "ne bis in idem" and did not constitute repetitive proceedings. Therefore, the court of second instance ordered the court of first instance to continue the trial.

Example 2: In this case[7] of application to set aside the arbitral award, the Claimant claimed that after the arbitral claim of the Respondent in the former case was rejected, the Respondent applied for arbitration again on the same dispute based on the same facts, and the arbitration commission made an arbitral award for the latter case accordingly, which violated the principle of "ne bis in idem".

Upon review, the court held that, in civil litigation, the judgment has no res judicata effect on matters after the reference time, and the principle of "ne bis in idem" does not apply to litigation brought by parties with facts after the reference time. By referring to the above-mentioned circumstances and principles regarding the inapplicability of the

6 Civil Ruling (Jing 03 Min Zhong [2021] No. 3444) rendered by the Beijing Third Intermediate People's Court on February 23, 2021.

7 Civil Ruling (Jing 04 Min Te [2019] No. 519) rendered by the Beijing Fourth Intermediate People's Court on November 15, 2019.

principle of "ne bis in idem" in civil proceedings, after an arbitral award is made, new facts arise, and the arbitral award made by the Arbitral Tribunal on the claim filed by the arbitration Claimant based on the arbitration clause and new facts does not violate the regulation on “the finality of an arbitral award”. An arbitral award made by the arbitration commission for the latter case based on new facts occurred after the arbitral award for the former case was made does not violate the regulation on “the finality of an arbitral award", so the court dismissed the Claimant's application to set aside the arbitral award.

Example 3: in this case[8] of setting aside of an arbitral award, the Claimant claimed that the arbitral award for the latter case and that for the former case constituted repetitive arbitration. The acceptance of the latter case by the arbitration commission was not in line with the principle of "ne bis in idem" and violated Article 274.1.4 (the current Article 281) of the *Civil Procedure Law of the People's Republic of China* (hereinafter referred to as the *Civil Procedure Law* in short). The Arbitral Tribunal had no arbitration authority, and the arbitral award made by the Arbitral Tribunal should be set aside in accordance with the law.

Upon review, the Court held that the subject matters of arbitration in the two cases were different. The subject matter of the claim in the former case was the principal calculated based on the total purchase price paid by the arbitration Claimant, Foreign Trading Limited Company, at the rate of 0.04% per day from October 30, 2004 to October 30, 2007, while the subject matter of the claim in the latter case was based on the 24 properties purchased by the small owners with each commercial house with independent

8 Civil Ruling (Jing 04 Min Te [2016] No. 23) rendered by Beijing the Fourth Intermediate People’s Court on August 16, 2019.

property rights as the calculation unit. In addition, after the arbitral award for the former case was made, the arbitration Claimant found 23 judgments through channels such as online searches, which were new evidence obtained after the arbitral award for the former case was made. According to Article 248 of the *Judicial Interpretation of the Civil Procedure Law*, where the party concerned files a lawsuit again due to new facts after a judgment comes into force, the people's court shall accept the lawsuit. The latter case did not fall under the scope of "ne bis in idem", nor did it constitute repetitive arbitration. The Court then rejected the Claimant's application to set aside the arbitral award.

Example 4: In the case[9] of application to set aside an arbitral award, the Claimant argued that the latter arbitral award was wrong in finding that the latter case constituted repetitive arbitration in violation of Article 9 of the *Arbitration Law*, which provides the "the finality of an arbitral award". The Claimant therefore applied to set aside the latter arbitral award for the latter case.

The Court held that the Arbitral Tribunal's determination of the nature of the parties' arbitration claim and whether it was in violation of the system of "the finality of an arbitral award" were within the scope of the tribunal's substantive hearing of the case and did not fall within the scope of setting aside an arbitral award to be reviewed by the people's court, and thus rejected the Claimant's application to set aside the arbitral award.

Example 1 and Example 3 above both involve the judgment on whether the subject matter of arbitration is repeated, while Example 2 and Example 3 also involve the judgment on whether there are new facts. With different identification standards, the

9 Civil Ruling (Jing 03 Min Te [2016] No. 302) rendered by the Beijing Third Intermediate People's Court on December 8, 2016.

conclusions will naturally be different. After the identification of the subject matter of arbitration is completed, the following questions are whether the court shall conduct a review, and how to conduct such review, which are shown in Example 2, Example 3 and Example 4. The above cases reveal the importance of the definition of the subject matter of arbitration, new facts and the identification standards thereof for the determination of repetitive arbitration. In addition, the above cases also demonstrate the complexity of repetitive arbitration review in judicial practice. Different subjects have different perceptions of what constitutes duplicative arbitration, and the issue remains controversial in both theoretical and practical circles. This Article intends to carry out analysis on the issue and bring up some suggestions for arbitration and judicial practices in light of the value orientation of arbitration.

II. Identification of Repetitive Arbitration

As mentioned above, we focus generally on two parts in determining whether repetitive arbitration is constituted: firstly, whether the former case and the latter case involve the "same dispute". The key and difficulty lie in the identification and determination of the subject matter of arbitration. If the subject matters of arbitration are different, then they do not involve the "same dispute", and naturally do not constitute repetitive arbitration. Secondly, whether the occurrence of new facts constitutes an exceptional circumstance of “the finality of an arbitral award", and how to determine the new facts, which is described in the following section.

A. Subject Matter of Arbitration and the Identification Thereof

1.Subject matter of arbitration

The object to be heard and determined in civil proceedings is the subject matter of

litigation. [10]Similarly, there are also objects that need to be heard and determined in commercial arbitration. We may call it the "subject matter of arbitration" by referring to the concept of the subject matter of the litigation. As a matter of fact, such term is indeed used in judicial practice. Many courts have summarized the objects of arbitration as the "subject matter of arbitration"[11].

2.Identification criteria for the subject matter of arbitration

At present, there are still no legislative or judicial interpretations on the subject matter of arbitration. The theory on the subject matter of litigation can be used to construct theories relating to the subject matter of arbitration in determination of repetitive arbitration, which will also be conducive to adapt to or respond to the judicial review by

10 *Civil Procedure Law* (Fourth Supplementary Edition) written by Shin Itō, translated by CAO Yunji and published by Peking University Press, Edition 2019, P.141. Also see *Civil Procedure Law* (Fifth Edition), written by Zhang Weiping and published by Law Press China. 2019 Edition, P. 197.

11 For example, in its Civil Ruling (Jing 04 Min Te [2016] No.23), the Beijing Fourth Intermediate People's Court stated: "… … the arbitration of the Case 2014 does not constitute a repetition of the arbitration of the Case 2012, nor does it violate the principle of ne bis in idem. Case 2012 and Case 2014 are different in the aspects of the parties, the subject matter of arbitration and the claims … … "In its Civil Ruling (Liao 01 Min Te [2021] No.325), the Shenyang Intermediate People's Court in Liaoning Province stated: "… … although the parties and the subject matter of the arbitration are the same, the arbitration claims are not the same, which does not meet the characteristics of a repetitive arbitration … …"In its Civil Ruling (Nei 07 Min Te [2021] No.27), the Hulunbeier Intermediate People's Court of Inner Mongolia Autonomous Region stated: "… … although the parties to the two cases are the same, different claims were made for different subject matters in the two arbitrations. The litigation in this case does not constitute a repetitive litigation as set forth in Article 247.1 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*. Therefore, Arbitral Award (Hu Zhong Cai Zi [2020] No.111) does not violate the basic system of "finality of an arbitral award" as set forth in the *Arbitration Law of the People's Republic of China* … … " In its Civil Ruling (E Wuhan Zhong Zhong Jian Zi [2015] No. 00073), the Wuhan Intermediate People's Court in Hubei Province stated: "... it is generally believed that a" particular matter "referred to in the principle of "ne bis in idem" means that the same party brought forward the same claim in respect of the same subject matter of arbitration.… … although the parties to the above two cases are the same, the subject matter of arbitration and the arbitration claims are not the same. Therefore, the principle of "ne bis in idem" is not satisfied.… …. "

courts. As stated above, after the *Judicial Interpretation of the Civil Procedure Law* comes into force, courts review repetitive arbitration according to provisions on repetitive litigation. Therefore, it is of very realistic consideration to construct the theory of the subject matter of arbitration corresponding to the subject matter of litigation.

Theoretically, there are many controversies concerning the definition of the subject matter of litigation. Especially in cases involving concurrence of claims, whether a judge or an arbitrator holds different theories on the subject matter of litigation will directly affect the judgment on whether repetitive litigation or repetitive arbitration is constituted. In a word, there are roughly two kinds of theories, one is doctrine of substance or old doctrine of subject matter of litigation, and the other is doctrine of procedural law or new doctrine of subject matter of litigation. [12]The doctrine of substance is based on the substantive law claim, under which the number of substantive claims corresponds to the number of subject matters of litigation. In short, the doctrine of substance holds that the subject matter of litigation is determined by the substantive legal relationships. There shall be as many subject matters of litigation as there are substantive legal relationships in dispute. According to the theory of procedural law, the subject matter of litigation is a kind of request indicated in the claim, requiring to obtain court rulings, and the number of subject matter of litigation only depends on the number of requests put forward by the plaintiff and the number of court rulings obtained through such requests. [13]

At present, according to the views of the Supreme People's Court ("SPC") in its *Understanding and Application of the Judicial Interpretation of the New Civil Procedure*

12 *Civil Procedure Law (Fifth Edition)* written by ZHANG Weiping and published by Law Press China, 2019 Edition, P. 199 and P. 200

13 *Theory of Subject Matter of Civil Action under a New Paradigm* written by CHEN Hangping, LU Pei, CHAO Zhixiong and SHI Mingzhou and published by China Legal Publishing House, 2020 Edition, P. 86.

Law (Part One), the understanding of the theory of subject matter of litigation from the substantive point of view conforms to the actual situation of China's civil litigation, and the definition of the subject matter of litigation from the perspective of the right of claim in substantive law is consistent with the understanding of trial objects in China's civil litigation practice for a long time. [14]Therefore, if the legal relations or rights and obligations claimed by the parties are different, the subject matters are different, and it does not constitute repetitive litigation. [15]The SPC also explicitly points out in the book *Questions and Answers on Civil Trial Practice* that: "If a plaintiff files a lawsuit on the ground of a certain legal relationship but its claim is rejected by the court, and files another lawsuit on the ground of a different legal relationship with the same dispute fact, although the former lawsuit and the latter lawsuit are consistent in terms of the subjects of action and the claims but involve different subject matters of litigation, the latter lawsuit does not violate the [16]principle of "ne bis in idem"." The aforesaid Example 1 is an illustration. In Example 1, unjust enrichment and a contract of mandate have different legal relations and constitute different subject matters. Although the parties and claims in the cases were the same, the subject matters were different, so it did not constitute repetitive litigation. In another example of a retrial case[17], the Claimant filed a lawsuit on the ground that the Respondent's illegal possession of the construction proceeds constituted unjust enrichment, and a third party to the first instance claimed the owed construction proceeds in a separate action against the Claimant. The SPC held

14 *Understanding and Application of the Judicial Interpretation of the New Civil Procedure Law by the Supreme People's Court (Part One)*, compiled by the Supreme People's Court Leading Group Office for Implementation of the Civil Code and published by the People's Court Press, 2022 Edition, P. 520.

15 iCivil Ruling (Lu 14 Min Zhong [2021] No.1425) rendered by the Dezhou Intermediate People's Court in Shandong Province on April 30, 2021.

16 *Questions and Answers on Civil Trial Practice* compiled by Civil Adjudication Tribunal No. 1 of the SPC and published by Law Press China, 2021 Edition, P. 262.

17 Civil Ruling (Zui Gao Fa Min Zai [2021] No.55) rendered by the SPC on March 30, 2021.

that the Claimant's claim in the retrial was based on unjust enrichment, while the third party's claim in the first trial was based on the construction contract relationship, the legal relations between the parties to the two cases were different, and the subject matters of litigation were also different, which did not constitute repetitive litigation.

In summary, we believe that the subject matter of arbitration may be defined and identified according to the substantive theory (i.e., the substantive legal relation claimed by the Claimant). Where the substantive legal relations or rights and obligations claimed by the Claimant in the former and latter cases are different, it is inappropriate to identify repetitive arbitration. In other words, after the arbitral award for the former case was rendered, if the Claimant applies for arbitration again on the ground of a different legal relation or rights and obligations, it does not constitute repetitive arbitration.

How to identify whether the legal relations or rights and obligations claimed by the parties are different generally needs to be analyzed in light of the basis for the claims of the parties, including the legal basis, contractual basis and factual basis asserted by the parties. It is not appropriate to conclude that the subject matters of arbitration are the same simply because the underlying contracts that the parties apply for arbitration are the same. This can be reflected in courts' practice of judicial review of arbitration and in cases involving repetitive arbitration heard by arbitral bodies.

For cases involving courts' judicial review of arbitration, even if the underlying contracts are the same, the subject matters of litigation may be different. For example, in the case[18] concerning application to set aside an arbitral award, the court held that both cases arose from the leasing relationship between the parties. However, in the former case, the

18 Civil Ruling (Xin 01 Min Te [2016] No. 271) rendered by the Urumqi Intermediate People's Court in Xinjiang Uygur Autonomous Region on October 24, 2016.

Claimant requested the Respondent to return the rental deposit according to the lease contract, while in the latter case, the Respondent required the Claimant to compensate for the relevant losses arising from the Claimant's late delivery of the property according to the lease contract. Therefore, the subject matters of arbitration in the two cases were different. In another example, in the case[19] concerning application to set aside an arbitral award, the underlying contracts were both contracts for the purchase and sale of commodity houses. The court held that the Claimant claimed in the first arbitration to confirm the validity of the contract and to continue to perform the contract and claimed in the second arbitration to rescind the contract and to return the house purchase price. Both the subject matters and claims of the action were different, and the second claim did not deny the result of the first arbitration. Furthermore, in Example 3 mentioned above, the superior court held that the subject matter of arbitration for the former case was the principal calculated based on the total purchase price at the rate of 0.04% per day from October 30, 2004 to October 30, 2007; the subject matters of arbitration for the latter case were the 24 properties purchased by the owners, with each commercial housing with independent property rights as the calculation unit. The former case and the latter case are different in subject matters of arbitration and thus do not constitute repetitive arbitration.

For cases involving repetitive arbitrations heard by arbitration agencies, whether the contracts are the same or not is irrelevant to whether the subject matters of arbitration are the same or not. By retrieving and filtering the cases concluded by the China International Economic and Trade Arbitration Commission (hereinafter referred to as the "CIETAC" in short) after de-classification (the awards were rendered during the

19 Civil Ruling (E 08 Min Te [2020] No. 19) rendered by the Jingmen Intermediate People's Court in Hubei Province on December 11, 2020.

period from 2019 to the end of March 2023), and excluding repeated cases and cases that have no substantial connection with repetitive arbitrations, we obtain four typical cases involving the identification of the subject matters of arbitration. The details are as follows:

① In a case concerning an asset management contract dispute concluded by CIETAC in 2019, the Arbitral Tribunal held that the Claimant's claim and subject matters of arbitration in the former case and that in this case were different. In the former case, the subject matter of the dispute between the parties was the legal relationship of the asset management contract. The Claimant filed an application for payment to the Arbitral Tribunal in accordance with the asset management contract on the basis of deeming the asset management contract legal and valid. In this case, however, the Claimant requested to revoke the asset management contract on the ground of material misunderstanding. The Claimant filed an action for formation. The Arbitral Tribunal further held that the Claimant's claim and subject matter of arbitration had undergone a qualitative change, thus the Claimant's application for arbitration in this case did not constitute repeated application for arbitration, and CIETAC had jurisdiction over this case.

In this case, the underlying contracts in both the former case and the latter case were asset management contracts. However, the Claimant in the former case brought the action for payment based on the validity of the contract, while the Claimant in the latter case brought the action for formation based on material misunderstanding. Therefore, the subject matters of arbitration were different.

② In a case concerning a fund contract dispute concluded by CIETAC in 2021, the Arbitral Tribunal held that the Claimants and the Respondents in the former case and this case were the same. However, the Claimant's arbitration claim in the former case was

to require the Respondent to disclose relevant materials and compensate attorney fee, while the Claimant's arbitration claim in this case was to compensate for losses (including return of investment principal and proceeds, and loss of fund occupation). Accordingly, the subject matter of arbitration in the former case was the Claimant's right to know under the contract of this case, which corresponded to the Respondent's information disclosure obligation; while the Respondent's breach of contract and irregularities in this case caused losses to the Claimant, thus the subject matters of arbitration in the two cases were different.

In this case, the underlying contract in both the former case and the latter case was a fund contract. However, the Claimant in the former case claimed to exercise the right to know based on the Respondent's information disclosure obligation, while the Claimant in the latter case claimed for compensation for losses based on the Respondent's breach of contract, thus the subject matters of arbitration were different.

③ In a case concerning a contract for payment difference concluded by CIETAC in 2021, the Arbitral Tribunal held that the circumstances constituting repetitive arbitration may be considered in terms of the parties to the arbitration, the claims and the subject matter of arbitration, with reference to Article 247 of the *Judicial Interpretation of the Civil Procedure Law*. The subject matter of arbitration in this case was different from that in the former case. The subject matter of arbitration in this case was the contractual relationship between the Claimant and the Respondent on payment difference, while that in the former case was the contractual relationship on payment difference between the Claimant and D, a natural person, and Company E, which were not parties to the case, and the contractual relationship on payment difference between the Claimant and F and G, who were national person and not parties to the case. In the two cases, the underlying contracts between the Claimant and the Respondents were different, and the

Claimant filed for arbitration in accordance with different and independent arbitration clauses. To sum up, the Arbitral Tribunal held that this case did not constitute repetitive claims of substantive rights for the same subject matter of arbitration by the parties.

In this case, the underlying contracts and legal relations in the former case and the latter case are different, as are the subject matters of arbitration.

④ In a case concerning a contract dispute concluded by CIETAC in 2023, the Arbitral Tribunal held that the subject matter of arbitration in this case was different from that in the former case. The subject matter of arbitration refers to the civil or economic legal relation disputed between the parties, which needs to be resolved by an arbitration agency. In terms of facts, although this case and the former case fell into the scope of disputes under a *Contractor Agreement*, the specific facts are different. The fact that whether the Respondent in this case provided a qualified product was not heard in the former case. In terms of legal relation, there is only legal relation under the *Contractor Agreement* between the parties in the former case. The Respondent failed to complete the installation and commissioning of the waste gas treatment equipment and pass the environmental acceptance inspection as agreed in the contract, nor did it perform its quality assurance obligations, which constituted a material breach of the contract and led to the frustration of the purpose of the contract. Therefore, the basis of the claim for arbitration in the former case was the Respondent's installation and commissioning obligations under the *Contractor Agreement*, and the subject of arbitration was the contractual legal relation between the two parties under the *Contractor Agreement*. The legal relation between the two parties arising out of this dispute is solely related to the Contractor Agreement. In this case, the Claimant claimed rescission of the contract and refund of the payment on the grounds that the equipment provided by the Respondent was a nonconforming product. The basis for its claim was the Respondent's obligation

to provide a qualified product under the Contractor Agreement and the mandatory provisions with respect to product quality in the *Product Quality Law*. Therefore, the subject matter of arbitration in this Case was both the contractual legal relation under the *Contractor Agreement* and the rights and obligations of sellers and consumers with respect to product quality under the *Product Quality Law*. Such legal relation was not only related to the *Contractor Agreement*, but also related to the mandatory requirements prescribed in the P*roduct Quality Law*. Even if the Contractor Agreement did not exist between the parties, the Respondent still had product quality obligations to the Claimant arising from the law. Therefore, this case and the former case have different basis of claim and different legal relations, and the contract and legal basis of the Claimant's two arbitration claims are also different. Therefore, the Arbitral Tribunal held that acceptance and hearing of this case did not constitute repetitive arbitration.

In this case, the underlying contracts in both the former case and the latter case are contractor agreement. The Claimant in the former case claimed its rights based on the Respondent's installation and commissioning obligations, while the Claimant in the latter case claimed its rights on the ground of the nonconforming products provided by the Respondent. The legal relations, contracts, legal basis and factual basis in the two cases are different, so are the subject matters of arbitration.

B. New Facts and the Identification Thereof

The above explains what the subject matter of arbitration is and how to identify it by referring to cases handled by courts and arbitration institutions (take CIETAC as an example). The next question that needs to be addressed is that whether the occurrence of new facts constitutes an exception to the “the finality of an arbitral award"; and if so, how to determine whether new facts have occurred in practice.

1.On whether the occurrence of new facts constitutes an exceptional circumstance of “the finality of an arbitral award"

At present, there is still controversy as to whether the occurrence of new facts constitute an exceptional circumstance of “the finality of an arbitral award".

As far as repetitive litigation is concerned, it is worth noting that Article 248 of the *Judicial Interpretation of the Civil Procedure Law* also stipulates an exceptional circumstance, i.e.: "where a party files a lawsuit again due to any new fact after a judgment has taken effect, the people's court shall accept the lawsuit in accordance with the law." In Civil Ruling (Zui Gao Fa Min Zhong [2017] No.361 B) and Civil Ruling (Zui Gao Fa Min Shen [2020] No.6027), the SPC respectively pointed out that: "as long as the subjective and objective elements provided in the aforesaid Article 247.1 are not met simultaneously, it shall not be regarded as a repetitive litigation; even if the essential elements are met, it shall not be regarded as a repetitive litigation if the litigation is based on new facts...Article 248 of the *Judicial Interpretation of the Civil Procedure Law* provides exceptional circumstances where the principle of “ne bis in idem” does not apply"[20] and "this Article is an exceptional provision for the principle of 'ne bis in idem'"[21]. At present, according to Article 9 of the Arbitration Law, the "same dispute" shall not be arbitrated repeatedly, but it still cannot be determined whether an arbitration or litigation filed by the parties on the ground of new facts can be regarded as an exceptional circumstance for the “the finality of an arbitral award" only according to this Article.

20 Civil Ruling (Zui Gao Fa Min Zhong [2017] No.361 B) rendered by the Supreme People's Court on September 28, 2017.

21 Civil Ruling (Zui Gao Fa Min Shen [2020] No.6027) rendered by the Supreme People's Court on December 14, 2020.

Res judicata of civil judgments is limited to a certain scope, including objective scope, subjective scope and time scope. [22]In terms of the time scope, the reference time of res judicata is "at the end of the factual trial argument", and there is no res judicata for matters after the reference time (new facts). [23]The final effect of an arbitral award and the res judicata of a civil judgment have equivalence. [24]This also means that an arbitral award is not binding on any new facts occurred thereafter. In Example 2, the court correctly pointed out that by referring to the circumstances and principles regarding inapplicability of the principle of "ne bis in idem" in civil proceedings, if there are new facts occurred after an arbitral award was made, the Arbitral Tribunal's award on the arbitration claim made by the arbitration Claimant on the basis of the arbitration clause and new facts does not violate the regulation of "the finality of an arbitral award".

In this regard, in its *Letter of Reply to the Request for Instructions on the Case Involving the Application by China Petrochemical Corporation International Petroleum Exploration & Development Co., Ltd. for Setting aside of an Arbitral Award Rendered by CIETAC*, the SPC pointed out that "Article 248 of the *SPC's Interpretation on the Application of the Civil Procedure Law of the People's Republic of China* provides that 'if a party concerned files a lawsuit again after a judgment has taken legal effect, the people's court shall accept the lawsuit in accordance with the law if any new facts occur', which targets the civil procedures, and does not apply to arbitral proceedings. The *Arbitration Law* does not authorize an arbitration institution to conduct a second arbitration after the occurrence

22 For detailed discussion on the "res judicata", please see the *Study on the Objective Scope of Res Judicata of Civil Judgments* written by LIN Jianfeng.

23 *The Supreme People's Court's Understanding and Application of the New Civil Procedure Law (Part One)* compiled by the Supreme People's Court Leading Group Office for Implementation of the Civil Code and published by the People's Court Press, 2022 Edition, P. 522.

24 *Case Studies on the "Res Judicata" of Arbitral Awards and Refinement of Chinese Civil Procedure Law* written by BU Yuanshi and published on the Chinese Journal of Applied Jurisprudence, Issue 1, 2017.

of any new facts occurred"[25]. Many experts believe that the view of the SPC in this Letter is relatively conservative, which is not entirely in line with the basic principle and logic of res judicata (finality).

In practice, it is generally believed in practice that an arbitral award is not binding upon new facts occurred after the rendering of the arbitral award. In other words, when a party applies for arbitration based on facts occurred after the arbitral award is rendered, it does not constitute repetitive arbitration. In fact, in quite a few cases on judicial review of arbitration, the courts have recognized that a party is entitled to apply for arbitration again based on new facts occurred after the arbitral award in the former case is rendered[26].

25 Civil Ruling (Jing 04 Min Te[2017] No. 39) rendered by the Beijing Fourth Intermediate People's Court on April 27, 2020.

26 For example, in its Civil Ruling (Jing 04 Min Te [2022] No. 447), the Beijing Fourth Intermediate People's Court stated that: "..... In determining whether the former case and the latter case involve the same dispute, we can examine in terms of the parties, the legal relation in dispute, the arbitration claims and so on. If the above contents are the same, or the arbitration claim in the latter case substantially negates the arbitration result of the former case, it can be determined as the parties applying for arbitration again in respect of the same dispute. However, if new facts have occurred after the award has been made in the former case, it does not fall the scope of the same dispute, and the party concerned can apply for arbitration again on the basis of the new facts, and the acceptance of the case by the arbitration institution does not constitute a breach of the principle of "finality of an arbitral award .....". In Civil Ruling (Jing 04 Min Te [2019] No. 519), the Beijing Fourth Intermediate People's Court stated that: "..... In civil litigation, it is determined that a judgement has res judicata effect only in respect of matters occurring prior to the reference time and has no res judicata effect in respect of matters occurring after the reference time. For the new facts occur after the legal effect of the judgement, as they occur after the reference time for res judicata, which are not determined by the effective judgment and not part of the litigation, they should not be subject to the constraints of res judicata. Where new facts have occurred, thus changing the rights recognized by the judgment of res judicata, the litigation filed again by a party concerned on the ground of such facts is no subject to the principle of ne bis in idem, and the court shall accept it. With reference to the above circumstances and principles regarding the non-applicability of the principle of 'ne bis in idem' in civil litigation, if new facts have occurred after an arbitral award has been rendered, the Arbitral Tribunal's ruling on the arbitration claim made by the arbitration claimant on the

2.Criteria for identification of new facts

Having recognized that initiation of an arbitration based on new facts does not violate the rule of "the finality of an arbitral award" and does not constitute repetitive arbitration, the next question is how to identify the new facts.

basis of the arbitration clause and the newly occurred facts does not contravene the provisions of the 'finality of an arbitral award' ....." In its Civil Ruling (Hu 01 Min Te [2020] No. 236), the Shanghai First Intermediate People's Court stated that: "..... in determining whether two cases involve the same dispute, we can generally examine such cases in terms of the parties, the disputed legal relation, the arbitration claims and so on; if the parties, the disputed legal relation and the arbitration claims in both cases are the same, or if the arbitration claim in the latter case substantially negates the result of the decision in the former case, it can be concluded that it constitutes a situation where the parties apply for arbitration again in respect of the same dispute. However, if new facts have occurred after the arbitral award has been rendered in the former case, it does not constitute the same dispute, and the party concerned may apply for arbitration again on the basis of the new facts, and the acceptance of the case by the arbitration institution in this case is not in violation of the provisions of the rule of finality of an arbitral award ....." In its Civil Ruling (Hu 01 Min Te [2020] No. 453, the Shanghai First Intermediate People's Court stated that: "..... Of course, if a new fact occurs after an arbitral award has been made in the former case, it does not involve the same dispute, and the party concerned can apply for arbitration again on the basis of the new fact ....." In its Civil Ruling (E 01 Min Te [2019] No. 619), the Wuhan Intermediate People's Court in Hubei Province pointed out that "..... and in the former arbitration, the Arbitral Tribunal considered that the conditions of some of Hu Jianyong's arbitration claims were not fulfilled, Hu Jianyong could claim separately after the conditions were fulfilled. Hu Jianyong's two successive arbitration applications did not involve the same claim, and after the former arbitration was made, new facts occurred, Hu Jianyong's filing of the current arbitration based on the new facts did not violate the principle of 'ne bis in idem' ....." In its Civil Rulin (Shan 03 Min Zhong [2018] No. 1422), the Baoji Intermediate People's Court in Shaanxi Province stated that "..... The focus of the dispute is mainly on how to understand and specifically identify the 'same dispute'. Arbitration application or litigation claim is the substantive right claim made by the parties to the other party, which determines the scope of arbitration or trial of the civil case by the arbitration institution or the people's court. The arbitral award or the court decision is judgment and ruling made on the status of the substantive legal relation between the parties at a particular point in time based on the arbitration application or litigation claim, so it deals only with the matter occurred before the reference time and claimed. For a new fact occurred after the reference time that the party concerned did not know or foresee, changing the dispute between the parties that has been determined in an effective judgement, as it has not been heard and adjudicated in the effective judgement, it shall not be the same dispute as the matter that has been adjudicated and shall not be bound by res judicata. ....."

With respect to new facts, the SPC pointed out in the book *Understanding and Application of the Judicial Interpretation of the Civil Procedure Law by the Supreme People' Court* that: "new facts shall be facts occurred after an effective judgment has become legally effective, instead of facts which were not ascertained or involved in the original effective judgment, nor were the facts which were not raised by the parties in the original trial. It shall be noted that the facts which have existed before the end of the original trial and the facts which the parties should have asserted but failed to do so are not new facts either[27]." In Civil Ruling (Zui Gao Fa Min Zhong [2018] No. 453), the SPC further pointed out that: "'New facts' refer to the facts which newly occur after the judgment is rendered and may affect the rights and obligations of the parties. From the point of time, the new facts shall occur at least after the facts on which the judgment is based. In addition, such new facts do not equal new evidence. If the new evidence still proves the facts disputed by the previous lawsuit, such facts are facts on which the former lawsuit has been heard and on which the judgment for the former lawsuit is based. Where a party concerned considers that the new evidence is sufficient to overthrow the original judgment, it shall apply for a retrial in accordance with the law instead of instituting a new lawsuit on the basis of such new evidence."

It is worth considering that, as far as court proceedings are concerned, new evidence may be the cause of commencement of retrial proceedings[28]. Therefore, it is reasonable to distinguish between new facts and new evidence, and the discovery or production of new evidence does not constitute an exceptional circumstance for repetitive litigation. However, arbitration is different from litigation. Given that the arbitral procedure lacks

27 Understanding and Application of the Judicial Interpretation of the Civil Procedure Law by the Supreme People' Court (Part One) complied by the Office of the Leading Group of the Supreme People's Court for the Implementation of the Revised Civil Procedure Law and published by the People's Court Press, 2015 Edition, P. 637.

a correction mechanism for errors due to the "the finality of an arbitral award, it remains to be considered whether the criteria for determining new facts under the repetitive litigation rules should be directly referred to.

To this end, this Article studies relevant typical cases in which the courts and arbitration institutions (taking CIETAC as an example) are involved in repetitive arbitration and makes a summary on how to identify new facts in practice below.

After retrieval and filtering, [29]we made statistics on new facts or the identification of new facts in cases reviewed by domestic courts which involve repetitive arbitration (all involving application to set aside arbitral awards). According to the following 8 typical cases, the parties may apply for arbitration again based on new facts, which does not constitute repetitive arbitration and does not violate the principle of "ne bis in idem". The details are as follows.

① In the Case (Jing 04 Min Te [2019] No. 519) concluded by Beijing Fourth Intermediate People's Court, the Court held that in Award No.0902 rendered by Beijing Arbitration Commission, the Arbitral Tribunal did not uphold the claim of Jindu Weiye Company (the Claimant for counterclaim in the former case, and the Claimant for

28 Article 207 of the *Civil Procedure Law of the People's Republic of China provides* that: "If the application made by a party conforms to any of the following circumstances, the people's court shall conduct a retrial: (i) there is new evidence which is sufficient to overthrow the original judgment or ruling; …"Article 385 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* provides that: "If the new evidence submitted by the applicant for retrial can prove that the ascertainment of basic facts, or the results of the original judgment or ruling were erroneous, it shall be deemed that the circumstance set forth in Article 207.1 of the Civil Procedure Law applies. For evidence which complies with the preceding paragraph, the people's court shall order the applicant for retrial to state the reason for failure to provide such evidence within the stipulated period; where the applicant refuses to state the reason or the reason is not tenable, Article 68.2 of the *Civil Procedure Law* and Article 102 of this Interpretation shall apply."

29 All cases are selected from PKU law database by searching keywords with no limitation on year.

arbitration in the latter case) for the demolition expenses for the houses left over from the Gaoxingli Project, because such expenses had not been actually incurred. In the award for this case, the Arbitral Tribunal confirmed that Jindu Weiye Company had submitted sufficient evidence to prove that it had subsequently spent 99,079,280 yuan for the demolition of the houses left over on the ground of No. 30, Gexingli. Therefore, based on new facts occurred after the issuance of Award No.0902, Beijing Arbitration Commission has the authority to arbitrate the arbitration claim filed by Jindu Weiye Company in respect of the demolition expenses for the houses left over from the Gexingli Project, which does not violate the rule of "the finality of an arbitral award", nor does it violate the provisions of *Arbitration Law of the People's Republic of China and the Arbitration Rules*.

According to this case, the actual expenses incurred after the issuance of the award for the former case are newly occurred facts, on ground of which the party concerned may apply for arbitration again.

② In the Case (Jing 04 Min Te [2022] No. 447) concluded by Beijing Fourth Intermediate People's Court, the Court held that, according to the award for the former case, the Arbitral Tribunal did not uphold the claim of the Bus Company (the Claimant for arbitration counterclaim in the former case, and the Claimant for arbitration in the latter case) for determining the validity of rescission of the contract on the ground that the conditions for rescission as agreed in the contract were not satisfied. After the Award No.1797 for the former case was rendered, Advertising Branch of the Bus Company sent a new letter to Columbia Corporation (the Claimant for arbitration in the former case, and the Respondent for arbitration in the latter case) for rescission of the contract in question, and served an audit report issued by a third party to Columbia Corporation, asserting that the conditions for exercise of the right of rescission as agreed

in the contract were met, and requesting the Arbitral Tribunal to confirm the rescission of the contract. The Court held that the nature of the claim of the Advertising Branch of the Bus Company was the right of formation in essence. The company claimed to the arbitral institution to confirm the establishment of the right of formation based on newly occurred facts. Beijing Arbitration Commission's acceptance of this case and its rendering of an award based on the newly occurred facts did not violate the principle of "the finality of an arbitral award".

According to this case, a new fact is constituted when the party concerned sent a letter of recession to rescind the contract after the award for the former case was rendered, thus the party concerned may file for arbitration again.

③ In the Case (Jing 04 Min Te [2016] No.23) concluded by Beijing Fourth Intermediate People's Court, the Court held that the arbitration claimant discovered new evidence through such channels as online searches after the award for the 2012 Case was rendered. Among the 23 judgements submitted by the Claimant, 21 were issued after the award for the 2012 Case was made, thus falling the scope of new evidence emerged after the conclusion of the 2012 Case. Although the other two judgements were rendered before the award for the 2012 Case was made, there was no evidence to prove that the arbitration claimant had previously known of and possessed the judgments. Therefore, these 23 judgments were new evidence after the award for the 2012 Case was rendered. According to Article 248 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, if a party concerned files a lawsuit again on the ground of any new fact after a judgment has taken effect, the people's court shall accept such lawsuit. Hence this Case did not fall under ne bis in idem.

According to this Case, the court judgments discovered in the searches after the rendering of a judgement for the former Case (including the judgment made prior to the rendering of the judgement for the former case which is unknown to the parties) can be deemed as new evidence and constitute new facts, on ground of which the party concerned may file another arbitration application.

④ In the Case (Hu 01 Min Te [2020] No.236) concluded by Shanghai First Intermediate People's Court, the Court held that in the Case No. 1181 heard by Shanghai Arbitration Commission, the Arbitral Tribunal determined that the products involved in the Case provided by the Claimant to the Respondent were qualified products based on the information such as the inbound goods inspection and quarantine certificate and the hygiene certificate issued by the commodity inspection authority submitted by the Claimant. After Case was arbitrated, the Respondent applied to Waigaoqiao Customs for information disclosure in respect of the aforementioned documents submitted by the Claimant in Case No. 1181. Waigaoqiao Customs issued a Reply on April 30, 2019, replying that the aforementioned documents did not exist. The Respondent submitted this Reply in this arbitration to refute the facts proved by the aforementioned documents submitted by the Claimant in Case No.1181. The Arbitral Tribunal adopted this Reply and took it as one of the grounds for finding that the products in question were foodstuffs that did not comply with the safety standards, and then ruled that the Claimant's act constituted a breach of contract, for which the Claimant should bear the liability to refund the purchase price and to compensate for the losses. Hence the factual basis of the two cases as to whether the products in question provided by the Claimant to the Respondent were qualified products changed, i.e., new facts occurred after the arbitral award was rendered for Case No. 1181. Therefore, even if the arbitration claims made by the Respondent for refund of the purchase price in the two cases overlapped, the two cases should be considered as two different disputes due to

the occurrence of new facts, and it was not inappropriate for the Respondent to file for arbitration again on the ground of new facts.

According to this Case, the government's reply opinions subsequent to the award for the former case can overturn the facts determined in the former case, which constitutes new facts and can enable the party concerned to file for arbitration again.

⑤ In the Case (Hu 01 Min Te [2019] No. 663) concluded by Shanghai First Intermediate People's Court, the Court held that according to the agreement of the parties in the contract in question, the project price agreed in the contract was a provisional price, and the parties would determine the final project price upon settlement, so the final project price should be determined on the premise of settlement. In Case No. 0837, the Arbitral Tribunal mainly held that the settlement documents submitted by the Respondent were not consented by the Claimant, and the Respondent did not apply for judicial expertise for the project price, so the settlement documents could not be taken as the basis for settlement of project price, and thus rejected the Respondent's counterclaim, i.e. the project price at issue in the case could not be determined due to the lack of settlement, and the disputes between the two parties over the settlement of the project price or the payment of the remaining project price had not been substantively resolved in the case. At the same time, given the fact that no judicial expertise was conducted for the Case No.0837 did not mean that the Respondent refused to entrust judicial expertise after the Arbitral Tribunal made explanations, the Respondent entrusted an audit agency to issue a settlement report and applied for judicial expertise after the award was rendered. It can be considered that after the award for the Case No. 0837 was rendered, the fact whether the disputed project price had been settled had changed, i.e., new facts occurred, and the Respondent filed for arbitration again based on such a fact. The Shanghai Arbitration Commission's acceptance of this

arbitration case and its rendering of the award do not violate the rule of “the finality of an arbitral awards".

According to this Case, after the application in the former case was rejected due to lack of judicial expertise and unsettled project price, the entrustment of audit and the provision of settlement report in the latter case can be deemed as a new fact occurred.

⑥ In the Case (Shen Zhong Fa Min Er Chu Zi [2010] No.78) concluded by Shenzhen Intermediate People's Court in Guangdong Province, the Court held that, in terms of facts, although Ji X Corporation, the Claimant in Award No. 986 rendered by Shenzhen Arbitration Commission claimed payment of goods in the total amount of RMB 1,241,939.00 and liquidated damages, and the evidence submitted by the Claimant Ji X Corporation in arbitration No. 220 in this case was all submitted in Award No. 986. However, in Award No. 986, the Arbitral Tribunal did not organize a hearing or conduct written cross-examination of key evidence involved in the 37 contracts, including 17 copies of *Proof of Acceptance for Lading Inspection*, the goods waybill and courier details, the freight forwarder's certificate and so on, only on the ground that the evidence submitted after the hearing constituted evidentiary disqualification, and thus the Arbitral Tribunal did not conduct a substantive hearing, and the award made by Award No. 220 in respect of the payments under the 37 Elevator Spare Parts Purchase Contracts did not overlap and conflict with Award No. 986 … As for Award No. 986 and Award No. 220, the former award did not provide opportunities for cross-examination and hearing of key evidence under the 37 contracts in the latter award, and when other evidence submitted by Ji X Corporation before the hearing significantly prevailed, the Arbitral Tribunal rejected the claims under the 37 contracts only on the ground that the time limits for adducing a small portion of the evidence had expired, which lacks sufficient basis.

Given the limitation of the existing laws regarding the judicial review of arbitral awards by people's courts, Award No. 220 is in essence a self-correction made by the arbitral institution, otherwise the parties would have no remedy available to them, which is against the principle of fairness and justice. Therefore, it does not meet the requirement of Article 58 of Arbitration Law for setting aside of an award.

According to this Case, for the evidence which has been submitted but has not been cross-examined and heard in the former case, the parties involved can file for arbitration in the latter case again. However, in this Case, the Court finally recognized that the Arbitral Tribunal may hear the latter case and dismissed the party's request to set aside the award after taking into comprehensive consideration the facts of the case, the limitation of the judicial review of arbitral awards, and the principles of fairness and justice, etc.

⑦ In the Case (Jing 04 Min Te [2021] No.222) concluded by Beijing Fourth Intermediate People's Court, the Court held that although a lawsuit had been filed, if the party concerned withdrew the lawsuit, and since the court concerned had not made a decision on the lawsuit, the party concerned may file a lawsuit again, which did not violate the principle of "ne bis in idem". As a corollary, it is not a violation of the principle of "the finality of an arbitral award" if a party initiates arbitration but later withdraws its arbitration claim, or if, for reasons not attributable to the party, the arbitration institution fails to make an award on the matter that the party has claimed in arbitration and allows the party to arbitrate in a separate arbitration at a later date when the evidence is sufficient or when the conditions are fulfilled. Although the arbitral award for the Case No. 0434 ultimately rejected the arbitration claim of Haihan Corporation, it can be seen in the arbitral award for this case that the Arbitral Tribunal held that the Mobile Design Institute should pay the design fee for the Henan Project to Haihan

Corporation. However, the design fee due to Haihan Corporation for the Henan Project could not be determined based on the evidence at that time for the Case No. 0434. The Arbitral Tribunal then allowed Haihan Corporation to file for a separate arbitration upon sufficient evidence, but the Arbitral Tribunal did not make an award correspondingly on assumption of responsibilities in respect of the arbitration claims for this part in substance. The Arbitral Tribunal for the Case No. 0166 made an award on the design fee and interest payment for the Henan project claimed by Haihan Corporation, which did not violate the principle of "the finality of an arbitral award".

According to this Case, the application was rejected in the former case due to insufficient evidence of the due design fee, the Arbitral Tribunal did not make an award on the liability in substance but heard the new evidence submitted by the party concerned to the latter case and made an award thereon, all of which did not violate the principle of "the finality of an arbitral award".

⑧ In the Case (Yue 13 Min Te [2022] No. 40) concluded by Huizhou Intermediate People's Court in Guangdong Province, the Court held that the Arbitral Award (Hui Zhong An Zi [2018] No.475) rendered by the Arbitral Tribunal previously stated that: "The Arbitral Tribunal believes that based on the existing evidence, it is inappropriate to render an award on the Claimant's claim that the Respondent shall pay the compensation of 1.5 million yuan for the residential building that was not completed in accordance with the Construction Project Planning Permit (Jian Zi [2015] No. 60063). The Claimant may file a separate claim after the Seventh Floor of the building in question has been dealt with by the relevant governmental administrative departments." That is to say, the Arbitral Tribunal did not conduct substantive review of this claim, and the judgment of the Arbitral Tribunal as to whether the evidence submitted by the Respondent in this arbitration is new evidence falls within the scope of the Arbitral

Tribunal's exercise of the right to deal with substantive matters rather than the scope of court hearing, so the Court did not uphold this claim of the Claimant.

According to this Case, the application was dismissed in the former case due to insufficient evidence, and the party concerned to the latter case submitted the reply of the government department issued after the award for the former case was rendered as new evidence, the Arbitral Tribunal had the authority to hear and render a decision thereon, and the Court held that whether this evidence is new evidence falls within the scope of the Arbitral Tribunal's authority to deal with substantive matters.

Among the cases of repetitive arbitration concluded by CIETAC (the awards were rendered during the period from 2019 to the end of March 2023), seven typical cases involving ascertainment of new facts are specifically set out below.

① In a sales contract dispute case concluded by CIETAC in 2019, the Arbitral Tribunal held that the Claimant in this case sought compensation for tax losses from the Respondent in the former case. As the Claimant had not yet made the payment for the goods at that time, the Respondent had not yet delivered the VAT invoice, the VAT voucher, deduction, and disbursement of the purchase cost before income tax had not occurred. Given that the Claimant's tax losses had not occurred yet at that time, the Claimant could not claim compensation for losses that had not yet occurred, therefore, the Arbitral Tribunal dismissed the Claimant's arbitration claim on the ground that the losses had not yet occurred, rather than the Respondent's alleged lack of evidence. After the Claimant made payment for the goods, it is unable to obtain the VAT invoice certification and deduction on the strength of the photocopy of the Certificate on the Lost VAT Special Invoice and the accounting copy of the special invoice delivered by

the Respondent, so the Claimant deemed that its tax losses had already occurred. The Arbitral Tribunal for this case recognized such claim of the Claimant, and held that the Claimant was entitled to file for arbitration for its tax losses in this case, and the CIETAC's acceptance of the Claimant's arbitration claim did not violate the principle of "ne bis in idem".

In this Case, although the Arbitral Tribunal did not explicitly point out new facts, it determined that the tax losses had not occurred in the former case but the tax losses had actually occurred in the latter case, thus the Claimant is entitled to file for arbitration again for the tax losses.

② In a case of a dispute over a cooperative development contract on a project concluded by CIETAC in 2019, the Arbitral Tribunal held that as can be seen from the previous trial and the outcome of the decision, the case identified the reasons for the shelving of the development of the second batch of Phase II of the project, and then determined that the Respondent's proposal to suspend the development of the project and the transfer of the equity interest were the reasons for the shelving of the development of the second batch of Phase II of the project, and the Respondent, as the cooperation party, failed to fulfill its due responsibilities, therefore the Arbitral Tribunal applied the principle of contributory negligence in dealing with the Claimant's compensation for breach of contract and made a final award as appropriate. In this case, the Claimant claimed that relevant personnel of the Respondent took away the project company's special finance seal and U-Shield for bank payment, etc. from the project company. After reviewing the arbitral award for the former case, although the Claimant raised the claim as a defense during the arbitration in this case, the Arbitral Tribunal did not determine and deal with whether such claim was tenable in the part of the finding of facts and reasons of the award in the former case. Therefore, the independent arbitration request for such claim

filed by the Claimant in this case did not constitute repetitive arbitration, nor was it subject to the effect of the arbitral award for the former case, and the Arbitral Tribunal could legally hear the case and make an award thereon.

In this Case, although the Arbitral Tribunal did not explicitly point out new facts, some of the facts and bases of breach of contract claimed in the former case and the latter case were different, the Arbitral Tribunal thus found that the facts that had not been examined substantively in the former case could be claimed in this Case and did not constitute repetitive arbitration.

③ In a lawyer fee dispute case concluded by CIETAC in 2020, the Arbitral Tribunal held that the inapplicability of "ne bis in idem" stipulated in Article 248 of the J*udicial Interpretation of the Civil Procedure Law* shall mean that the "new facts" occurred after the judgment took effect, and the dispute resolution agency had not examined the legal relationship involved in such new facts, so it was not appropriate to simply interpret evidence that should have been submitted in the original trial but was not submitted as "the occurrence of new facts". The fact that the Claimant claimed the attorney fees of 160,000 yuan from the Respondent has been heard In the former case. As the Claimant failed to submit evidence of having paid the attorney fees, the Arbitral Tribunal dismissed the Claimant's claim for attorney fees. According to the principle of “ne bis in idem”, the same claim as that in the former case should not be heard in this case. Article 4.2 of the *Agency Agreement* concluded by and between the Claimant and H Law Firm in December 2019 provided that: "Upon consultation, both parties agree that the attorney fee is 160,000 yuan, which shall be paid within three days upon the execution of this *Agreement*". Under such agreement, the Claimant should pay attorney fees to H Law Firm before December 2019. During the period from December 2019 to February 2020 when the former case was concluded, the Claimant was able to submit evidence in

respect of the payment of the attorney fees but failed to do so, nor did it account for or explain to the Arbitral Tribunal the reasons for non-payment of the attorney fees or apply for extension of the time limit for production of evidence. The adverse consequences arising therefrom shall be borne by the Claimant itself.

In this Case, the Arbitral Tribunal expressly recognized that the parties may initiate arbitration based on new facts, however, in light of the parties' ability to produce evidence, new facts occurred do not include the evidence that the parties should have produced, but failed to do so.

④ In a lawyer fee dispute case concluded by CIETAC in 2020, the Arbitral Tribunal held that, the arbitral award for the former case mentioned that the Respondent's "use of the machine in question for processing wood substitutes did not comply with the contractual agreement, which directly resulted in the impairment of the performance of the machine", but the arbitral award aimed to show that the Respondent's "claim that the machine in question had quality problems was untenable". The Claimant's counterclaim in the former case was based on the fact that the contract was legally effective and the Respondent had no right to rescind the contract, and the Respondent shall continue to perform the contract and pay the remaining price since it has actually used the machine in question for four years. The Arbitral Tribunal's opinions set out in the arbitral award for the former case are that: "The final acceptance report signed by the representative of the Buyer and the representative of the Seller has not been produced. The payment conditions set forth in the contract have not been satisfied." The Arbitral Tribunal in the former case held that the Claimant had no right to request the Respondent to pay the remaining price under the Contract or claim compensation for loss of interest on anticipated payment. In its arbitration claim in this case, the Claimant provided the *Request for Arbitration*, the secret key authorized email, photos

of demolition of the equipment installation site and other evidence submitted by the Respondent in the former case, and claimed that the Respondent maliciously prevented the inspection and acceptance conditions from being met or the equipment from being put into normal production, and removed the equipment from without consent, etc., which shall be deemed that the equipment has passed the inspection and acceptance. Since the Two Cases were not based on "the same fact", the Arbitral Tribunal adopted the Claimant's opinion that this Case did not constitute repetitive hearing.

In this Case, the Claimant's initiation of arbitration on the ground of different facts after the award for the former case was rendered and proof of the satisfaction of payment conditions did not violate the rules of finality of an arbitral award.

⑤ In a logistics service agreement dispute case concluded by CIETAC in 2021, the Arbitral Tribunal held that the main reason the arbitration in the former case did not support the Claimant's claim for compensation of losses was that there was not sufficient evidence to find that the goods were indeed stored in the warehouse of the Respondent, but the arbitration in the former case did not draw a conclusion that the Respondent did not constitute a breach of contract or should be exempted from liability. According to Article 248 of the *Judicial Interpretation of the Civil Procedure Law*, where a party concerned files another lawsuit on the ground of occurrence of new facts after a judgment has taken effect, the people's court shall accept the lawsuit in accordance with the law. In this Case, the Claimant's application for arbitration to the Arbitral Tribunal on the ground of the basic facts found under the Criminal Judgment (Zhe 02 Xing Chu [2018] No.89) and the Criminal Ruling (Zhe Xing Zhong [2019] No.383) newly rendered by the court after the award for the former case took effect conforms to the abovementioned provisions of the *Judicial Interpretation* and does not constitute

"repetitive arbitration".

In this Case, the initiation of arbitration by the party to the latter case on the ground of the basic facts found in the new judgment rendered by the court after the award for the former case was rendered satisfies the conditions for the occurrence of new facts and thus does not constitute repetitive arbitration.

⑥ In a fund contract dispute case concluded by CIETAC in 2021, the Arbitral Tribunal held that the Claimant also produced new evidence (including the *Reconsideration Decision of the China Securities Regulatory Commission* and the *Reply from the Beijing Securities Regulator*) under this Case, so the facts and grounds relied on in the two cases were not exactly the same either.

In this Case, a party to the latter case submitted new evidence obtained after the award for the former case was rendered, and the Arbitral Tribunal held that the facts based on which the former and the latter arbitration cases were arbitrated were not exactly the same, which did not violate the rules of finality of an arbitral award.

⑦ In a sales contract dispute case concluded by CIETAC in 2021, the Arbitral Tribunal held that the criterion for determining whether it is the same dispute depends on whether it is a dispute over the same matter or issue between the same parties. Although the parties to this Case and the parties to the former case are completely the same, the matter or arbitration dispute applied by the Claimant for arbitration in this Case is a dispute arising from the process of continuing to perform the contract between the parties thereafter, based on the Claimant's claim that the award for the former case determines that the contract has not been rescinded and should continue to be performed. The Claimant claimed that the Respondent's failure to perform the corresponding contractual obligations after the award for the former case was

rendered constitutes breach of contract by the Respondent, so the Claimant further claimed that the Respondent should continue to perform its contractual obligations and indemnify the Claimant for direct and indirect losses caused by the Respondent's breach of contract. The dispute involved in the Claimant's claim arose after the award for the former case was rendered but had not been heard yet by the Arbitral Tribunal in the former case. In accordance with the effective arbitration clause of Article 18 of the Contract in this Case, the Arbitral Tribunal in this Case has the authority to arbitrate any new dispute arising from the continuous performance of the contract between the parties after the award for the former case was rendered. The Arbitral Tribunal held that the Claimant's arbitration claims in this Case were made by the Claimant on the ground of the new dispute (new matter) arising from the continued performance of the contract after the award for the former case was rendered, where were arbitration matters or disputes different from the Claimant's claim for losses on the ground of rescission of the contract in the former case. Therefore, the Respondent's view that all the Claimant's claims for compensation for losses shall be deemed to have been arbitrated was untenable.

In this Case, as recognized by the Arbitral Tribunal, the Claimant filed for arbitration of a new dispute (new matter) arising from the continued performance of the contract after the award for the former case was rendered, such fact shall not constitute repetitive arbitration of the "same dispute" without trial in the former case.

It can be seen from the above cases that the courts and arbitral institutions are inclined to give a more flexible and broad interpretation of new facts occurred after the award for the former case is rendered. The occurrence of new facts includes both the occurrence of facts having an impact on the substantive rights and obligations of the parties after the award for the former case is rendered, which may be referred to as the "new occurrence

criterion", [30]and the occurrence or discovery of new evidence after the award for the former case is rendered[31], which may be referred to as the "new discovery criterion".

Of course, in the above cases, the courts or arbitral tribunals do not arbitrarily expand the interpretation and find the occurrence of new facts, including the existence of new evidence, but generally impose restrictions on the content to be proved by new evidence and the time of discovery or provision of the new evidence, taking into account the ability of the parties to produce evidence (for example, in the aforesaid attorney fee dispute case concluded by CIETAC in 2020, the Arbitral Tribunal found that the occurrence of new facts did not include the evidence that should have been submitted but has not been submitted in the former case). Such a way of ruling may not only alleviate the situation where the finality of an arbitral award results in serious substantive injustices which cannot be rectified, but also prevent the parties from deliberately concealing evidence, abusing their litigation rights and affecting the efficiency of dispute resolution. From a case perspective, new evidence generally refers to the evidence formed after the award for the former case was rendered and obtained by the party concerned, and the content of the new evidence shall have an impact on the substantive determination of the case. However, in consideration of the actual possibility

30 For example, in the aforesaid case (Jing 04 Min Te [2019]No. 519), the actual expenses were incurred to the party for relocation after the award for the former case was rendered; in the case (Jing 04 Min Te [2022] No. 447), the Letter of Rescission was sent by the party after the award for the former case was rendered; in the case (Hu 01 Min Te [2019]No. 663), the party commissioned an audit and settle the project funds after the award for the former case was rendered; in the case of a sales contract dispute concluded by CIETAC in 2019, tax losses were actually occurred after the award for the former case was rendered.

31 For example, in the aforesaid case (Jing 04 Min Te [2016]No. 23), the party found by search the judgement that can prove facts of the case after the award for the former case was rendered; in the case (Hu 01 Min Te [2020] No. 236), the party consulted the Customs and obtained reply from the Customs that could prove facts of the case after the award for the former case was rendered; and in the case of a logistic service agreement dispute concluded by the CIETAC in 2021, the party initiated arbitration on the basis of the facts identified in the criminal judgment newly made by the Court after the award for the former case was rendered.

of the production of evidence, new evidence also includes the evidence that the party concerned could not have discovered or provided in the former case due to objective reasons and could only have discovered or provided after the award for the former case was rendered (for example, in the aforesaid Case (Jing 04 Min Te [2016]No. 23), the Court found that although two of the judgments submitted by the party concerned were delivered before the award for the former case was made, but there was no evidence to prove that the party concerned had known of and possessed such judgments, the Court thus deemed such two judgments as new evidence).

In an individual case, for matters that have not been substantively heard by the Arbitral Tribunal due to the party's lack of evidence or rejection of overdue evidence in the former case, if the Arbitral Tribunal for the latter case has rendered a award under the principles of fairness and good faith on the basis of the evidence newly submitted by the party and the overall circumstances of the case, the Court also recognizes that it is not against the rule of finality of an arbitral award (such as the aforesaid cases (Shen Zhong Fa Min Er Chu Zi [2010] No.78 and (Jing 04 Min Te [2021] No. 222), or the Court may directly rule that whether to adopt the party's new evidence and hear the case falls within the scope of the Arbitral Tribunal's substantive hearing and shall not be intervened by the Court (such as the aforesaid Case (Yue 13 Min Te [2022] No. 40). This thinking reflects the value orientation of arbitral tribunals to solve disputes properly within the scope permitted by the law, and also embodies the modesty characteristic of judicial review.

III. Review of Repetitive Arbitration by Courts

The criteria used to identify repetitive arbitration are discussed above in the context of case studies, which shows that in practice, both arbitral institutions and courts conduct review of repetitive arbitration. In fact, at present, there are still considerable

controversies on whether courts have the authority to review repetitive arbitration and on what grounds courts should conduct such review. This issue will be explained below.

A. Whether Courts Have the Authority to Review Repetitive Arbitration

Generally speaking, the supervision of arbitration activities by courts adheres to the principle of limited supervision[32]. In other words, the scope of court's supervision shall be limited to the issues explicitly prescribed in the *Arbitration Law and the Civil Procedure Law*, and courts shall not review issues within the arbitration authority of the Arbitral Tribunal. The next question is whether the defense of repetitive arbitration raised by one party in the proceeding for judicial review of arbitration is a substantive defense or a procedural defense. In practice, there is substantial controversy over this issue.

One view holds that the determination of repetitive arbitration involves substantive review, and thus courts have no authority to conduct such review. In Example 4, Beijing No.3 Intermediate People's Court expressly made it clear that the determination of whether or not there was a violation of the system of “the finality of an arbitral award " was within the scope of an arbitral tribunal's substantive hearing of a case, rather than the scope of review for setting aside an award by a people's court. For another example, in the Reply to the Request for Instructions on the Application by Beijing Kangwei

32 For example, in its Civil Ruling (Hu 01 Min Te [2022] No. 173, the Shanghai First Intermediate People’s Court held that "it should be pointed out that, given the nature of arbitration awards being final and the respect for the parties' autonomy, the law provides that the principle of limited supervision shall apply to the judicial supervision of arbitration, courts’ review of the application to set aside an arbitral award shall be limited to the circumstances stipulated in Article 58 of the *Arbitration Law,* and courts have no authority to review or ascertain matters beyond the provisions of such Article." Furthermore, in its Civil Ruling (Jing 04 Min Te [2020] No. 312, the Beijing Fourth Intermediate People’s Court held that "the procedure for setting aside an arbitral award is the limited supervision of arbitration proceedings by people's courts within the scope of the law, rather than a second-instance procedure for an arbitration case. The ascertainment of facts and application of law are within the scope of an arbitral tribunal’s authority to hear substantive cases, rather than the scope of judicial review of arbitration by a people's court."

Medical Consultation Service Center Co., Ltd. for Setting aside of an Arbitral Award Rendered by the China International Economic and Trade Arbitration Commission (Min Si Ta Zi [2012]No.57), the SPC emphasized that the opinion that the award should be set aside for violation of the principle of "the finality of an arbitral award" was in essence a review of whether the substantive result of an arbitral award was correct, which violated the principle of procedural review. For the last example, in the case (Jing 04 Min Te [2019] No. 105), Beijing Fourth Intermediate People's Court held upon review that the parties and subject matter of action of the two cases were the same, and the award for the latter case substantively denied the award for the former case. However, Beijing High People's Court held upon review that the reason of the Claimant's application for setting aside the award for the latter case involved substantive determination of the case, thus the case did not involve the setting aside of the arbitral award in a foreign-related case. Similar viewpoints can also be found in such civil ruling as Civil Ruling (Jing 04 Min Te [2018] No. 218)[33], Civil Ruling (Jing 01 Zhi Yi [2018] No. 368)[34] and Civil Ruling (Yue 19 Min Te [2017] No. 322)[35].

33 In its Civil Ruling (Jing 04 Min Te [2018] No. 218), the Beijing Fourth Intermediate People's Court stated, "..... on the issue that the Award No. 0872 raised by Coloumba Company constitutes a lack of authority to re-arbitrate and a wrongful award. Whether the Award No. 0872 and the Award No. 0772 are for the same dispute involving the arbitral tribunal's substantive hearings of the arbitration case, which does not fall within the scope of the court's review, nor does it fall within the grounds for setting aside an arbitral award as stipulated in Article 58 of the *Arbitration Law of the People's Republic of China* ....."

34 In its Civil Ruling (Jing 01 Zhi Yi [2018] No. 368), the Beijing First Intermediate People's Court stated that "..... whether the arbitral tribunal accepts the case and how to make an award is the arbitral tribunal's judgment on the case, which is within the scope of the arbitral tribunal's discretion, rather than the circumstance of arbitration procedures violating the statutory procedures. For the application for non-enforcement filed on the ground of the above, this Court does not uphold ....."

35 In its Civil Ruling (Yue 19 Min Te [2017] No. 322), the Dongguan Intermediate People's Court in Guangdong Province stated, "..... CHEN Kai's view that this case is not a repetitive arbitration is a is a different opinion on the arbitral tribunal's substantive handling, which does not fall under the circumstances stipulated in Article 58(3) of the *Arbitration Law of the People's Republic of China*, hence this Court does not uphold ....."

On the contrary, in more judicial practice, how to determine whether a case constitutes repetitive arbitration is a procedural issue, and court have the authority to review whether a case constitutes repetitive arbitration. For example, in the Case (Jing 04 Min Te [2017] No. 39), after being reviewed by the SPC, the SPC agreed to set aside the arbitral award on the ground of repetitive arbitration. The SPC stated that "the defense is not tenable that whether or not the system of 'finality of an arbitral award' is violated does not fall within the scope of the court's review of setting aside the arbitral award." More recently, take the Civil Ruling (Jing 04 Min Te [2022] No. 447) as an example, Beijing Fourth Intermediate People's Court pointed out in this Case that the "system of finality of an arbitral award" was the procedural principle that should be followed in arbitration. Any arbitral award in violation of this system fell within the circumstance where the arbitration procedures violate the statutory procedures as stipulated in Article 58 of the *Arbitration Law.* Similar viewpoints can also be found in Civil Ruling (Yue 03 Min Te [2019] No.1345)[36], Civil Ruling (Hu 01 Min Te ([2020] No. 236)[37] and

36 In its Civil Ruling (Yue 03 Min Te [2019] No.1345), the Shenzhen Intermediate People's Court in Guangdong Province stated: "... regarding the applicant's argument that the Arbitral Award (Shen Zhong Cai Zi [2018] No.1197) also has no authority to make a repetitive award in respect of the matters of the Award (Yue 03 Min Te [2018] No. 251), this Court holds that the Case (Yue 03 Min Te [2018] 251) is a judicial review conducted by the people's court of the application for setting aside of the Arbitral Award (Shen Zhong Cai Zi [2016] No.1993), which does not involve substantive issues and is different from a substantive hearing of a case by an arbitral tribunal in exercising its arbitration rights..."

37 In its Civil Ruling (Hu 01 Min Te [2020] No. 236), the Shanghai First Intermediate People's Court stated: "According to Article 9 of the *Arbitration Law of the People's Republic of China*, an arbitral award is final. After an award has been made, if a party reapplies for arbitration or requests a hearing to the people's court over the same dispute, the arbitration commission or the people's court shall not accept the case. This is an institutional provision in the *Arbitration Law of the People's Republic of China* that an arbitral award is final and is also a procedural principle which should be followed in arbitration. Any arbitral award violating the above provision falls under the circumstance where "the arbitration procedures violate the statutory procedures" as stipulated in Article 58.1.3 of the *Arbitration Law of the People's Republic of China* and shall be set aside by a ruling."

other civil rulings. In addition, in some of the cases, the courts directly review the issue without clarifying whether the repetitive arbitration should be determined as substantive review or procedural review, which in practice implies the premise that the courts have the authority to review repetitive arbitration. For example, in the Reply of the Supreme People's Court to the Request for Instructions on the Case Involving the Application of Dongguan Haoqing Paper Co., Ltd. for Non-enforcement of an Arbitral Award (Min Si Ta Zi [2015] No.35) and the Reply of the Supreme People's Court to the Request for Instructions on the Case Involving the Application of JIANG Zhifeng for Setting aside of an Arbitral Award (Min Si Ta Zi [2005] No.23), the SPC directly reviewed whether repetitive arbitration is tenable, and then reached a conclusion on whether to consent to set aside or not to enforce the arbitral award.

In fact, the dispute between the substantive defense and the procedural defense, superficially, is a dispute over the criteria of judicial review by the courts. Especially, from the perspective of the substantive defense, whether or not it constitutes repetitive arbitration falls within the arbitration authority of an arbitral tribunal. Once an Arbitral Tribunal has made a judgment, the Court should not review it again. However, the core of this issue is: what is the purpose or function of the system of "an arbitral award is final"?

Article 9 of the Arbitration Law provides that, after an arbitral award has been made, if a party reapplies for arbitration or requests a hearing to the people's court over the same dispute, the arbitration commission or people's court shall not accept the case. Obviously, based on the final effect of an arbitral award, if the same dispute has been arbitrated, it shall constitute a matter that cannot be arbitrated as stipulated in Article 3 of the Arbitration Law, and the arbitration institution shall not hear or render a judgment thereon again. According to Article 13.2 of the *Provisions of the Supreme People's Court on Several Issues concerning the Handling of Cases by People's Courts to*

Enforce Arbitral Awards, if an awarded matter falls into the scope of non-arbitrable matters under the law or arbitration rules chosen by the parties concerned, it shall constitute a circumstance in which an arbitration institution has no arbitration authority. In the aforementioned Case (Jing 04 Min Te [2017] No.39), the Court took the same view, noting that "the arbitral award violates the system of "the finality of an arbitral award" stipulated in Article 9 of the Arbitration Law and conforms to the circumstance stipulated in Article 274.1.4 of the Civil Procedure Law where "the arbitrated matter does not fall within the scope of the arbitration agreement or the arbitral institution has no arbitration authority." Certainly, there is also a point of view that "although the outcome of prohibition of repetitive arbitration is highly similar to that of no arbitrability of disputes, no arbitrability and repetitive arbitration are two sets of concepts which are not substantively connected[38]." In comparison, the *Arbitration Law (Revision) (Draft for Comment)* issued by the Ministry of Justice (during the period from July 30, 2021 to August 29, 2021) provides a clearer and more reasonable approach in dealing with this issue. Article 9 stipulates that "After an award is made, the parties may not apply for arbitration or bring an action in the people's court in respect of the same dispute."[39]

To sum up, we believe that whether repetitive arbitration is constituted is primarily a procedural issue. Although it may touch on substantive issues at certain levels, for example, whether the subject matter of arbitration for the former case and that for the latter case are the same, it is a further development based on the procedural issue, and is not sufficient to change the nature of the procedural issue. Therefore, courts have the authority to review the issue of repetitive arbitration.

38 *Judicial Review Methods and Applicable Causes of Repetitive Arbitration* written by WANG Bei and published on Law Journal, Issue No. 5, 2022.

39 See:https://zqyj.chinalaw.gov.cn/readmore?listType=1&id=4518.

B. Specific Grounds for Judicial Review of Repetitive Arbitration

After it is established that the court has the authority to review whether repetitive arbitration is constituted, the next question is what kind of judicial review grounds repetitive arbitration constitutes. As to what kind of judicial review grounds repetitive arbitration constitutes, from a practical point of view, there may be such three grounds as “lack of authority to arbitrate”, "violation of legal procedures", and "making an award against social and public interests".

A typical case where the Court applies the ground of “lack of authority to arbitrate” is the aforementioned Case (Jing 04 Min Te [2017] No.39). In that case, the Court held that "the arbitral award violates the system of ‘the finality of an arbitral award’ stipulated in Article 9 of the Arbitration Law, and conforms to the circumstance stipulated in Article 274.1.4 of the *Civil Procedure Law*, where the arbitrated matter does not fall within the scope of the arbitration agreement or the arbitral institution has no authority to arbitrate." In addition, in the Civil Ruling (Su 07 Min Te [2019] No.59), Lianyungang Intermediate People's Court in Jiangsu Province held that, in the circumstance that Wang Jianfei's request for payment of the housing price difference by the High Hope Company had already been rejected by an effective arbitral award, Lianyungang Arbitration Commission shall not accept the Wang Jianfei’s request again in the arbitration in question according to Article 9 of the Arbitration Law, nor does it have the authority to make an award on such a request.

From the point of view of Beijing Fourth Intermediate People’s Court in its *Annual Report on Judicial Review of Domestic Commercial Arbitration (2019-2021)*, the Court recently also holds that repetitive arbitration is a ground of "violation of legal procedures." Beijing Fourth Intermediate People’s Court stated in its aforesaid Report

that "Judging from the point of view of the cases of application to set aside arbitral awards accepted by this Court, a people's court, by reference to the fundamental principle of "ne bis in idem" of civil procedures and centering on the arbitration claimant's application, reviews whether the parties involved in the two arbitrations are the same, whether the subject matters of arbitrations are the same, whether there is the same arbitration claim and whether any new fact has occurred, which does not interfere with the substantive hearing of the arbitration case, but judges through the preliminary judicial review whether the Arbitration Tribunal has repeated the arbitration, thus violating the legal procedures[40]." In the aforementioned Civil Ruling (Jing 04 Min Te [2022]No.447), Beijing Fourth Intermediate People's Court held that the violation of an arbitral award of the provision of "the finality of an arbitral award" as stipulated in Article 9 of the *Arbitration Law* falls within the circumstance where the arbitration procedures violate the legal procedures as stipulated in Article 58 of the *Arbitration Law*. *In the Reply to the Request for Instructions on the Case Involving the Application Filed by JIANG Zhifeng for Setting aside of an Arbitral Award* (Min Si Ta Zi [2005]No.23), the SPC also held that the violation of the provisions of "the finality of an arbitral award" in the *Arbitration Law* and the *Arbitration Rules* were falls under the circumstance where the arbitration procedures are inconsistent with the arbitration rules.

With regard to the ground that an arbitral award is contrary to the public interest, in the Reply of the Supreme People's Court to the Request for Instructions on the Refusal to Recognize and Enforce an Arbitral Award Rendered by the ICC International Court of Arbitration (Min Si Ta Zi [2008]No.11), the SPC refused to recognize and enforce a foreign arbitral award on the grounds that "the ICC International Court of

40 The *Annual Report on Judicial Review of Domestic Commercial Arbitration (2019-2021)* prepared by the Beijing Fourth Intermediate People's Court, P. 13.

Arbitration's rehearing and rendering an award on the lease contract dispute between Jinan Yongning Pharmaceutical Co., Ltd. and the joint venture company Jinan - Hemofarm Pharmaceutical Co., Ltd. has violated the judicial sovereignty of China and the jurisdiction of the Chinese courts" and in accordance with the provisions[41] of Article 5.1.3 and 5.2.2 of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. The ground under Article 5.2.2 of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* is that "the recognition or enforcement of the award is against the public policy of the country concerned", which corresponds to "contrary to the public interest of society"[42] as a ground for setting aside or non-

41 Article 5.1 of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* provides that: "1. Recognition and enforcement of an award may be refused at the request of the party against whom the award is invoked, only if that party furnishes the evidence to the competent authority at the place where the recognition and enforcement is sought on any of the following circumstances: … (c) the dispute dealt with by the award is not the subject matter of or is not falling within the terms of the submission to the arbitration, or the award contains decisions on matters beyond the scope of the submission to the arbitration, however, if the decisions on matters submitted to the arbitration can be separated from those not submitted to the arbitration, that part of the award which contains decisions on matters submitted to the arbitration may be recognized and enforced; …" Article 5.2 provides that: "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority of the country where recognition and enforcement is sought finds that: … (b) the recognition or enforcement of the award is contrary to the public policy of that country."

42 Article 58 of the *Arbitration Law of the People's Republic of China* provides that: "The Intermediate People's Courts at the place where the arbitration commission is located may be applied to set aside the award if the parties provide evidence proving that the award involves any of the following circumstances: … If the people's court determines that the award is contrary to the public interest, it shall rule to set aside the award." Article 237 of the *Civil Procedure Law of the People's Republic of China* provides that: "… If a party fails to comply with an award rendered by an arbitral institution established according to the law, the other party may apply for enforcement to the people's court which has jurisdiction over the case.… If the people's court determines that the enforcement of the award is contrary to the public interest, it shall rule not to enforce the award.…. "Article 274 of the *Civil Procedure Law of the People's Republic of China* provides that: "Foreign related arbitral institutions of the People's Republic of China shall, after examination and verification by a collegiate bench formed by the people's court, rule not to enforce the award if the party against whom the application is made furnishes evidence proving that the arbitral award involves any of the following circumstances: … If the people's court determines that the enforcement of the award is contrary to the public interest, it shall rule not to enforce the award."

enforcement of a domestic or foreign-related arbitral award. However, unlike the above cases, most of domestic cases involving repetitive arbitration do not involve the issue of infringement upon domestic judicial sovereignty, so it is questionable whether the view from the above cases can be widely applied. There are more viewpoints that that an arbitral award only involves a dispute between the parties, which does not constitute "contrary to the public interest". For example, in the Civil Ruling (Jing 04 Min Te [2019] No. 519), Beijing Fourth Intermediate People's Court explicitly pointed out that "the contrary to the public interest as stipulated in Article 58.3 of the *Arbitration Law of the People's Republic of China* mainly refers to circumstances where an arbitral award violates the basic principles of Chinese law or good social customs, endangers national and social public security, etc., which shall involve the common interests of a non-specified majority and enjoyed by the public, and thus shall be different from the individual interests of the contracting parties. The *Compensation Agreement* involved in this case is a contractual dispute between civil parties of equal footing, and the resolution only involves the contracting parties, and does not involve the public interest." Similar viewpoints can also be found in such civil ruling as Civil Ruling (Jing 04 Min Te [2019] No. 159)[43], Civil Ruling (Jing 04 Min Te [2018] No. 218)[44] and Civil Ruling (Jing 01 Zhi Yi [2018] No.

43 In its Civil Ruling (Jing 04 Min Te [2019] No.159), the Beijing Fourth Intermediate People's Court stated that: "With respect to the ground that the Award No. 0089 is contrary to the public interest, this Court held that the aforesaid Award settles contract disputes between equal civil parties, which only involves partial interests between individuals of the society, and does not constitute harm to the public interest …."

44 In its Civil Ruling (Jing 04 Min Te [2018] No.218), the Beijing Fourth Intermediate People's Court stated that: "… Regarding the issue raised by the Global Company that the Award No. 0872 is contrary to the public interest, given that "being contrary to the public interest" refers to going against the public interest with the public as the main body of interest, which involves the most fundamental law and morality of the whole society, and is manifested by going against the basic systems and norms of laws of China, going against the basic values of the social and economic life and going against the basic moral standards of China. In this Case, the dispute between the Global Company and JIN Yushen is a civil dispute which does not fall within the scope of the public interest. Therefore, the Global Company's ground for this application lacks factual and legal basis, thus this Court does not support the application …. "

368)[45].

Comparatively speaking, it is more reasonable to review repetitive arbitration on the ground of "lack of authority to arbitrate". Firstly, although Article 3 of the *Arbitration Law* does not include re-arbitration of the same dispute into the scope of non-arbitrable matters, stating that "lack of arbitrability and repetitive arbitration are two sets of concepts which have no substantial connection[46]", however, the provision of "non-admissibility" in Article 9 actually renders the issue non-arbitrable. After all, there is not and should not be an intermediate state which is arbitrable but not admissible. Arbitrability in such a sense is meaningless, only adding to legal difficulties and unnecessary conceptual disputes. In particular, the *Arbitration Law (Revised) (Draft for Comment)* provides a clearer answer to this question, that is, the parties "shall not" reapply for arbitration in respect of the same dispute. Secondly, logically, "lack of authority to arbitrate" should be placed before "violation of legal procedure". If the cause of "lack of authority to arbitrate" is constituted, then it is clear that the arbitral institution does not have the authority to decide the dispute, in which case the discussion of whether the statutory procedure has been violated is no longer necessary. This case is similar to the case where an arbitral award is simultaneously constituted "lack of arbitration agreement" and "falsification of evidence". In the latter case, it is not necessary to discuss whether "falsification of evidence" is tenable. For example, in the Civil Ruling (Jing 04 Min Te [2020] No.65), the signature on the *Guarantee*

45 In its Civil Ruling (Jing 01 Zhi Yi [2018]No.368), the Beijing First Intermediate People's Court stated that: "… this Case involves a dispute between equal civil subjects, i.e. Municipal First Construction Company and CNPC First Construction Petrochemical Equipment Branch, over the performance of a contract, and the arbitral award for this case does not involve the public interest. The Court does not support the ground for non-enforcement put forward by Municipal First Construction Company …. "

46 *Judicial Review Methods and Applicable Causes for Repetitive Arbitration* written by WANG Bei and published on Law Science, Issue 5, 2022.

Contract for Joint and Several Liability was not signed by the Claimant, and the Claimant simultaneously claimed the grounds of “lack of an arbitral agreement” and "falsification of evidence". However, upon examination, the Court set aside the arbitral award for the cause of “lack of an arbitral agreement”, on the grounds that the signature was not made by the Claimant and there was no expression of intention to arbitrate.

IV. Value Orientations and De Jure Ways to Identify and Review Repetitive Arbitration (Substitute for Conclusion)

People always act according to certain value guidelines. Despite attempts to identify repetitive arbitration based on the judgment yardstick for repetitive lawsuits, we should not ignore the characteristics and values of arbitration itself. Compared with civil cases, courts shall base themselves on facts and take the law as yardstick[47], while arbitration emphasizes fair and reasonable settlement of disputes[48] based on facts and in compliance with law. This is also intuitively demonstrated in international arbitration. In the absence of choice of law agreements, international arbitral tribunals generally have greater latitude in choosing the applicable law. They can choose to apply the applicable law system or legal rules rather than that of a single country, including customary commercial law, general legal principles, etc.[49] Some arbitration institutions such as the ICC International Court of Arbitration also stipulate in its arbitration rules that the arbitral tribunal may directly apply "such rules of law as it deems appropriate," and "make an award in accordance with the principle of fairness and reasonableness" if

47 Article 7 of the *Civil Procedure Law* provides that "In trying civil cases, people's courts must base themselves on facts and take the law as yardstick."

48 Article 7 of the *Arbitration Law* provides that "Disputes shall be settled fairly and reasonably by arbitration on the basis of facts and in compliance with the law."

49 International Arbitration: Law and Practice written by Gary B. Bohn, translated by BAI Lin et al. and published by the Commercial Press, 2015 Edition, P.320

authorized by the parties.[50]

Fair and reasonable settlement of disputes within the scope provided by law is not only the feature and characteristic of arbitration, but also the value orientation of arbitration. This value orientation should play an important role as guidance in the identification and review of repetitive arbitrations. In short, we should identify and review repetitive arbitrations with the purpose and starting point of resolving disputes between the parties in a fair and reasonable manner. Undoubtedly, the ultimate purpose of the identification and review of repetitive arbitrations is still to serve the purpose of fair and reasonable dispute resolution.

Guided by the value orientation of arbitration, the de jure manner for the identification and review of repetitive arbitrations is to flexibly determine which legal rule and theory is more conducive to achieving the fundamental purpose of "fair and reasonable dispute resolution" based on the basic facts of the case. In cases where the law is unclear, the adoption of a theory to identify repetitive arbitration is itself within the competence of the arbitral tribunal's substantive discretion, and it is difficult to say which theory is right or wrong, nor should one be bound to apply a particular theory.

Based on the aforesaid fact, after an arbitration institution accepts a case that may involve

50 See Article 7 of the *Rules of Arbitration of the International Chamber of Commerce,* which provide that "applicable rules of law".

1. The parties are entitled to agree freely on the rules of law to be applied by the arbitral tribunal in dealing with the substance of the case. If the parties have not so agreed, the arbitral tribunal may decide to apply such rules of law as it considers appropriate.

2. The arbitral tribunal shall take into account the provisions of the contract between the parties, if any, and any relevant trade usages.

3. The arbitral tribunal shall have the power only if the parties agree to authorize the arbitral tribunal to act as a friendly mediator or to make an award on the basis of fairness and reasonableness."

repetitive arbitration, if the Arbitral Tribunal, after examining the facts of the case, finds that there are indeed unreasonable aspects in the handling or result of the former case, it should be inclined to identify the subject matter of arbitration by reference to the substantive law theory or expand the interpretation of what constitutes the occurrence of new facts, thereby raising the threshold for the latter case to constitute repetitive arbitration, so as to correct the serious unfairness in the substantive handling of the case through the new arbitration case. In the process of judicial review of arbitration by a court, when identifying the subject matter of arbitration and new facts, the court should also respect the theoretical viewpoints adopted by the arbitral tribunal and its understanding of the facts of the case to the greatest extent, so as to maintain judicial humility, and should not forcibly apply the theoretical standards that the court itself is inclined to adopt to the identification of repetitive arbitration. This also reflects the functional difference between litigation and arbitration. How a court makes rulings in the litigation procedures reflects the exercise direction of the state public power, and it is necessary to establish universal guiding rules to achieve the "same verdict for the same case", so as to meet the public's modest expectation for legal stability. However, arbitration was born to solve commercial disputes, with characteristics such as civility, confidentiality and flexibility, with more focus on the proper resolution of the disputes between the parties on a case-by-case basis rather than the establishment of uniformly applicable rules.

Compared with civil litigations, in which the parties have full remedies, including but not limited to appeal, retrial and procuratorial supervision, the characteristic of arbitration is the “the finality of an arbitral award", in which the parties have extremely limited remedies, which are limited in principle to application to set aside an arbitral award and application for non-enforcement of an arbitral award, and are not subject to appeal, retrial and procuratorial supervision. Of course, the risk should be borne by the

parties themselves. The parties enjoy the convenience and efficiency of “the finality of an arbitral award" and should bear the negative effects of “the finality of an arbitral award". However, it should not be ignored that we do not have a strict tradition of separation between civil arbitration and commercial arbitration, and a large part of our commercial arbitration is constituted by the disputes between civil subjects. "Rational commercial subjects" are not enough to endorse the system of “the finality of an arbitral award".

Repetitive arbitration is a hot and difficult issue in current arbitration. There are many reasons for the recurrence of repetitive arbitration, but the inappropriate substantive result is undoubtedly one of the important reasons. To accurately identify repetitive arbitration in an individual case will undoubtedly provide a path for the self-correction of arbitration.

Chapter Three

Development Trends of International Commercial Arbitration Rules in Recent Years

International commercial arbitration rules are the rules that regulate the specific procedures for international commercial arbitration and the legal relationships relating to arbitration in those procedures, also the rules to be followed by arbitration institutions, arbitrators and arbitration participants in the conduct of international commercial arbitration. International commercial arbitration rules are usually developed by arbitration institutions or chambers of commerce to which they are affiliated and other organizations. It is commonly believed that arbitration rules have the force of a contract and become the "procedural law of the parties" when the parties so choose[1]. International commercial arbitration rules are not only the code of conduct for arbitrators, parties and other arbitration participants to participate in arbitration activities, but also the letter of commitment and the letter of guarantee for arbitration institutions to provide external services, which are an integral part of the core competitiveness of arbitration institutions. The world today is undergoing profound changes unseen in a century. The global economic governance system and the international economic order are undergoing profound adjustments. In this context, the international commercial arbitration system, as a major mechanism for resolving cross-border commercial disputes, has been

1 See Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Fouchard Gaillard Goldman on International Commercial Arbitration*, CITIC Publishing House 2004, at 179, 182.

experiencing rapid adjustment and reform. International commercial arbitration rules continue to evolve and develop. In this Chapter, we will make a comparative study on the development and changes of international commercial arbitration rules[2] of important influence in a time frame of 5 years, explore the law behind the evolution of these rules and provide reference for the development of arbitration undertakings in China.

I. Major Revisions to the World's Leading International Commercial Arbitration Rules Made Recently

In recent years, the ICC International Court of Arbitration, the London Court of International Arbitration, the International Centre for Dispute Resolution of American Arbitration Association, the Vienna International Arbitral Centre and the United Nations Commission on International Trade Law have modified their arbitration rules.

A. Arbitration and Mediation Rules of the ICC International Court of Arbitration

The ICC International Court of Arbitration, established in 1923, is one of the most

2 The Stockholm Chamber of Commerce Arbitration Institute, established in 1917, is a permanent international arbitration institution affiliated to the Stockholm Chamber of Commerce (SCC). Sweden has a long tradition of international arbitration. As an arbitration-friendly jurisdiction, Sweden has traditionally been a popular arbitration venue, particularly during the Cold War. Benefiting from Sweden's neutral status, the SCC Arbitration Institute was favored by the United States and the Soviet Union as a neutral institution to resolve international disputes. Today, the SCC Arbitration Institute is one of the influential arbitration institutions in the world. The SCC Arbitration Institute has adopted the revised Arbitration Rules based on the 2017 Rules, which come into effect on January 1, 2023. Compared to the 2017 Rules, the major revision to the 2023 Rules is the addition of a provision for remote hearings. Article 32.2 of the 2023 Rules explicitly provides that, after consulting with the parties and taking into account the specific circumstances of the case, the arbitral tribunal shall decide whether any hearing shall be conducted in person at a specified location or remotely, in whole or in part, by videoconference or other appropriate means of communication. As there are only minor revisions to the 2023 Rules made by the SCC Arbitration Institute, they are not introduced in the main text.

important international arbitration institutions, which was organized and set up by the International Chamber of Commerce (ICC) and headquartered in Paris, France[3]. On December 1, 2020, the ICC International Court of Arbitration officially released the 2021 Arbitration Rules (the *2021 ICC Arbitration Rules*) which shall come into force as of January 1, 2021. The 2021 Arbitration Rules are the ninth arbitration rules adopted by the ICC International Court of Arbitration in its century-long history.[4]

The 2021 ICC Arbitration Rules are revised on the basis of the 2017 Arbitration Rules (*the 2017 ICC Arbitration Rules*), with the main revisions in the following six aspects.

1. Adding the remote hearing and electronic service

The previous arbitration rules stipulate a relatively narrow manner of hearing, and in practice, there is a dispute as to whether remote hearing is included. In order to cope with the impact of the COVID-19 pandemic, Article 26.1 of the *2021 ICC Arbitration Rules* specifies that the arbitral tribunal may decide, after consulting the parties, on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone and other appropriate means of communication. This provides a guarantee of legality and legitimacy for the arbitral tribunal to hold a hearing remotely.

3 See Gary B. Born, *International Arbitration: Law and Practice*, 2012 Kluwer Law International BV, The Netherlands, at 30.

4 The first arbitration rules of the ICC International Court of Arbitration were formulated in 1922 and revised subsequently in 1927, 1955, 1975, 1988, 1998, 2012, 2017 and 2021. For a history of revisions to the ICC arbitration rules, see Barbara Steindl, 'Chapter II: The Arbitrator and the Arbitration Procedure: The 2012 ICC Arbitration Rules – Origin, Development and Practicability', in Christian Klausegger, Peter Klein , et al. (eds), Austrian Yearbook on International Arbitration 2012, Austrian Yearbook on International Arbitration, Volume 2012 (© Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2012) pp. 131-161.

In terms of the service of documents, Article 3.1, Article 4.4.2 and Article 5.3 of the *2021 ICC Arbitration Rules* have revised the requirements on submission of written documents, by no longer requiring the parties to submit a certain number of copies of written documents, and instead stipulating that only the claimant or respondent shall submit a sufficient number of copies of the written documents if it decides to send the arbitration application, defense or emergency application by delivery against receipt, registered post or courier, otherwise it is unnecessary to provide such documents. Such revision changes the traditional default method of delivery by mail, but in principle adopts electronic service, which is more convenient, efficient and up to date.

2. Expanding the scope of applicability of joinder and consolidation

With regard to joinder, the 2*017 ICC Arbitration Rules* establishes the rule that after the confirmation or appointment of an arbitrator, no additional party may be joined to an arbitration, unless all the parties including the additional party otherwise agree. This provision in principle closes the door for joinder of any party after the constitution of an arbitral tribunal. The *2021 ICC Arbitration Rules* opens the door to some extent, as Article 7.5 provides that, "Any Request for Joinder, made after the confirmation or appointment of any arbitrator, shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable." New provisions enable joinder of parties after the composition of the arbitral tribunal.

The *2021 ICC Arbitration Rules* expand the scope of applicability of consolidation. According to Article 10.2 of the amended arbitration rules, where a claim is made under multiple identical arbitration agreements, the identical parties in the arbitration and the identical legal relationship of the disputes in the arbitration are no longer a prerequisite

for consolidation. Arbitrations with different parties or different legal relationship of the disputes may be consolidated into a single arbitration. In addition, according to Article 10.3 added to the amended arbitration rules, where a claim is not made under the same arbitration agreement or multiple arbitration agreements, but the arbitrations are between the same parties, and the disputes in the arbitrations arise in connection with the same legal relationship and the arbitration court finds that these arbitration agreements are compatible with each other, the arbitrations may be consolidated into a single arbitration. This greatly expands the scope of applicability of consolidation, which is conducive to improving the efficiency of arbitration, reducing the time and expenses of the parties, while reducing the possibility of conflicting rulings in similar cases or connected cases and enhancing the credibility of arbitration.

3. Expanding the scope of applicability of expedited procedure

The *2017 ICC Arbitration Rules* introduced the expedited procedure, and the *2021 ICC Arbitration* Rules further expands the scope of application of the expedited procedure. According to Article 30.2 and Article 1.2 of Appendix VI to the 2021 ICC Arbitration Rules, the amount in dispute to which the expedited procedure applies has been increased from US $2 million to US $3 million, which means that more cases can be efficiently settled through the expedited procedure.

4. Increasing the requirement for the parties to disclose information on third-party funding

The third-party funding system has been established. On the one hand, is conducive to helping parties with financial difficulties to claim their rights to avoid losing rights due to poverty; on the other hand, it has brought about a series of procedural issues, among which the impact of third-party funding on the impartiality and independence of the

arbitrators is the most concerned. To address this problem, Article 11.7 of the *2021 ICC Arbitration Rules* provides that, "Each party must promptly notify the Secretariat, the arbitral tribunal and the other parties of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defenses and under which it has an economic interest in the outcome of the arbitration." The disclosure of third-party funding information may assist the arbitral tribunal in promptly determining whether there is a conflict of interest so as to ensure the tribunal's impartiality and independence.

5. Enhancing the transparency of arbitration proceedings

With regard to the arbitration court's authority to decide certain procedural matters, including determination of preliminary jurisdiction of arbitral institutions (Article 6.4), consolidation of arbitrations (Article 10), direct appointment of arbitrators (Article 12.8 and 12.9), review of challenges to the arbitrator's neutrality and independence (Article 14), and replacement of the arbitrator (Article 15.2), under the 2017 Arbitration Rules, the ICC International Court of Arbitration is not obligated to give reasons for its decision. Article 5.1 and 5.2 of Appendix II has been added to the 2021 Arbitration Rules, providing that, "Upon the request of any party, the Court will communicate the reasons for Articles 6.4, 10, 12.8, 12.9, 14 and 15.2." Accordingly, the parties may have a clearer understanding of the reasons on which the ICC International Court of Arbitration has made its relevant decisions, which makes the arbitration proceedings more transparent and enhances the experience for arbitration users.

6. Preventing abuse of rights by the parties

A new Article 17.2 has been added to the *2021 Arbitration Rules*, which provides that, "The arbitral tribunal may, once constituted and after it has afforded an opportunity to

the parties to comment in writing within a suitable period of time, take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings." Such provision is to prevent the parties from abusing their rights by replacing representatives "skillfully" and creating a conflict of interest of the arbitrator artificially and disrupting the arbitration process.

Article 12.9 of the *2021 Arbitration Rules* provides that, notwithstanding the parties' agreement on the method of constitution of the arbitral tribunal, the ICC International Court of Arbitration may, in exceptional cases, appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment or unfairness affecting the validity of the award. This provision is intended to create a "safety valve" for the parties to appoint arbitrators equally. In the event that the method of composition of the arbitral tribunal agreed upon by the parties will put the parties in unfair and unequal positions and create material risks to the validity of the arbitral award, the ICC International Court of Arbitration shall have the authority to appoint, against the agreement of the parties, the members of the arbitral tribunal, in order to ensure the equality of the parties in appointment of arbitrators and the validity of the arbitral award.

B. Arbitration Rules of London Court of International Arbitration

The London Court of International Arbitration (LCIA), established on November 23, 1892, is the oldest arbitration institution in the world and one of the leading international institutions for the resolution of commercial disputes[5]. As amended to the 2014 Arbitration Rules (*2014 LCIA Rules*), the LCIA issued the 2020 Arbitration Rules (*2020 LCIA Rules*) which come into force on October 1, 2020, with the major revisions

5 About LCIA, see https://lcia.org, last visited on April 4, 2023.

as follows:

1. Adding remote hearing and adopting the rule of preferred electronic service

Article 19.2 of the *2020 LCIA Rules* expressly provides that, "The arbitral tribunal shall organise the conduct of any hearing in advance in consultation with the parties. The arbitral tribunal shall have the fullest authority under the arbitration agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time limit and geographical place, if applicable. As to the form, a hearing may take place in person, or virtually by conference call, videoconference or other communications technology, with participants in one or more geographical locations (or in a combined form). As to the content, the arbitral tribunal may require the parties to address specific questions or issues arising from the parties' dispute. The arbitral tribunal may also limit the extent to which questions or issues are to be addressed." Accordingly, the arbitral tribunal has the power to decide whether to hold a hearing in person, remotely, or in a combined form.

As to the service of documents, the *2020 LCIA Rules* gives priority to service by electronic means. Article 4.1 of the *2020 LCIA Rules* provides that, "The Claimant shall submit the Request under Article 1.3 and the Respondent the Response under Article 2.3 in electronic form, either by email or other electronic means including via any electronic filing system operated by the LCIA. Prior written approval should be sought from the Registrar, acting on behalf of the LCIA Court, to submit the Request or the Response by any alternative method. "Article 4.2 further provides that, "Save with the prior written approval or direction of the Arbitral Tribunal, or, prior to the constitution of the Arbitral Tribunal, the Registrar acting on behalf of the LCIA Court, any written communication in relation to the arbitration shall be delivered by email or any other electronic means of

communication that provides a record of its transmission. "

In addition, pursuant to Article 26.2 of the *2020 LCIA Rules*, unless the parties agree otherwise, or the Arbitral Tribunal or LCIA Court directs otherwise, any award may be signed electronically and/or in counterparts and assembled into a single instrument.

2. Introducing the early determination system

In order to prevent indiscriminate claims and abuse of procedural rights of the parties, Article 22.1.8 of the *2020 LCIA Rules* provides that, the Arbitral Tribunal shall have the power, upon the application of any party or upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination").

3. Expanding the scope of application of consolidation and clarifying the concurrent arbitration

The *2020 LCIA Rules* have improved and optimized the provisions relating to consolidation and concurrent arbitration and expanded the authority of the arbitration court and the arbitral tribunal.

According to Article 22.9 and 22.10 of the *2014 LCIA Rules,* consolidation decided by the arbitral tribunal is limited to cases where all the parties so agree in writing, or different arbitrations commenced under the same arbitration agreement or a compatible arbitration agreement between the same disputing parties. Pursuant to Article 22.7 of *2020 LCIA Rules*, arbitral tribunal's decision to consolidate arbitrations is no longer

limited to the scope of the same parties. The arbitral tribunal also has the power to decide whether to consolidate arbitrations arising out of the same transaction or a series of transactions between different parties if commenced under the same arbitration agreement or any compatible arbitration agreement. Article 22.7 of the *2020 LCIA Rules* also provides that where two or more arbitrations are initiated under the same arbitration agreement or any compatible arbitration agreement, and the arbitrations between the same disputing parties arise out of the same transaction or series of related transactions, two or more arbitrations may be conducted concurrently if the same arbitral tribunal is constituted in respect of each arbitration.

According to Article 22.8 of the *2020 LCIA Rules*, the LCIA also has the power, pending the constitution of the arbitral tribunal, to decide to consolidate the arbitrations under the following circumstances: (1) two or more arbitrations are consolidated into a single arbitration, subject to the arbitration rules, and all the parties to the arbitrations so agree in writing; (2) the LCIA may, after giving the parties a reasonable opportunity to state their views, decide to consolidate two or more arbitrations subject to the arbitration rules and commenced under the same arbitration agreement or any compatible arbitration agreement and either between the same disputing parties or arising out of the same transaction or series of related transactions.

4. Adding provisions on the secretary of the arbitral tribuna.

The secretary of the arbitral tribunal is specifically provided for in the *2020 LCIA Rules.* Under Article 14A, the tribunal secretary may be used subject to the following: (1) the arbitral tribunal may only use the secretary with the consent of the parties; (2) the tribunal secretary may not be used in conflict with the applicable law; (3) the tribunal secretary has a duty of disclosure and must maintain impartiality and independence; (4)

the arbitral tribunal shall supervise the work of the secretary; (5) the duty of the tribunal secretary is to assist in matters related to the arbitration, and the arbitral tribunal may not delegate decision-making authority to the secretary; and (6) the tribunal secretary must devote sufficient time and act with due diligence.

5. Adding provisions on compliance and data protection

Compliance and data protection are new issues in international arbitration, to which the *2020 LCIA Rules* have specifically added provisions to respond.

With respect to compliance issues, Article 24.9 of the *2020 LCIA Rules* provides that any dealings between a party and the LCIA will be subject to any requirements applicable to that party or the LCIA relating to bribery, corruption, terrorist financing, fraud, tax evasion, money laundering and/or economic or trade sanctions ("Prohibited Activity"), and that the LCIA will deal with any party on the understanding that it complies with all such requirements.

Article 24.10 provides that the LCIA may refuse to act on any instruction and/or accept or make any payment if the LCIA determines (in its sole discretion and without the need to state any reasons) that doing so may involve Prohibited Activity, or breach any law, regulation, or other legal duty which applies to it, or that doing so might otherwise expose the LCIA to enforcement action or censure from any regulator or law enforcement agency.

Article 24.11 provides that the parties agree to provide the LCIA with any information and/or documents reasonably required by the LCIA for the purpose of compliance with laws relating to Prohibited Activity. The LCIA may take any action it considers appropriate to comply with any applicable obligation with respect to Prohibited Activity,

including the disclosure of any information and documents to courts, law enforcement agencies or regulatory authorities.

With respect to data protection, Article 30.4 of the 2020 LCIA Rules provides that any processing of personal data by the LCIA is subject to applicable data protection legislation, and the LCIA's data protection notice can be found on the LCIA website;

Article 30.5 provides that, in accordance with its duties set out in Article 14.1, the Arbitral Tribunal shall, in consultation with the parties early in the arbitral proceedings and where appropriate the LCIA, consider whether it is appropriate to adopt: (1) any specific information security measures to protect the physical and electronic information shared in the arbitration; and (2) any means to address the processing of personal data generated or exchanged in the arbitration pursuant to the applicable data protection legislation or equivalent legislation;

Article 30.6 provides that, the LCIA and the Arbitral Tribunal may issue directions addressing information security or data protection, which shall be binding on the parties, and in the case of those issued by the LCIA, also on the members of the Arbitral Tribunal, subject to the mandatory provisions of any applicable law or rule of law.

C. Arbitration Rules of the International Centre for Dispute Resolution of American Arbitration Association

Founded in 1926, the American Arbitration Association (AAA) is a non-governmental and non-profit permanent arbitration institution with branches in each major city

6 With respect to the establishment and development of the AAA, see CHEN Fuyong, The Unfinished Transformation, Law Press China, 1st edition in January 2010, p. 60-96.

in the United States and its headquarters in New York[6]. The International Centre for Dispute Resolution (ICDR) of AAA is the international business division of the AAA and specializes in accepting international cases. The new *ICDR International Dispute Resolution Procedures* (including the Mediation and Arbitration Rules, hereinafter referred to as the *2021 Procedures*) come into force on March 1, 2021. In the 2021 Procedures, major amendments are made to the 2014 *International Dispute Resolution Procedures* (hereinafter referred to as the *2014 Procedures*) as follows:

1. Extending the scope of application of joinder and consolidation

Article 8.1 of the 2021 Procedures provides that, "A party wishing to join an additional party to the arbitration shall submit to the Administrator a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless:

(1) all the parties, including the additional party, otherwise agree, or;

(2) the arbitral tribunal once constituted determines that the joinder of an additional party is appropriate and the additional party consents to such joinder. "

The second item above is new provision.[7] Accordingly, in addition to the consent of all the parties, after the constitution of the arbitral tribunal, the joinder of an additional party may be made if the arbitral tribunal finds it appropriate and the additional party consents to the joinder, which expands the scope of applicability of joinder.

Article 9.1 of the *2021 Procedures* provides that, "At the request of a party or on its

7 See Article 7.1 of the *International Arbitration Rules* in the *2014 International Dispute Resolution Procedures* of the ICDR of the AAA.

own initiative, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:

(1) the parties have expressly agreed to appoint a consolidation arbitrator; or

(2) all the claims and counterclaims in the arbitrations are made under the same arbitration agreement; or

(3) the claims, counterclaims or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the same or related parties; the disputes in the arbitrations arise out of the same legal relationships; and the arbitration agreements are compatible. "

Article 8.1.3 of the *2014 Procedures provides* that arbitrations may only be consolidated if the parties involved are the same. Article 9.1 of the 2021 Procedures broadens the scope of consolidation by expanding this provision to include "the same or related parties."

2. Adding the requirement for a party's disclosure of information on third-party funding

The *2014 Procedures* did not involve third-party funding, while the *2021 Procedures* introduced and regulated third-party funding. The newly added Article 14.7 of the *2021 Procedures* provides that the arbitral tribunal may, upon the application of a party or at its own discretion, require the parties to disclose:

(1) whether any non-party (such as a third-party funder or an insurer) has undertaken to pay or to contribute to the cost of a party's participation in the arbitration, and if so, to

identify such person or entity concerned and to describe the nature of such undertaking; and

(2) whether any non-party (such as a third-party funder, insurer, parent company or ultimate beneficial owner) has an economic interest in the outcome of the arbitration, and if so, to identify such person or entity concerned and to describe the nature of such interest.

3. Implied presumption of mediation

Article 6 "Mediation" of the *2021 Procedures* provides that, "Subject to (1) any agreement of the parties otherwise, or (2) the right of any party to elect not to participate in mediation, the parties shall mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration." Accordingly, unless the parties choose to exclude mediation, the *2021 Procedures* provide that the parties will mediate during the arbitration process, and the scope of mediation will be further expanded.

4. Introducing the system of a secretary of the arbitral tribunal

According to the newly added Article 17 of the *2021 Procedures*, the arbitral tribunal

8 The "Exclusion of Liability" in Article 41 of the International Arbitration Rules in the *International Dispute Resolution Procedures* of the ICDR of the AAA provides that, "The members of the arbitral tribunal, any emergency arbitrator appointed under Article 7, any consolidation arbitrator appointed under Article 9, any arbitral tribunal secretary, and the Administrator shall not be liable to any party for any act or omission in connection with any arbitration under these Rules, except to the extent that such a limitation of liability is prohibited by applicable law. The parties agree that no arbitrator, emergency arbitrator, consolidation arbitrator, or arbitral tribunal secretary, nor the Administrator shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any of these persons a party or witness in any judicial or other proceedings relating to the arbitration.

may, with the consent of the parties, appoint a secretary of the arbitral tribunal who will serve in accordance with ICDR guidelines. The secretary of the arbitral tribunal shall enjoy the same immunity from liability as the arbitrator under Article 41.[8]

5. Expanding jurisdiction of the arbitral tribunal

When the parties refer to the Arbitration Rules, it may be controversial whether to refer the issue of arbitrability to the arbitral tribunal. Article 21.1 of the *2021 Procedures* expressly provides that the arbitral tribunal has the jurisdiction to hear and decide upon a dispute concerning arbitrability without any need to refer such matters first to a court.

6. Introducing the early disposition system

Article 23.1 of the 2021 Procedures provides that, "A party may request leave from the arbitral tribunal to submit an application for disposition of any issue presented by any claim or counterclaim in advance of the hearing on the merits ("early disposition"). The tribunal shall allow a party to file an application for early disposition if it determines that the application (1) has a reasonable possibility of succeeding; (2) will dispose of, or narrow, one or more issues in the case; and (3) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits." According to Article23.3, the arbitral tribunal may make any order or award in connection with the early disposition of any issue and state the reasons for award. A party may file a request for early disposition of a disputed matter with a reasonable prospect of success, which will resolve or narrow the scope of the matter in dispute in order to make the arbitration proceeding more economical.

7. Introducing remote hearing and electronic signatures

Article 26.2 of the *2021 Procedures* provides that, "A hearing or a portion of a hearing

may be held by video, audio or any other electronic means. The Tribunal may at any hearing direct that witnesses be examined through means that do not require their physical presence. "

Article 32.4 is added to the *2021 Procedures*, which permits the tribunal to sign orders or awards electronically unless (1) the applicable law requires a physical signature, (2) the parties have agreed otherwise, or (3) the arbitration administrator has requested otherwise.

In addition, the *2021 Procedures* encourage the use of modern technological means in the arbitration proceedings. For example, Article 22.2 provides that in establishing procedures for a case, the tribunal and the parties may consider how technology, including video, audio or other electronic means, could be used to increase efficiency and economy of the proceedings.

8. Adding cybersecurity, privacy and data protection clauses

The provisions relating to cybersecurity, privacy and data protection are added in Article 22 "Conduct of the Proceedings" of the *2021 Procedures*. According to 22.3, at the procedural hearing, the tribunal shall discuss with the parties the issues of cybersecurity, privacy and data protection in order to provide for an appropriate degree of security and compliance in connection with the proceedings.[9]

9. Expanding the scope of application of the expedited procedure

The *2014 Procedures* for the first time provided for the expedited procedure for cases in

9 In practice, the ICDR of AAA sends the parties AAA-ICDR Best Practices Guide and the AAA-ICDR Cybersecurity Checklist.

which the amount of claim or counterclaim does not exceed US $250,000, while the 2021 Procedures have increased such amount to US $500,000. Article 1.4 of the *2021 Procedures* expands the scope of application of the expedited procedure, which provides that, "Unless the parties agree or the arbitration administrator otherwise determines, the international expedited procedure shall apply in any cases in which no disclosed claim or counterclaim exceeds US $500,000 (exclusive of interest and arbitration costs)."

10. Optimizing the administration of arbitration institutions

The ICDR is the arbitration administrator. Article 5 has been added to the *2021 Procedures*, which provides that, "When the Administrator is called upon to act under these Rules, the Administrator may act through its International Administrative Review Council (IARC) to take any action. Such actions may include determining challenges to the appointment or continuing service of an arbitrator, deciding disputes regarding the number of arbitrators to be appointed, or determining whether a party has met the administrative requirements to initiate or file an arbitration contained in the Rules. If the parties do not agree on the seat of arbitration, the IARC may make an initial determination as to the seat of arbitration, subject to the power of the arbitral tribunal to make a final determination." The *2021 Procedures* institutionalize the ICDR's practice of setting up an IARC, which consists of current and former senior officers of the ICDR and performs its duties in accordance with the arbitration rules.[10]

D. Rules of Arbitration and Mediation of the Vienna International Arbitral Centre

10 See the presentation by the ICDR of AAA on the characteristics of international arbitration, https://www.icdr.org/sites/defalut/files/ICDR_Rules_Chinese_March2021.pdf, p. 6, last visited on April 9, 2023.

The Vienna International Arbitral Centre (VIAC), established in 1975, is a permanent international arbitral institution under the Austrian Federal Economic Chamber. Since its establishment, the VIAC has accepted more than 1,700 cases and has become one of the important arbitral institutions in Europe[11]. The *VIAC Rules of Arbitration and Mediation 2021* (the *2021 Vienna Rules*) officially entered into force on July 1, 2021 and superseded the previous 2018 Arbitration Rules. Compared with the 2018 Arbitration Rules, the major highlighted amendments to the 2021 Arbitration Rules are as follows:

1. Adding the third-party funding system

The third-party funding system is introduced in the 2021 *Vienna Rules*. According to Article 6.1.9, third-party funding refers to any agreement entered into with a natural or legal person who is not a party to the proceedings or a party representative, to fund or provide any other material support to a party, directly or indirectly financing part or all of the costs of the proceedings either through a donation or a grant, or in exchange for remuneration or reimbursement that is wholly or partially dependent upon the outcome of the proceedings. Article 13a provides that a party shall disclose the existence of any third-party funding and the identity of the third-party funder in its statement of claim or its answer to the statement of claim, or immediately upon concluding a third-party funding arrangement. If a party discloses third-party funding prior to the constitution of the arbitral tribunal, the Secretary General shall inform any arbitrator nominated for appointment or already appointed of such disclosure for purposes of completing the arbitrator declaration under Article 16.3.

2. Improving the transparency of the arbitrator confirmation procedure

11 About VIAC, https://www.viac.eu/en/about-us, last visited on April 4, 2023.

Pursuant to Articles 17 and 19 of the *2021 Vienna Rules,* the parties have the right to nominate an arbitrator and a sole arbitrator. The presiding arbitrator shall be jointly nominated by the arbitrators nominated by the parties, and the nominated arbitrator shall be confirmed by the Secretary General or the Board of the VIAC.

Article 19.2 of the *2018 Vienna Rules* provides that if deemed necessary by the Secretary General, the Board shall decide whether to confirm a nominated arbitrator. The Board shall decide at its own discretion. The *2021 Vienna Rules* add a step for the parties and arbitrators to comment, that is, prior to the decision of the Board, the Secretary General may request comments from the arbitrator to be confirmed and from the parties. All comments shall be communicated to the parties and the arbitrator.

The amendment to Article 19.2 of the *2021 Vienna Rules* mainly refers to the practice in Article 20.3 on the challenge procedure for arbitrators, which gives the parties and arbitrators the right to comment and improves the transparency of the arbitration confirmation procedure to a certain extent, helping to enhance the confidence of the parties in the arbitral tribunal.

3. Encouraging the parties to reach a settlement in the arbitration proceedings

Article 28.3 is added to the *2021 Vienna Rules*, which provides that the arbitral tribunal shall facilitate the parties' endeavors to reach a settlement at any stage of the arbitration proceedings.

4. Adding the provisions on remote hearing

Article 30.1 of the *2021 Vienna Rules* revises the form of hearings, providing that having due regard to the views of the parties and the specific circumstances of the case, the arbitral tribunal may decide to hold an oral hearing in person or by other means.

5. Adding the provisions on service of award in an electronic manner upon agreement between the parties

Article 36.5 of the 2021 Vienna Rules adjusts the methods of serving the award. Due to the impact of the COVID-19 pandemic, this Article has been revised accordingly, providing that if an award cannot be served in written form, it shall be served electronically, and a hard copy may be subsequently sent by mail. The *2021 Vienna Rules* adopt this practice and add a provision that, upon agreement of the parties, the award may be served electronically. With respect to the methods of service of documents other than the award, the *2021 Vienna Rules* have followed the practice set forth in the 2018 Vienna Rules, that is, the parties must submit the relevant materials to the secretariat in electronic form, while the methods of service of documents between the parties and between the parties and the arbitral tribunal will be determined by the arbitral tribunal after its constitution (Article 12).

E. Expedited Arbitration Rules of United Nations Commission on International Trade Law

The United Nations Commission on International Trade Law ("UNCITRAL"), as the core legal organ of the United Nations, plays a leading role in promoting the unification and modernization of legal rules on international commercial arbitration[12]. In 1976, the UNCITRAL formulated the *UNCITRAL Arbitration Rules*, which were amended in 2010 and 2013[13]. On July 9, 2021, the UNCITRAL adopted the *UNCITRAL Expedited Arbitration Rules* (the *Expedited Arbitration Rules*), which come into force on September

12 For more information on UNCITRAL, see https://uncitral.un.org, last visited on April 5, 2023.

13 For more information on the *UNCITRAL Arbitration Rules*, see https://uncitral.un.org/zh/texts/arbitration/contractualtexts/arbitration, last visited on April 5, 2023.

19, 2021. By simplifying the arbitration procedures and shortening the arbitration period, the *Expedited Arbitration Rules* aim to help the parties resolve disputes in a more efficient and economical manner. The Expedited Arbitration Rules are incorporated as an appendix to the *UNCITRAL Arbitration Rules* with a newly added Article 1.5.

The *Expedited Arbitration Rules* contain 16 articles, which are mainly as follows:

1. Commencement and exit from expedited arbitration

According to Article 1 of the *Expedited Arbitration Rules*, the opt-in mode is adopted, the arbitration is based on the consensus reached by the parties. Meanwhile, according to Article 2 of the *Expedited Arbitration Rules*, at any time during the proceedings, the parties may agree that the *Expedited Arbitration Rules* shall no longer apply to the arbitration; and at the request of a party, the arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, determine that the *Expedited Arbitration Rules* shall no longer apply to the arbitration.

2. Constitution of the arbitral tribunal

According to Article 7 of the *Expedited Arbitration Rules*, the Arbitral Tribunal shall consist of one arbitrator in principle, and according to Article 8 of *the Expedited Arbitration Rules*, the sole arbitrator shall be jointly appointed by the parties, and if the parties fail to jointly appoint the sole arbitrator, the appointing authority shall appoint the sole arbitrator according to the list method provided for in Article 8.2 of the *Arbitration Rules*.

3. Expeditious conduct and shortened periods

According to Article 3 of the *Expedited Arbitration Rules*, the parties should act

expeditiously throughout the proceedings; the arbitral tribunal shall conduct the proceedings expeditiously taking into consideration the fact that the parties have agreed to refer their dispute to expedited arbitration and the time frames under the *Expedited Arbitration Rules*.

Article 4 of the *Expedited Arbitration Rules* requires the claimant to also communicate its statement of claim when communicating its notice of arbitration to the respondent. The *Expedited Arbitration Rules* impose limitations on hearings, supplementary submissions by the parties and further submission of written submissions. Article 11 of the *Expedited Arbitration Rules* provides that the arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held. Article 13 provides that except in exceptional circumstances, a party may not amend or supplement its claim or its defence during the course of the arbitration proceedings. Article 14 also gives the arbitral tribunal the power to prohibit the parties from submitting further written statement.

The time limit for general procedural matters under the *Expedited Arbitration Rules* is 15 days, which is shorter than that of the *UNCITRAL Arbitration Rules*. However, Article 10 of the *Expedited Arbitration Rules* also grants the arbitral tribunal discretion with regard to the time limit, extending or shortening any period of time prescribed under the *UNCITRAL Arbitration Rules* and the *Expedited Arbitration Rules* or agreed upon by the parties.

As for the time limit for rendering an award, Article 16 of the *Expedited Arbitration Rules* provides that an award shall be rendered within six months from the constitution of the arbitral tribunal, which may be extended in exceptional circumstances, but total period shall not exceed nine months. If the arbitral tribunal considers that it may not be

possible to render the award within nine months from the constitution of the arbitral tribunal, it shall propose a final extended time limit. state the reasons therefor and invite the parties to comment within the specified time limit. The extension will be adopted only if the parties agree to this proposal within the specified time limit.

4. Remote hearings

Article 3.3 of the *Expedited Arbitration Rules* provides that the arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to conduct the proceedings, including to communicate with the parties and to hold consultations and hearings remotely.

II. Main Development Trends of International Commercial Arbitration Rules in Recent Times and the Causes

A. Main Development Trends

Taking into account the main amendments to the arbitration rules of major international arbitration institutions and the UNCITRAL Arbitration Rules, generally speaking, the international commercial arbitration rules have shown the following main trends in recent years:

1. People-oriented development of international commercial arbitration

International commercial arbitration rules take the parties as the center, highlight the problem-oriented approach and meet the reasonable requests of the parties. In order to help the parties "afford the lawsuit", the system of third-party funding has been introduced and regulated in various arbitration rules, allowing an investor to provide

financial aid to the parties to an arbitration case to resolve the difficulties of the parties in paying the arbitration costs and requiring the parties to disclose the information of the funder to ensure the impartiality of the arbitration. In order to improve the parties' right to know and right to supervise the composition of the arbitral tribunal and the arbitration proceedings, the concept and practice of improving the transparency of the arbitration proceedings are gradually adopted in the arbitration practice. For example, the VIAC Arbitration Rules 2021 improve the nominated arbitrator confirmation process, improve the parties' and arbitrators' right to know in the process and make the nominated arbitrator confirmation process more transparent.

Recent international commercial arbitration rules further improve and guarantee the exercise of discretion by arbitrators, so as to facilitate arbitrators' participation in arbitration proceedings and give full play to their functions. The VIAC Arbitration Rules 2021 grant the arbitral tribunal a wide range of authority, providing the arbitral tribunal the authority to decide issues concerning its jurisdiction (Article 24.2), to investigate and collect evidence on its own initiative (Article 29.1), to decide whether to hear a case in person or in writing (Article 30.1) and to decide the interim measures (Article 33), etc. Meanwhile, the provisions of exemption of arbitrator liability have been amended from the wording "where permitted by law" to "the liability is excluded unless such act or omission constitutes willful misconduct or gross negligence", in an effort to "safeguard" arbitrators in performing their duties. Furthermore, the LCIA has provided for the widest discretion concept in the Arbitration Rules, providing procedural assurance for arbitrators to efficiently proceed with the arbitration proceedings on a case-by-case basis.

2. Information-based development of international commercial arbitration

At present, the Fourth Scientific, Technological and Industrial Revolution is gaining

its momentum and accelerating its development. In just over two decades since the beginning of the 21st century, mobile Internet, big data, blockchain, cloud computing, deep learning and artificial intelligence have dominated the world. ChatGPT has attracted the attention of the world. We have entered an era of artificial intelligence. The Fourth Scientific, Technological and Industrial Revolution is profoundly reshaping and changing the current "look" of international commercial arbitration, and the pandemic of the century has sped up the pace at which arbitration is embracing new technologies. Traditional on-site hearing, service by mail and other means can no longer meet the demand to promote arbitration proceedings during the epidemic period. Technological means such as remote hearing and electronic service have become increasingly important to promote arbitration proceedings and are increasingly applied in arbitration proceedings. International commercial arbitration institutions have accelerated the pace of information technology development, introducing information-based means to arbitration proceedings, making international commercial arbitration proceedings more up-to-date.

The ICC International Court of Arbitration, the LCIA, the VIAC, The AAA-ICDR and other arbitration institutions have written the achievements in the application of information technology in arbitration proceedings, such as remote hearing and electronic service, into the new rules, providing the parties concerned and arbitration tribunals with a direct operating basis. Meanwhile, the new rules leave room for the future iteration and upgrading of information technology. In addition, international arbitration institutions such as the ICC International Court of Arbitration, the Hong Kong International Arbitration Centre (HKIAC), the VIAC and the ICDR of AAA have launched online

14 The VIAC Portal, https://www.viac.eu/en/news/viac-portal, last visited on Aug. 12, 2023.

case management platforms, making it possible to carry out document exchange and other collaborative operations via cloud technologies, making "cloud arbitration" a reality.[14]

3. High-efficient development of international commercial arbitration

Recently, there has been growing dissatisfaction with the low efficiency and high cost of international commercial arbitration. In order to address the prominent concerns of the parties, international commercial arbitration rules have given more priority to efficiency. In order to save arbitration time and reduce arbitration costs, various arbitration institutions have released rules for summary arbitration, expedited arbitration and small amount arbitration procedures one after another, allow multi-contract arbitration, consolidation of arbitrations, and the joinder of a third party, introduce early determination rules on arbitration applications, adopt the emergency arbitrator system, simplify evidence discovery, shorten the time of court session, promote written hearing, encourage reconciliation and strengthen accounting for arbitrators' remunerations and expenses. For example, in the Arbitration Rules of the 2021 ICC International Court of Arbitration, Article 7 provides for the joinder of parties; Article 9 provides for multi-contract arbitration; Article 10 provides for the consolidation of arbitrations; Article 12 emphasizes the priority of a sole arbitrator[15]; Article 24 requires the arbitral tribunal to convene a case management conference to arrange the arbitral proceedings as soon

15 Article 12.2 of the *2021 ICC Arbitration Rules* provides that, "If the parties have not agreed on the number of arbitrators, the arbitral tribunal shall appoint a sole arbitrator, unless it considers that the appointment of three arbitrators is required for the dispute in the case."

16 In addition, the ICC Commission on Arbitration and ADR has released a guide for the administration of arbitration proceedings to help arbitration users save costs and improve arbitration efficiency. ICC Commission on Arbitration and ADR: *Effective Management of Arbitration– A Guide for In-House Counsel and Other Party Representatives*. http://www.iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunal/, last visited on April 8, 2023.

as possible; Article 25 provides for the arbitral tribunal to determine the facts of the case by all appropriate means in the shortest possible time; Article 30 provides for an expedited procedure; and Article 31 specifies the time limit for the arbitral tribunal to render the final award, etc.[16] If an arbitrator is unable to submit a draft award on time, the arbitral tribunal has the power to reduce the remuneration of the arbitrator. The introduction of remote hearing and the holding of procedural management meetings by various arbitration institutions, the allowance and priority of electronic service, and the promotion of the cloud platform for arbitration also help to improve the efficiency of arbitration and reduce the arbitration costs of the parties.

4. Integration of international commercial arbitration rules

Due to economic, historical, cultural and other reasons, the modern international commercial arbitration system is greatly influenced by the common law system, and at the same time, the international commercial arbitration system is also a product of the constant conflict, compromise and integration between the common law system and the civil law system. For example, although currently the distinctive practices in common law system, such as discovery and cross examination, are predominant in international commercial arbitration, compared with such practices in common law system countries, especially in the US litigation, evidence discovery and cross examination in international commercial arbitration have been greatly simplified and improved.

More recently, international commercial arbitration rules emphasize "speeding up and increasing efficiency" by introducing arbitration rules for summary arbitration, speedy arbitration and small-claim arbitration procedures, and correspondingly endow arbitral tribunals with broader discretions. The arbitral tribunal may appropriately limit the parties' rights to submit pleadings, conduct discovery and cross-examination

of witnesses, and the discovery of evidence and cross examination have been simplified. The ICDR of AAA expressly states in its Arbitration Rules that depositions, interrogatories, and requests to admit as developed for use in US court proceedings are generally not appropriate procedures for obtaining information in an arbitration under these Rules.[17] In 2019, arbitration experts from about 30 countries around the world published the Rules on the *Efficient Conduct of Proceedings in International Arbitration* (the "Prague Rules") for reference and use by international commercial arbitral tribunals and parties. The Rules draw on much of the practices of civil law countries, whereby the arbitral tribunal dominates the arbitral proceedings and strictly restricts the discovery of evidence.

More notably, with the West learning from the East for international commercial arbitration rules, the system of international commercial arbitration, as the dispute settlement mechanism originated in the West, has absorbed more and more practices from the East, thus the trend of "blending of east and west" is even more obvious. The summary procedure, arbitration secretary and other systems and practices that have been effectively implemented for many years in China's arbitration practice have been gradually adopted by the West. The arbitration secretary system has also been explicitly included in the arbitration rules of the LCIA, the ICDR of AAA and other arbitration institutions.

5. Convergence of international commercial arbitration rules

From the perspective of the main content of recent international commercial arbitration rules, the issues to be addressed by them are highly consistent, which mainly focus on

17 See Article 24.10 of the *International Arbitration Rules* in the *International Dispute Resolution Procedures* of the ICDR of the AAA.

addressing the reasonable concerns of arbitration users, improving arbitration efficiency, adapting to the development of the scientific and technological and industrial revolution, and coping with the challenges of the epidemic situation. The solutions adopted are also consistent or similar, which focus on introducing simplified arbitration procedures and the third-party funding system, recognizing remote hearing and electronic service, expanding the scope of application of consolidation of arbitrations and joinder of additional parties, and improving the transparency of the arbitration procedures. Arbitration institutions have learned from each other in competition, and the "copying doctrine" prevails, and there is a remarkable trend of convergence of arbitration rules of all arbitration institutions.

As an invention of the commercial society, arbitration is the "law of nations" of the commercial society and is naturally international. Under the guidance of the *UNCITRAL Model Law on International Commercial Arbitration*, 85 countries and 118 jurisdictions have formulated arbitration laws based on it[18], and the arbitration systems of different countries and regions have, to a certain extent, shown a trend of convergence. Convergent arbitration rules can increase the certainty of arbitration proceedings, reduce the differences between the laws and cultures of different legal systems, reduce the cost of dispute resolution, enhance the confidence of the parties in the arbitration system, facilitate the recognition and enforcement of arbitral awards and help improve the international competitiveness of the arbitration system.

B. Analysis of Causes

18 United Nations, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,* https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status,last visited on April 8, 2023 ; WANG Hui, "*The Creation, Impact and Inspiration of the Model Law on International Commercial Arbitration*", Wuhan University International Law Review, Issue.3 2019, p. 104.

1. Decision by user demands

Arbitration is the outcome of agreement between the parties, and the contractual nature is the fundamental attribute of arbitration. The authorization of arbitration by agreement between the parties is the only source of jurisdiction over arbitration. International commercial arbitration is a modern service industry, in which competition has become increasingly fierce.[19] The contractual nature and the service nature of arbitration, and the competitiveness of international commercial arbitration determine that the suppliers of international commercial arbitration must always pay attention to and constantly meet the arbitration needs of the parties and maintain their competitive edge. Otherwise, the parties may vote with their feet, and give up choice of international commercial arbitration. Recently, many changes have been made to the rules of international commercial arbitration, and these changes are substantially to meet the reasonable needs of the commercial society. For example, international commercial arbitration has deviated from the original efficient and convenient way and has become more and more litigation-oriented. International commercial arbitration is time-consuming, costly, and

19 The *United Nations Convention on International Settlement Agreements Resulting from Mediation*, also known as the *Singapore Convention on Mediation*, was adopted in December 2018. The *Convention* applies to the international settlement agreement resulting from mediation and establishes a unified legal framework for the right to invoke and enforce the settlement agreement. The *Convention* was open for signing in Singapore from August 7, 2019, and by August 23, 2023, 56 countries including China and the United States have signed the *Convention.* The Convention has entered into force for 10 countries including Singapore. https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status, last visited on August 23, 2023. On July 2, 2019, the 22nd diplomatic conference of the Hague Conference on Private International Law adopted the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention), aiming to promote the effective international circulation of foreign judgments in civil and commercial matters. Http://www.hcch.net/en/instruments/conventions/specialised-sections/judgments/, last visited on April 8, 2023. The reform of international mediation and cross-border litigation systems has reduced the comparative advantages of international commercial arbitration in the system, and further increased the competition pressure on international commercial arbitration.

inefficient, and has become a "Rolls-Royce" type of fairness. To address the concerns of a vast number of parties, various methods and technologies, such as simplified arbitration rules, simplified discovery, and procedural management techniques, have emerged in order to improve the efficiency of arbitration. Some of the changes are self-targeted revolution at the expense of reaction to the traditional concept of arbitration. For example, the relativity of arbitration is given up to a certain extent, by introducing arbitration under multiple contracts, consolidation, and joinder of third parties; to a certain extent, the privacy of arbitration is deviated by disclosing the awards and decisions of the arbitration tribunal in order to promote fairness and improve the credibility of arbitration; to a certain extent, the primary principle of arbitration of the parties' autonomy is even challenged, and even the parties' right of choice of arbitrators is restricted in expedited proceedings.

2. Catalysis by scientific and technological revolution

We have entered the era of artificial intelligence (AI). The Internet has given birth to Internet-based arbitration and expanded the scope of application of international commercial arbitration. The accelerated iteration of communication and information technologies has made online case filing, electronic service, electronic signature and, in particular, multimedia evidence demonstration and remote hearing a reality. Blockchain, big data and AI technologies have become, and will irreversibly become, more and more common in international commercial arbitration scenarios. The application of blockchain technology will affect and change the rules of evidence in international commercial arbitration; big data and AI will increasingly empower arbitral tribunals and have a significant impact on the hearing of cases and the awards made by them. In the future, more and more arbitral tribunals will distinguish right from wrong and settle disputes under the aid of big data and AI, and the boundaries between Intelligent

Arbitrator (IA) and Artificial Intelligence (AI) will become blurred. The technological and industrial revolution will continue to change and shape the pattern and form of international commercial arbitration.

3. Fueled by epidemic situation in the new century

In response to the outbreak of COVID-19, countries in the world have generally adopted a series of measures to restrict or prohibit international travel and people gathering, which has a greater negative impact on international commercial arbitration activities. In order to properly cope with the adverse impact of the COVID-19 pandemic on international commercial arbitration activities, some arbitration institutions clarified the compliance of remote hearing at the beginning of the COVID-19 pandemic. For example, as early as in April 2020, the ICC International Court of Arbitration, the CIETAC and other internationally renowned arbitration institutions have successively issued guidelines on effectively promoting arbitral proceedings during the COVID-19 pandemic,[20] recognizing the right of arbitral tribunals to hear cases remotely by video under appropriate circumstances. Subsequently, the LCIA specified in its 2020 arbitration rules that court hearings may be conducted through virtual means such as teleconference or other communication technologies. The 2021 Arbitration Rules of ICC International Court of Arbitration added provisions on remote hearing and use of electronic means. The COVID-19 pandemic is a "Black Swan Event", but it has played an important role in accelerating the pace of scientific and technological empowerment

20 The *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, https://cms.iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-chinese.pdf, December 12, 2021. The CIETAC *Guidelines on Actively and Steadily Promoting Arbitration Proceedings During the COVID-19 Pandemic (for Trial Implementation)*, http://www.cietac.org/index.php?m=Article&a=show&id=16910, last visited on April 8, 2023.

in international commercial arbitration.

III. Main Inspirations to the Formulation of Arbitration Rules by Chinese Arbitration Institutions

1. Adopting the party-centered approach

Merchants are the mother of international commercial arbitration. From the perspective of the origin of modern arbitration system, in order to adapt to the development of commodity trade and get rid of the domination of feudal and religious forces, the merchants spontaneously organized some institutions with similar jurisdiction to resolve disputes between merchants by themselves by means of arbitration, and thus the modern arbitration system came into being. Arbitration institutions are organizations that provide services for market players to resolve disputes. The contractual nature of arbitration determines that arbitration institutions must firmly establish the concept of service, put the party first, constantly optimize service quality, improve arbitration efficiency, enhance competitive advantage and make arbitration subjects understand arbitration, believe in arbitration, choose arbitration and prefer arbitration by the excellent arbitration team, the best arbitration products and the strongest credibility.

In the process of formulating arbitration rules, arbitration institutions shall learn about the people's needs, carry out in-depth investigation and research, fully understand the true demands of arbitration users, adopt the problem-oriented approach and strive to resolve the reasonable demands of the parties; follow the principle of "open-door legislation", take the initiative to invite arbitration users such as business counsels and arbitration lawyers to participate in the process of formulation and modification of arbitration rules, widely seek opinions and suggestions from all walks of life, and conscientiously respond to the real concerns of market players; fully respect the parties' right of autonomy of

will and effectively guarantee the implementation of the procedural rights of the parties; reform the methods of appointment of presiding arbitrator and sole arbitrator, improve the participation and voice of the parties and improve the transparency of arbitration; and strengthen the rigid constraints of arbitration honesty, properly handle seriously asymmetric arbitration procedure agreements, and prevent and regulate the abuse of arbitration rights by the parties and the malicious damage to the arbitration procedure while ensuring the autonomy of will of the parties.

2. Striving to improve the arbitration efficiency

Justice delayed is justice denied. Efficiency itself is one of the important value goals pursued by arbitration system. As an economic mode for efficient and reasonable allocation of social resources, market economy requires rapid resolution of disputes so as to improve the level of optimal allocation of resources. Arbitration is an incomplete way to achieve justice. In a sense, it is the strong pursuit of efficiency that dilutes the inherent defects of arbitration. Arbitration is different from and superior to litigation because of its pursuit of efficiency, so that it has craved a place in the system of remedy for social conflicts.[21] Although the arbitration efficiency of China's arbitration institutions is higher than that of foreign arbitration institutions, there is still a big gap compared with the expectations of the parties.

In the course of formulating arbitration rules, an arbitration institution shall give prominence to the improvement of arbitration efficiency and adopt various measures to save both the time and costs of arbitration. First, it shall expand the application scope of summary procedure; Second, it shall introduce practices such as arbitration procedure

21 See ZHAO Jian, the *Research on Judicial Supervision over International Commercial Arbitration*, Law Press China, 1st edition, January 2000, p. 5-6.

management meetings, procedural orders, procedural schedules, evidence exchange and pre-hearing conferences, so as to take more steps for the arbitral tribunal to improve the efficiency of arbitration; Third, it shall optimize service modes, stipulate electronic service and use of management systems such as cloud platforms to submit and exchange arbitration documents, abandon the service by announcement, appropriately reduce the requirements and costs for the proposed service and improve the efficiency and quality of service; Fourth, it shall introduce the systems of multi-contract arbitration, consolidation of arbitrations and joinder of parties and moderately relax the applicable conditions; Fifth, it shall grant wider discretion to arbitral tribunal, so as to facilitate the adoption of cost-effective arbitral procedure solutions by the arbitral tribunal on a case-by-case basis in comprehensive consideration of the specific circumstances of each case.

3. Continuing the scientific and technological empowerment

In the new era of in-depth integration of AI and legal services, enhancing arbitration capacity urgently requires scientific and technological empowerment, and smart arbitration will lead the development direction of arbitration in the future. At the stage of case filing, online filing will effectively improve the case filing efficiency. With the use of intelligent technology, it is possible to timely screen and give early warning against false arbitrations, and at the same time complicated cases are separated from simple ones. At the stage of document service, electronic service will greatly improve the service efficiency and save the service cost. At the stage of arbitration hearing, remote hearing will reduce the cost of the parties, agents and other arbitration participants in participating in the arbitration proceedings. Technologies such as voice input, machine translation, correlation of multi-modal records of court hearings and intelligent review will greatly enhance the accuracy of court transcripts. The modularization of court hearing process and intelligent auxiliary technology for trial will also contribute to

more standardized hearing of cases. With the use of blockchain, evidence risks can be effectively circumvented. At the stage of adjudication, the analysis technology of legal texts, accurate recommendation of similar cases, modeling of case facts and disputed focus, prediction of award results, automatic generation of award and other technologies not only greatly shorten the time of drafting awards by the arbitral tribunal, but also reduce the working difficulties of arbitrators, are conducive to avoiding "different judgments on the same case" and improving the quality of arbitral awards. The emergence of smart contracts will gradually realize the automatic application of cases, automatic filing and review of cases by arbitration institutions, and speedy hearing in batch.

The future has come. Only by embracing new technologies can arbitration adapt to the development of the AI era and enhance the arbitration capability. In the process of formulating arbitration rules, we should, firstly, keep an open attitude to scientific and technological developments, actively promote the in-depth integration of technology and

22 The Professor SHEN Yang Team from the Center for New Media Communication Studies of Tsinghua University authorized the release of the *Metaverse Development Research Report (2020-2021)* on September 16, 2021. The Report, which is organized into three chapters including the Concept Chapter, Industry Chapter and the Risk Chapter, aims to interpret the profound significance of the "Metaverse", a new stage of internet development, from the perspectives of sorting out concepts, structuring theories and analyzing the industry, and research into and predict its development trends and potential risks. This is the first research report on the metaverse in the academic circle in China. According to the Report, the metaverse is a new type of internet application and social form that blends virtuality and reality generated by the integration of various new technologies. It provides immersive experience based on extended reality technology, generates a mirror image of the real world based on digital twin technology and establishes an economic system based on blockchain technology to closely integrate the virtual world and the real world in the aspects of economic system, social system and identity system and allow each user to produce content and edit content in the world. The core connotation of the metaverse includes five points, namely, the integration of virtuality and reality, user-produced content as the main body, embodied interaction, unified identity and economic system. YE Haiyan and ZENG Ye, the *Dialogue with Editor in Chief of China's First Metaverse Development Report*, November 3, 2021, https://hainan.china.com/news/20001581/20211103/25472354.html, last visited on April 8, 2023.

arbitration, pay close attention to the development of the metaverse[22], actively explore the application of augmented reality (AR) and virtual reality (VR) technologies in arbitration scenarios and open up space and reserve space for technological empowerment; secondly, we should adhere to technological neutrality, prevent the inequality of the legal status of arbitration between the parties due to the difference in technical capabilities and guard against the data gap on arbitration; thirdly, we should strengthen the compliance management of arbitration data and safeguard the arbitration information security of the parties concerned from two aspects, namely hardware (technology) and software (rules); fourthly, we should strengthen the connection and interaction between arbitration rules and cloud platforms for arbitration case management, strengthen the interconnection and intercommunication between the arbitration case management platform of arbitration institutions and the information platforms of people's courts, lawyer associations and law firms, notary agencies, mediation agencies, electronic evidence preservation agencies, market regulatory authorities, credit investigation organs and other organs and entities, realize data sharing under the premise of ensuring information security, improve and facilitate the online arbitration conducted by the parties in various regions and raise the quality and efficiency of arbitration.

4. Keeping aligned with comprehensively deepening the reform of the arbitration system and mechanism

In 1954, the Government Administration Council of the Central People's Government decided to establish the Foreign Trade Arbitration Commission, the predecessor of CIETAC, which began the journey of arbitration undertakings in New China. Since the

23 On the development achievements of China's arbitration undertakings, JIANG Lili, T*en Years of Arbitration: Building a Strong Foundation and Setting Sail with a Reed*, published in *China Trade News,* 6th edition, October 11, 2022.

Arbitration Law of China came into force in 1995, especially since the accession to the World Trade Organization ("WTO"), China's arbitration undertakings have witnessed rapid development. At present, China has developed into a large country of arbitration.[23] At the same time, we should also be aware that China is "large but not powerful" in arbitration, which is faced with new situations and new problems such as imperfect internal governance structure of arbitration commissions, non-standard development order of arbitration, weak international competitiveness of arbitration, imperfect supervision and restraint mechanism and inadequate support and guarantee, which affect the credibility of arbitration and restrict the healthy and rapid development of China's arbitration undertakings, so there is an urgent need to comprehensively deepen the reform.

The formulation of arbitration rules shall keep pace, mutually promote and align with the comprehensive deepening of the reform of the arbitration system and mechanism. We should adhere to the civil nature[24], public welfare and professionalism of arbitration agencies, strictly implement the *Several Opinions on Improving Arbitration System and Enhancing the Credibility of Arbitration* promulgated by the General Office of the CPC Central Committee and the General Office of the State Council, and establish and improve the non-profit corporate governance structure under the principles of separating decision-making power, enforcement power and supervision power, effective check and balance and reciprocity between power and responsibility. We should also reform and improve the arbitration cost system, establish a remuneration system in line with the responsibilities and rights of arbitrators and improve the transparency of arbitrators' remunerations. Comprehensively reviewing the system of arbitration rules in China,

24 On the legal person positioning and "de-administration" of arbitration institutions in China, please see *Civilianization is the Development Direction of China's Arbitration System* written by WANG Hongsong, https://www.bjac.org.cn/news/view?id=1453, last visited on August 23, 2023.

we conclude that China's arbitration rules have a certain function of "the organic law of arbitration institutions", so the arbitration rules shall timely reflect the achievements of the reform of the arbitration system and mechanism in China, incorporate the reform achievements into "rules", and at the same time leave space for continuous deepening of the reform.

5. Placing equal emphasis on "bringing in" and "going global"

The modern commercial system originated from the West and was introduced to China later. Reviewing the history of the arbitration system in China, China has experienced a process of learning, following, participating in the formulation of and making active contributions to international commercial arbitration rules.

On the one hand, we should continue to learn from the advanced experience of international commercial arbitration. As the birthplace of the international commercial arbitration system, Western countries are still the epitome of the international commercial arbitration system. In recent years, most of the new theories, systems and practices of the international commercial arbitration system, such as consolidation of arbitrations and concurrent arbitrations, emergency arbitrator system, and improvement of the transparency of arbitration, come from Western developed countries. As a newcomer, China's arbitration institutions should still make preparations for studying and learning, introducing, absorbing and improving so as to keep their arbitration rules in line with international practices.

On the other hand, it should also be noted that arbitration activities in the Asia-Pacific region are becoming increasingly active and the status of arbitral institutions in the Asia-

25 Queen Mary, White & Case: *2021 International Arbitration Survey: Adapting arbitration to a changing world*, 2021, p.6.

Pacific region continues to rise. According to the *2021 International Arbitration Survey* released in 2021 by Queen Mary University of London and White & Case, among the top 10 most popular seats of arbitration in the world, Hong Kong ranks the second and Beijing the joint fifth, with Shanghai followed.[25] Among the top five most popular arbitration agencies in the world, the HKIAC ranks third, and CIETAC ranks fifth.[26] Both have made historic breakthroughs. As mentioned above, with the West learning from the East for international commercial arbitration rules, Western countries have gradually adopted the simplified procedure, arbitration secretary system and other rules and practices that have been effectively implemented for many years in China's arbitration practice. China ranks top in the world in terms of the number of arbitration agencies, the number of arbitrators and other arbitration practitioners, the number of accepted cases, the value of disputed subject matters and the number of countries of origin of parties concerned. China is one of the countries with the richest vitality and the most potential in the arbitration sector. Supported by grand arbitration practice and based on profound cultural background, Chinese arbitration agencies should conscientiously summarize the development experience of China's arbitration practice, extract Eastern experience and Chinese wisdom such as the combination of arbitration and mediation, simplified procedure and arbitration secretary system, constantly enrich the international commercial arbitration practice and strive to contribute a "Chinese solution" to the development of international commercial arbitration.

6. Upholding the advanced nature of arbitration rules

Observing the major international commercial arbitration agencies in the world, it

26 Queen Mary, White & Case: *2021 International Arbitration Survey: Adapting arbitration to a changing world*, 2021, p.10.

27 For a history of amendments to HKIAC arbitration rules, see https://www.hkiac.org/zh-hans/aribtration/rules-practice-notes, last visited on April 8, 2023.

is not difficult to see that their arbitration rules are revised approximately every five years so as to maintain their advanced nature. For example, in the new century, the ICC International Court of Arbitration revised its arbitration rules in 2012, 2017 and 2021 respectively; the HKIAC revised its arbitration rules in 2008, 2013 and 2018 respectively[27]; and the Singapore International Arbitration Centre (SIAC) formulated the first arbitration rule in 1991, and revised its rules in 1997, 2007, 2010, 2013 and 2016 respectively.[28] The main reason for the frequent revision of international commercial arbitration rules is that the arbitration system itself acts as the "lubricant" for the operation of market economy and is closely connected with the commercial society. With the twists and turns of economic globalization, a new round of scientific, technological and industrial revolution is making robust progress, and the international economic order is undergoing profound adjustments, the commercial society is putting forward higher and newer requirements for arbitration system. Arbitration agencies, as the service suppliers, need to constantly respond to the needs of the demand side and the changing environment, in order to maintain their competitiveness.

Chinese arbitration institutions shall pay close attention to the latest evolution of international commercial arbitration rules, profoundly grasp the changes in the demands of arbitration users, timely revise their arbitration rules in accordance with the provisions of laws and on the basis of the current situation, maintain the advanced and internationalized nature of arbitration rules, keep the constant driving force for supply of rules and constantly improve the international competitiveness and international credibility of arbitration.

28 For a history of amendments to SIAC arbitration rules, see https://siac.org.sg/siac-rules-previous-editions, last visited on April 8, 2023.

IV. Conclusion

China is at the historical intersection of the Two Centenary Goals and in the critical period of promoting Chinese-style modernization and is faced with new historical opportunities and challenges for the development of China's arbitration undertaking. As the "national team" and "leading goose" of Chinese arbitration, the CIETAC is one of the world's major permanent commercial arbitration agencies. It is also the main force for Chinese arbitration to participate in international arbitration competition and global arbitration governance. The CIETAC's current arbitration rules came into force on January 1, 2015. Good law is the prerequisite for good governance. At present, CIETAC is based on the arbitration practice of China, focusing on the outstanding problems in arbitration practice, paying close attention to the development and evolution of international commercial arbitration rules, earnestly responding to the new challenges brought by the development of science and technology, the epidemic situation in the 21st century and the new economic forms, revising and improving its arbitration rules, and striving to build a world-class arbitration agency with Chinese characteristics, so as to provide higher quality arbitration services and guarantees for comprehensively promoting the construction of an international arbitration center in the new ear and China-style modernization.

Chapter Four

Practical Study on Arbitration of Legal Disputes in the Automotive Industry from the Whole-Process Perspective

In recent years, China has made continuous technological progress and expanded the scale of the automotive industry, making it one of the world's automotive powers. According to the data released by the China Association of Automobile Manufacturers ("CAAM"), in 2022, China's production and sales of automobiles reached 27.021 million units and 26.864 million units respectively, up 3.4% and 2.1% year-on-year.[1] The production and sales of new energy vehicles (NEVs) reached 7.058 million units and 6.887 million units respectively, up 96.9% and 93.4% year-on-year.[2]

Automotive industry is a strategic and pillar industry of China's national economy. Since 2009, China's auto production and sales have ranked first in the world for 14 consecutive years, accounting for about 30% of the global production and sales. China's NEV sales have ranked first in the world for eight consecutive years. By the end of 2022, the total number of automobiles for civilian use reached 319.03 million, which ranked the top in the world for three years in a row since 2020.[3] At the same time, the automotive industry also gained a momentum to boost consumption in China, with

1 The CAAM: Report on Economic Operation of the Automotive Industry in 2022, p. 1-2.

2 The CAAM: Report on Economic Operation of the Automotive Industry in 2022, p.8.

3 The Statistical Communiqué of the People's Republic of China on the 2022 National Economic and Social Development, http://www.stats.gov.cn/sj/zxfb/202302/t20230228_1919011.html, visited on March 12, 2023.

auto consumption accounting for about 10% of China's total consumption and 10% of the gross national tax revenue, and the total output value of the automotive industry accounted for more than 8% of China's GDP. According to the data of the National Bureau of Statistics sorted out and released by the CAAM on February 1, 2023, the automobile manufacturing industry achieved the business income of 9,289.99 billion yuan in 2022, up 6.8% year-on-year, accounting for 6.7% of the total business income of industrial enterprises above designated size.[4]

With the rapid development of China's automotive industry, the continuous expansion of business forms of the automotive industry, as well as the popularity and upgrading of automotive consumption, many problems and disputes have gradually become prominent. Especially in recent years, influenced by the trend of trade protectionism and backlash against globalization, in addition to the complex and changing geopolitical situation as well as the overall downturn of external economic situation, the upstream and downstream enterprises of the industrial chain of the automotive industry are greatly affected by the market fluctuations, and several enterprises find themselves in trouble. The increase of relevant disputes in the automotive industry has also brought many new problems and challenges to the dispute resolution and attracted more and more attention from automotive industry practitioners, legal professionals, and especially the arbitration practitioners.

This Chapter proposes suggestions on improving the arbitration mechanism for resolving legal disputes in the auto industry and future prospects and outlook by starting with the characteristics of legal disputes in the automotive industry, the advantages of arbitration in resolving legal disputes in the automotive industry as well as increasing the credibility

4 The CAAM: Report on Economic Operation of the Automotive Industry in 2022, p.2-3.

of arbitration in the automotive industry, and by analyzing typical arbitration cases in the automotive industry.

I. Overview of Legal Disputes in the Automotive Industry

The automobile industry chain is relatively long, centering on the finished automobile manufacturing industry, extending upward to the automobile research and development, component and parts manufacturing industry and other relevant basic industries, and downward to the automobile sale, after-sale, leasing, finance and other fields. In addition, there are sound supporting normative systems in each link of the automobile industry chain, including the standard system of laws and regulations, the development system for experiment and verification, the certification system and so on. With the rapid development of the automotive industry, numerous legal disputes arise in each link of the industry chain, including product development contract disputes from upstream to downstream, parts purchase contract disputes, automobile sales contract disputes, financial leasing contract disputes, disputes over product quality and protection of consumer rights, intellectual property infringement disputes. In general, the characteristics of legal disputes in the automotive industry are mainly shown as follows:

A. Considerable Quantity of Disputes

The quantity of legal dispute cases in the automotive industry has always been high. By searching the legal database of Wolters Kluwer, using the abbreviations of major domestic automobile manufacturers (hereinafter referred to as the "auto manufacturers") and the auto finance companies, new energy companies and major auto parts companies they established as the keywords, more than 100,000 cases have been retrieved within the period of three years (by the end of March

2023).[5] Among them, the cases involving contract or quasi-contract disputes account for 66.44%, the cases involving tort liability disputes account for 16.92%, the cases involving civil disputes relating to companies, securities, insurance, bills, etc. account for 6.53%, the cases involving intellectual property and competition disputes account for 1.14%, and the cases involving marine or maritime and various other types of disputes account for a total of 8.97%. Among the cases involving the automotive industry, auto leasing related cases (including related financial leasing cases) account for the largest proportion, followed by cases involving auto finance and supply chain.

B. Diversified Types of Disputes

As described earlier, China has seen a long automotive industry chain and fast product renewal and iteration. China's automotive industry chain covers 47 segmented industries.[6] In terms of specific types of disputes, disputes over sales contracts may be, for example, a dispute arising from the purchase of parts and components by auto manufacturers relating to demand forecast, pricing agreement, overdue supply and product quality, a dispute between auto manufacturers and dealers, between dealers and consumers or between a second-hand vehicle platform and consumers arising out of deposit/down payment, product quality and fraud, etc. From the perspective of subjects of disputes, taking auto manufacturers for example, such disputes may arise between them and their suppliers, disputes involving intellectual property and unfair competition may arise between them and other auto manufacturers, disputes arise out of distribution

5 The data only includes the related commercial disputes of the enterprises, excluding labor disputes, personnel disputes, special proceedings and other cases. In view of the unavailability of judgment documents by the courts, the search data is limited. The case search method mentioned below is the same.

6 See LV Yue and DENG Lijing, Striving to Enhance the Resilience and Safety Levels of Industry Chain and Supply Chain - Measurement and Analysis with the China's Automobile Industry Chain as an Example, published in the Journal of International Trade, Issue 2, 2023, p.2.

agreements between them and distributors, and disputes over product quality arise between them and consumers etc. In addition, numerous market players are involved and a considerable number of disputes arise in the automotive aftermarket services such as automobile insurance, automobile rental, auto finance and automobile repair & maintenance.

In 2022, there were as many as 20 types of disputes heard by the China International Economic and Trade Arbitration Commission (hereinafter referred to as "CIETAC"), with the types on the top involving construction projects, electromechanical equipment, purchase and sale of goods, transfer of equity investment, service contracts, natural resources and financial disputes.[7] Among them, the cases involving disputes in the automotive industry are basically covered in the above types of disputes.

The legal disputes in the automotive industry have also received attention from courts. On March 28, 2023, Beijing Third Intermediate People's Court issued the Special Research Report on the Trial Observation on New Energy Vehicle Cases (2018-2022). According to the report, from January 2018 to December 2022, the people's courts at all levels across China concluded a total of 3,397 cases involving NEVs in the first instance, second instance and retrial stages. From the perspective of case types, the NEV cases mainly involved five categories, namely, product quality disputes, sales disputes, disputes over liability for motor vehicle traffic accidents, disputes over vehicle rental contracts and disputes over property management contracts (installation of charging piles).[8] Among them, disputes caused by product quality problems account for a relatively large

7 See CIETAC 2022 Work Report (Text), http://www.cietac.org.cn/index.php?m=Article&a=show&id=18839, visited on March 12, 2023.

8 The Notification on New Energy Vehicle Consumption and Trial Observation of Cases jointly by Beijing Third Intermediate People's Court and Beijing Consumer Association, https://bjgy.bjcourt.gov.cn/article/detail/2023/03/id/7220879.shtml, visited on April 1, 2023.

proportion. Dispute cases caused by battery system failure or power or braking system failure account for about 50% in such cases.[9]

C. Complex and Highly Specialized Nature of Disputes

First of all, compared with other business transactions, transactions in the automotive industry are often far more complex, and then more complicated transaction structures and legal relationships are formed. For example, in the case of a finance leasing with a subject matter of general type, the parties to the transaction consist of two parties such as the lessor and the lessee or three parties with an additional intermediary, and the relationship between the two parties or the three parties is relatively simple. However, the trading party structure of auto finance lease is generally more complicated, including auto manufacturers, finance leasing companies, automobile dealers, lessees, operators, logistics companies, banks and insurance companies, etc.; and the business modes thereof have expanded from the traditional direct leasing mode and sale-and-leaseback mode to new direct leasing mode, new sale-and-leaseback mode and mixed mode, and different legal relationships exist under different modes.

Second, the legal disputes in the automotive industry tend to be highly specialized in content. Firstly, there are plenty of terminologies and terms involved in legal disputes in the automotive industry. For example, semi-knocked down (SKD) refers to the imported or exported large parts or modules of automobile assembly such as engine and chassis; it is also often assembled into complete automobiles in domestic or overseas automobile factories mainly by SKD. Completely knocked down (CKD) is a terminology to refer

9 See the Trial Observation on New Energy Vehicle Cases released by the Beijing Third Intermediate People's Court, http://www.legaldaily.com.cn/judicial/content/2023-03/31/content_8839287.html, visited on April 1, 2023.

to the imported or exported complete automobile models in the form of completely knocked down parts. There are also other types of expertise, including automotive trading terms, that need to be identified by professionals. Secondly, with the acceleration of the intelligent, network-based, electrified and shared nature of automobiles, legal disputes involving automobiles brought by the new forces of automobile manufacturing also increasingly have "technological content". Thirdly, there are numerous relevant laws and regulations involved in the automotive industry, including a large number of relevant industrial policies, standards and specifications issued by competent government departments and industry associations. In addition to laws and regulations, relevant national and industry policies and standards are also applicable to some cases. By February 2023, the Standardization Administration of the People's Republic of China has approved 128 mandatory national standards for automobiles (including motorcycles). In the field of intelligent connected vehicles, the Ministry of Industry and Information Technology, the Standardization Administration of the People's Republic of China and other authorities jointly organized the formulation of the Guide to the Development of the National Industry Standards System for Internet of Vehicles (Intelligent Connected Vehicles) (2023 Edition) in July 2023, specifying that at present, there are 53 standards in the standards system for intelligent connected vehicles which have been released, submitted for approval or established. The national guidelines and policies are constantly changing, and it is still necessary for judges to continue to pay attention to the development trend of the industry. Owing to the high specialized nature of legal disputes in the automobile industry, it is urgent to have the legal experts familiar with the automobile industry to solve such disputes, posing a new challenge for experts in solving the disputes in the automotive industry.

Based on the above analysis of the automotive industry and the characteristics of relevant legal disputes, in the context of globalization, arbitration, as an important method to

resolve international commercial disputes, plays its unique advantages of specialty, high efficiency and confidentiality in the process of enterprises' international operations. For example, the parties may select or the arbitration agency may also nominate or appoint arbitrators who have an automotive industry working background and expertise in settling disputes in the automotive industry to resolve the relevant disputes. However, the specialized advantage of arbitration system does not mean that the litigation before a court or any other means for dispute resolution are not professional, but it specifically refers to the advantage of expert judgment of the arbitration system.[10]

II. Arbitration Is the First Choice for Resolving Legal Disputes in the Automotive Industry

More and more enterprises in the automotive industry choose arbitration as the preferred method to solve disputes in the automotive industry. The reasons for such choice lie in the inherent advantages of arbitration in settling such disputes and the enhanced credibility of arbitration.

A. Inherent Advantages of Arbitration in Settling Legal Disputes in the Automotive Industry

Since the entry into force of the Arbitration Law for more than 20 years, arbitration has played an irreplaceable and important role in protecting the legitimate rights and interests of the parties, settling disputes in a fair and timely manner, properly resolving conflicts, safeguarding the healthy development of the socialist market economy, maintaining social stability and promoting international economic exchanges by virtue of its unique advantages, such as fully respecting the parties' autonomy of will, and

10 JIANG Wei & XIAO Jianguo, the Arbitration Law, the China Renmin University Press, 2016, p. 12.

resolving disputes in a convenient, professional and efficient manner. With respect to the automotive industry, the inherent advantages of arbitration also apply. In practice, the automotive industry, because of its business characteristics, has the demand and motivation to choose arbitration for dispute resolution. The advantages of arbitration in resolving legal disputes in the automotive industry are mainly embodied in the following four aspects:

Firstly, arbitration fully respects the parties' autonomy of will and the parties have more freedom of choice. Arbitration cases are not subject to the restrictions of hierarchical jurisdiction and territorial jurisdiction in litigation procedures. The parties may freely choose arbitration institutions, arbitration rules, seat of arbitration, arbitrators, language of arbitration and applicable law, etc., and may also freely appoint persons they trust as their arbitration agents, who are not subject to the restrictions on agents in litigation procedures, etc., which has great flexibility and freedom. Specifically, due to the characteristics of the automobile industry, such as long industry chain, multiple forms of business, highly specialized nature and a large number of market players and geographical dispersion, relevant enterprises in the automobile industry, from the perspective of the consistency, economy, predictability and efficiency of dispute resolution, are more inclined to choose a relatively uniform dispute resolution body, in order to handle various disputes and controversies in a centralized and uniform manner. However, court proceedings are subject to the statutory jurisdiction, leaving little leeway for auto enterprises. This is also the internal motivation for auto enterprises to prefer to choose top-level arbitration bodies represented by CIETAC with stronger credibility to resolve disputes.

Secondly, the specialized nature embodied in case hearing by arbitration experts can fully guarantee the fairness and reasonableness of the arbitral award. According to the

criteria for selection and appointment of arbitrators stipulated in the Arbitration Law and the standards for appointment of arbitrators by arbitration institutions, the panel of arbitrators for institutional arbitration shall be composed of experts in various related fields such as law, economics and trade. In terms of legal disputes in the automotive industry, especially with respect to specialized disputes regarding the R&D and trial production of finished vehicles and auto parts, apportionment of tooling and fixture costs, debugging and acceptance inspection of specialized production equipment, in most cases, a fairly rich expertise in automobile manufacturing and other fields is needed to make a judgment on the facts. This is also the advantage of arbitration institutions to have expert arbitrators with rich expertise and familiar with legal norms. Therefore, expert arbitrators hearing cases may be more authoritative and persuasive, which is conducive to properly resolving disputes.

Thirdly, the confidentiality of arbitration is more conducive to protecting the intellectual property rights and business reputation of the parties. Compared with litigation, arbitration shall be conducted under the principle of hearing in private, and the closing documents such as arbitral awards, written arbitral mediation statements and case withdrawal decisions will not be made public. The arbitral proceedings are highly confidential, which is also more conducive for the parties to reach agreements, continue to maintain friendly and cooperative relations, and ensure that the normal business operations of the parties will not be interfered with to the maximum extent. The automotive industry is an industry characterized by free market competition in China. Especially with the current development trend of the "intelligent, network-based, electrified and shared" nature in the automotive industry, the automotive industry is paying more and more attention to intellectual property rights and business reputation. Arbitration, with its inherent advantages, can protect to the maximum extent the commercial reputation of parties in the automotive industry from being affected by

dispute cases in the course of dispute resolution, ensuring that their normal operation and management will not be interfered with. This is also another important reason why related auto enterprises prefer arbitration as the method of dispute resolution.

Fourthly, arbitration is independent, fair and efficient and the award is final, which is conducive to saving time and economic costs for the parties. Different from the nature of courts as state judicial organs, arbitration institutions are by nature social organizations. Different from state organs, they are also independent from administrative organs and have no subordinate relationship with administrative organs. Arbitration institutions are not subordinate to each other. Arbitrators are relatively more independent, arbitral tribunals handle cases independently, subject to less interference from arbitration institutions or administrative organs, and the impartiality of award is guaranteed. Meanwhile, compared with the "four-level two-trial system" of the people's courts, arbitration adopts the system that "award shall be final", and the arbitral awards have legal effect from the date on which they are made. Not only do the arbitral awards have the same legal effect as judgments made by courts, but there is no trial of second instance or retrial. Therefore, all the parties concerned may be free from litigation burdens, which saves the costs for dispute resolution and accords with the principle of economic benefits for enterprises involved in the automobile industry.

Furthermore, arbitration has other advantages, such as high-quality services, harmonious atmosphere, and easy enforcement. Due to limitations of the subject matter and the space of this Chapter, they are not elaborated here.

B. Enhanced Credibility of Arbitration

Arbitration is an internationally accepted dispute resolution method, the dispute resolution system prescribed under Chinese laws, also an important part of the

diversified dispute resolution mechanisms in China. With the increased credibility of arbitration, arbitration is well known and chosen by people from all walks of life for dispute resolution.

From the perspective of arbitration development, credibility could be said to be the lifeline of arbitration. Despite the many inherent advantages of arbitration during the process from its inception to its development, the biggest internal motivation for the parties' willingness to choose arbitration and their desire to resolve their disputes through arbitration lies in the credibility of arbitration. From the perspective of parties concerned, the credibility of arbitration is mainly the recognition and trust towards arbitration, that is, the recognition of the mechanism for dispute resolution through arbitration, including positive comments on and high recognition towards the design of the arbitration system and procedures, the arbitration institution, arbitrators, the quality and enforcement of arbitral awards, etc. A large Chinese automobile group, for example, according to incomplete statistics, has executed nearly 100,000 contracts annually in recent years with a total contractual value nearly 1 trillion yuan. More than 60% of the contracts provide for arbitration as the method of dispute resolution.[11]

For parties concerned in the automotive industry, the intrinsic reason for choosing arbitration to resolve disputes like any other market player is still based on the high recognition of arbitration. In 2020, the Ministry of Justice took the lead in revising the Arbitration Law, and the draft proposal for revision covered current pain points and difficulties in arbitration, which is targeted and further reflects the international development thinking of arbitration in China. Relevant companies in the automotive industry are also eager to seek the revision of the Arbitration Law, so as to establish the

11 The data was collected from all data of the OA system within the group according to the dispute resolution modes chosen in various contracts signed by the automobile group and its subsidiaries.

advanced experience in China's arbitration practice at the level of laws and improve the supporting judicial interpretations and industry standards on arbitration. In this way, it can not only effectively make the top-level design needed to enhance the credibility of arbitration, but also help the standardization, integration and supervision of arbitration institutions, improve the quality of arbitration and help the parties in the automotive industry choose arbitration and properly resolve arbitration cases.

III. Typical Examples: Advantages of Arbitration in Resolving Legal Disputes in the Automotive Industry

To more intuitively demonstrate and analyze the practice on arbitration of relevant legal disputes in the automotive industry, this Section focuses on approximately 110 important arbitration cases involving legal disputes in the automotive industry handled by the CIETAC in the past three years. The disputes mentioned above cover electromechanical equipment, sale of goods, transfer of equity investment, service contracts, financial disputes, and intellectual property rights[12], and the subjects involve famous automobile companies at home and abroad in countries like China, France, Korea, Japan and other countries with developed automotive industry. The following typical cases are selected to analyze the specific characteristics of the cases at the key links in the automotive industry chain, and the relevant matters that enterprises in the automotive industry should pay attention to when handling such kind of cases.

A. Advantages in Resolving Procedural Disputes

The most important procedural legal issue in arbitration cases in the automotive industry is that of jurisdiction. Jurisdiction is the primary issue that must be resolved in the

12 All the cases have been subject to data masking.

arbitration proceedings and is also the cornerstone and condition for the conduct of the arbitration proceedings and the enforcement of the arbitral awards. If there is any defect in jurisdiction, the arbitral award rendered by the arbitral tribunal may become meaningless due to the application of the parties to the court for setting aside or non-enforcement of the arbitral award. In the automotive industry, the R&D and production cycle of vehicles and parts is long, the business is complex, and numerous subjects are involved. Therefore, it is inevitable that there are numerous types of agreements, overlapping stipulations, etc., or different dispute resolution methods agreed upon in different agreements of the related businesses due to management reasons of the enterprises themselves, especially when different dispute resolution methods are agreed upon in the master and slave contracts. In such cases, jurisdiction itself may become the focus of dispute between the parties, and the expansion of arbitration clauses may also be involved.

There are many cases of jurisdictional disputes among relevant automotive industry enterprises. By searching the legal database of Wolters Kluwer with the combination of "automobile + jurisdiction" as the keyword within the search period of recent three years (by the end of March 2023), there are more than 3,400 civil cases of first instance involving jurisdictional disputes retrieved. By using the combination of "automobile + arbitration + jurisdiction" as the search keyword within the search period of recent three years (by the end of March 2023), there are more than 150 civil cases of first instance involving jurisdictional disputes concerning arbitration proceedings (including applications for determination of validity of arbitration agreements and applications for setting aside of arbitral awards).

Relevant enterprises in the automotive industry are paying more and more attention to the design and formulation of dispute resolution clauses in contracts. However, certain

clauses are still not standardized, which easily give rise to disputes over jurisdiction.

1. Typical arbitration case: jurisdictional dispute

Company A is an auto parts manufacturer, and Company B is an auto manufacturer. The *Purchase and Sale Contract* was entered into by and between the parties, specifying that Company A shall be the supplier of Company B and shall make preparation of materials for production and delivery at the request of Company B. The costs related to the specialized tooling purchased or fabricated by Company A (the "tooling costs") shall be paid by Company B to Company A as royalty on a monthly or equally divided amount per unit basis within 2 years from the date when the specialized tooling conforms to designated specifications as confirmed by Party B and the mass production of the products begins or reaches the batch size as agreed by the parties. Subsequently, both parties signed several Pricing Agreements to agree on the pre-tax unit prices of components and the specific method for amortization of the tooling cost. Later, both parties signed two *Parts Tooling Order Contracts* to agree on development cost and payment method. Thereafter, as Company B notified Company A to stop production, Company A claimed to rescind the *Purchase and Sale Contract* and requested Company B pay the outstanding amount of goods, the unamortized tooling cost, tooling development cost and other expenses.

In this case, the *Purchase and Sale Contract* provides that arbitration is the method for dispute resolution, while the two *Parts Tooling Order Contracts* involving tooling development cost provide that litigation is the method for dispute resolution. Company A held that the dispute of the two *Parts Tooling Order Contracts* shall also be settled by arbitration as agreed in the *Purchase and Sale Contract*; Company B held that although the jurisdiction by litigation is stipulated in the two *Parts Tooling Order Contracts*,

Company B agreed that the arbitration commission may continue to hear the case and make an award according to law. According to the relationship between the *Purchase and Sale Contract* and the Parts Tooling Order Contracts as well as the principle of handling the inconsistencies between the provisions in the Purchase and Sale Contract, the arbitral tribunal explained to the parties the convenience of dispute resolution through arbitration. Meanwhile, the arbitral tribunal also analyzed for the parties the litigation burden that would be incurred if the dispute were to be resolved in a separate case and that such resolution might affect further cooperation between the parties. Finally, the parties reached a consensus presided over by the arbitral tribunal that the disputes under the two contracts shall be resolved through arbitration and that the case will be heard and decided by the arbitral tribunal.

2. Dispute observation and practical suggestions

Each business link in the automotive industry is complicated and long-lasting. Therefore, in long-term cooperation, parties may sign several agreements and make specific arrangements for relevant business. Taking the procurement of components in the manufacturing process as an example, the auto manufacturer and the component supplier usually sign general rules of procurement or a framework purchase and sale contract, and then sign a pricing agreement for specific components, specifying the unit price of such components and the specific amortization method of the tooling cost. If tooling is involved, the *Parts Tooling Order Contract* similar to the one in this case may be signed, and each contract may specify different methods of dispute resolution. In the absence of agreement on which contract shall prevail, it is necessary to define the relationship between the contracts first and determine whether or not they are severable. The settlement of disputes in the closely related contracts shall be consistent. For example, in the master and slave contracts, if the master contract has stipulated arbitration, it

is inappropriate to stipulate other dispute settlement methods in the slave contract. A slave contract[13] refers to a contract whose existence is premised on the existence of other contracts, that is, the master and slave contracts are indivisible. For example, in the case of a debtor-creditor relationship, the loan contract is the master contract, and the security contract for providing mortgage, pledge or guarantee for debts is the slave contract. Therefore, if the master contract stipulates the jurisdiction by arbitration but the slave contract stipulates the jurisdiction of the court or does not stipulate dispute settlement method, there are certain controversies in judicial practice and theory circles as to whether the slave contract shall be bound by the arbitration clause of the master contract.

It is held that Article 21 of the *Interpretation of the Supreme People's Court on the Application of the Security System under the Civil Code of the People's Republic of China* (hereinafter referred to as the I*nterpretation of the Civil Code on Security System*) provides that, "Where a creditor files a lawsuit against the debtor and the security provider at the same time, the court with jurisdiction shall be determined on the basis of the master contract. Where the creditor may bring a lawsuit against the security provider separately and only against the security provider in accordance with the law, the court with jurisdiction shall be determined under the security contract." However, this provision explicitly states how to determine the court with jurisdiction under the master contract and the slave contract. Arbitration, on the other hand, is special and its power is derived from the agreement reached by the parties. According to Article 4 of the *Arbitration Law of the People's Republic of China*, "Where the parties resolve disputes by means of arbitration, both parties shall reach an arbitration agreement voluntarily. The arbitration commission shall not accept an application for arbitration submitted by one of the parties without an arbitration agreement", the arbitral tribunal may have the power to settle disputes only through the express agreement of the parties; therefore, the foregoing

13 HAN Shiyuan, *The Law of Contract*, Law Press China, 2011 Edition, p.66.

provision cannot be directly applied by analogy to arbitration. For example, the Supreme People's Court held in the Reply (Min Si Ta Zi [2013] No.9) that, "The security contract involved in the case does not stipulate any arbitration clause, and the opinion of the arbitral tribunal that since there is an arbitration clause in the master contract, the security contract, as an ancillary contract, shall be bound by such clause lacks legal basis. The arbitral tribunal examines the security contract without any arbitration clause and renders an award, and the reasons for the application of the guarantor, WANG Guojian, for setting aside of the part of the arbitral award involving WANG Guojian as the guarantor are tenable. "[14]

In contrast to the above opinion, Article 24 of the *Arbitration Law of the People's Republic of China (Revision) (Draft for Comment)* promulgated by the Ministry of Justice in July 2021 provides that, "If a dispute involves master and slave contracts, and there is any inconsistency between the arbitration agreements in the master and slave contracts, the provisions in the master contract shall prevail. If there is no arbitration agreement in the slave contract, the arbitration agreement in the master contract shall be binding on the parties to the salve contract." The foregoing provision established the rules governing arbitration for the master and slave contracts, clarifying that the slave contract shall be bound by the arbitration agreement in the master contract. It is reasonable to expand the application of the arbitration clause in the master contract to the slave contract from the point of view of ascertaining the facts of the case, improving the efficiency of hearing and fundamentally resolving the dispute. However, the cornerstone of the commercial arbitration system is the autonomy of will of the parties. The jurisdiction of dispute resolution method in the slave contract also depends on the specific agreements in the

14 *Reply of the Supreme People's Court to the Request for Instructions on the Case Involving the Application of Chengdu Youbang Stationery Co., Ltd. and WANG Guojian for Setting Aside of the Arbitral Award (Shen Zhong Cai Zi [2011] No.601) Rendered by Shenzhen Arbitration Commission* (Min Si Ta Zi [2013] No.9).

master and slave contracts. In this regard, it is suggested that relevant enterprises in the automotive industry should ensure the consistency of the dispute resolution clauses in complex transactions and related business chains to avoid complicating the dispute resolution by stipulating different dispute resolution methods in a series of related contracts.

For arbitral tribunals involved in similar cases, the experience of this case may also be used for reference. In the case of such jurisdictional disputes, under the principle of more facilitating the parties to resolve the substantive disputes, the arbitral tribunals shall make full use of their industrial and specialized knowledge to enable the parties to reach a consensus that the relevant disputes shall be heard and ruled by the arbitral tribunals from the perspective of facilitating the transactions, so as to reduce the litigation burden brought by settlement of dispute in separate cases, avoid affecting the subsequent cooperation between the parties and fully reflect the professionalism of arbitration.

B. Advantages in Resolving Substantive Disputes

1. Typical arbitration practice related to R&D of automotive products

As the automotive industry is a modern high-end manufacturing industry, the R&D of automotive products is particularly complex and highly integrated. In the process of R&D, it is common for enterprises to license and transfer technology and entrust others to develop technology. The parties usually enter into an agreement to clarify the use or ownership of the technological R&D results or the technology itself. Due to the complexity of the technology itself and the cognitive and understanding bias between the parties towards relevant clauses in the technology agreement and other subjective reasons, a large number of technology-related disputes arise in the automotive industry. For example, when developing and manufacturing auto parts, an auto manufacturer may

need to purchase a technology from the technology provider and use such technology according to the terms and conditions agreed in the agreement. However, in practice, the auto manufacturer may not be able to fully master the technology provided by the technology provider, which results in the final products unable to achieve the expected effect or quality problems may arise. In this context, the auto manufacturer may request the technology provider to assume the relevant liability, including compensation for losses and refund of fees, etc.

With the development of the NEV industry and the influx of new auto manufacturers into the market, technology collision is inevitable, and more and more auto-related technology disputes arise. By searching the legal database of Wolters Kluwer with the combination of "Automobile + technology licensing", "Automobile + technology transfer", "Automobile + entrusted development" and "Automobile + technology cooperation and development" as the key words within a search period of nearly three years (by the end of March 2023), there are more than 40 civil cases of first instance retrieved.

(1) Typical arbitration case: dispute over technology license contract

In June 2019, Company A and Company B entered into a *Technology License Agreement* (the "License Agreement"), specifying that in order to accelerate the research and development of its own vehicle platforms and vehicle models, Company B requires certain intellectual property rights and technical support and Company A is willing to support Company B by licensing its platform technology to Company B and providing necessary technical support, at the royalty of 200 million yuan, which shall be paid by Company B to Company A in four installments. A dispute arose following the parties' performance of the agreement until Company B paid the second installment of royalty.

Company A then initiated arbitration proceedings on the ground that Company B's refusal to pay the third installment of royalty constituted a breach of contract, requesting Company B to make payment of the third installment of royalty in the amount of 100 million yuan and corresponding liquidated damages. Company B argued that, based on the background and purpose of the License Agreement between the parties as well as the definition of and relevant stipulations on the technical data set forth in the License Agreement, the technical data delivered by Company A to Company B was not accurate, complete and valid, and contained a number of material defects, which had failed to be rectified despite Company B's repeated reminders. Due to the lack of any core documents of the technical data provided by Company A, Company B was unable to conduct necessary evaluation and verification. The conditions for the payment of the third installment of royalty were not met. Therefore, Company A's request was groundless.

The issue regarding the delivery of technical data is the focus of dispute in this case. Both parties have provided numerous opinions and materials, including expert witnesses' testimonies, to support their own claims. The disagreement between the parties mainly lies in the definition of the scope of the technical data as set forth in Appendix 2 to the License Agreement. Company A held that the scope of the technical data to be delivered it is set forth in Appendix 2, which, after repeated communications between the parties, accurately clarifies the scope and form of the technical data to be delivered by Company A. The contractual purpose of Company B under the License Agreement should be to obtain the licensed technology with the technical data as the carrier, and such contractual purpose shall be achieved once Company B has obtained all the technical documents as set forth in Appendix 2. Company B held that the scope of the technical data to be delivered by Company A should not be limited to the technical information as set forth in Appendix 2, because the contractual purpose of accelerating the R&D of

Company B's own platform and vehicle models is expressly provided in the "Whereas" clause of the License Agreement. In order to realize such purpose, the obligations undertaken by Company A involve various aspects, including licensing technology, improving technology, delivering technical information, providing technical support and maintaining intellectual property rights, etc. By comprehensively considering the definition, purpose, terms of obligations and performance practice of contract, the parties have agreed upon the extended scope of technical data to be delivered at the time of entering into and performing the License Agreement, i.e. Company A shall deliver any and all technical documentation necessary to fulfill the purpose contemplated under the License Agreement, as well as any other documents, software or data relating to the platform, and the delivery of the technical data only as set forth in Appendix 2 would not achieve the purpose of the contract.

The arbitral tribunal was of the opinion that, to determine the specific scope of the technical data to be delivered by Company A, it is first necessary to analyze whether the contractual provisions regarding the delivery in the License Agreement are clear and explicit; if yes, the scope of delivery by Company A should be determined according to such provisions; otherwise, the contractual provisions regarding the scope of delivery should be interpreted with reference to the purpose of the contract and other factors. After a comprehensive analysis of the contractual provisions regarding the scope of delivery in the License Agreement, the arbitral tribunal believed that Company A's delivery obligations and the scope of delivery within the licensing scope under the License Agreement are clear, including three aspects: first, all the technical data set forth in Appendix 2; second, patents and patent applications set forth in Appendix 1; third, any improvements made by Company A in the future. If the unquantifiable expression of intent "in order to accelerate the R&D of its own vehicle platforms and vehicle models" is used to expand the scope of technical data to be delivered by Company A beyond the

technical data specified in Appendix 2, it is obvious that the scope of delivery of technical data cannot be reasonably determined. Such expansion is not the true intention of the parties under the License Agreement. In addition, in comprehensive consideration of the lengthy and in-depth discussion on the technical issues between the parties before the conclusion of the License Agreement, the tribunal held that Appendix 2 was concluded through full consultations and discussions between the parties. In particular, after the delivery of the technical data by Company A, Company B requested for several times that the technical data was incomplete and needed to be supplemented, and Company A submitted supplementary technical data to Company B for several times. During this period, Company B entered into the Framework Agreement on Vehicle Development with Company F that is not a party to this case through its affiliates, i.e., Company B began to cooperate with the party not involved in the case, and its position on the License Agreement gradually turned negative before Company B finally refused the acceptance and payment, such the dispute arose.

(2) Dispute observation and practical suggestions

In this case, the arbitral tribunal fully respected the autonomy of will of the parties and demonstrated in detail on whether the contractual terms in connection with the scope of delivery of technical data shall be interpreted with reference to the purpose of the contract and other factors while the extended part of technical data was not completely limited to the provisions of the appendices to the contract in question and was determined with reference to the negotiations between the parties prior to the conclusion of the contract.

As a participant in an industry with extremely fierce market competition, many auto manufacturers inevitably sign relevant technology contracts with other companies

or individuals in their practice of business expansion, technology upgrading and management improvement due to actual needs. The subject matter of such contracts is usually closely related to the core technologies of the companies and the disputes arising from such contracts usually have significant impacts on the companies. This case is a common type of dispute over a technology license contract. In this case, the definition of the scope and meaning of the technical data to be delivered shall be based primarily on the agreement in the contract; where there is no such agreement or the agreement is unclear, the purpose of the contract shall be considered as the reference. However, the interpretation of the purpose of the contract shall not be unlimited, otherwise it will obviously increase one party's contractual obligations and that will not be beneficial to the fair trade. Due to the specialty of the technology and the complexity of the stipulation and performance of the License Agreement, if the License Agreement fails to meet the expectation of the parties thereto, or one or both parties to the contract have the intention to suspend or terminate the technology transfer or give up the cooperation, and the parties fail to properly resolve the remaining problems through consultation, disputes may ensue.

To better cope with or avoid such disputes, it is suggested that relevant enterprises in the automotive industry should do the following work: firstly, they shall prudently conduct technical evaluations, business negotiations of technology license projects and standardized design, determination and strict performance of the contract text. The subject matter of the transaction, the license term, the scope of use, the determination and payment of royalties, especially the definition of the licensed technology and its main carrier, i.e., the technical data, as well as the specific contents and method of delivery, shall all be clearly specified in the contract. It is a general practice to specify the list of technical data relating to the licensed technology as detailed as possible in the form of an appendix to the contract. For example, in a technology license agreement for finished

automobile manufacturing, the list of technical data generally covers the corresponding technical lists and specific deliverables for each stage of the R&D process, production process and equipment parameters, procurement requirements and quality control. The R&D process alone will involve provisions on corresponding design drawings, digital models and documents for the development process of the finished vehicle, etc. In the course of the performance of the agreement, the party hereto shall trace the evidence on delivery of specific technical information, so as to avoid disputes or put itself in a relatively favorable position when a dispute is triggered. Secondly, it is necessary to pay attention to the statement and setting of the "miscellaneous provision" in the technology license contract, clearly define the connotation and denotation of rights and obligations, avoid over-broad and vague expression and prevent disputes due to inaccurate agreement. Thirdly, during the signing and performance of a technology license contract, both the licensor and the licensee shall abide by the principle of good faith, regulate their own conduct and adhere to business ethics while preventing and avoiding risks, so as to promote the formation of an efficient, regulated and orderly market competition environment.

In addition, the arbitration practice in this case also provides a good reference for other arbitral tribunals in handling similar disputes. It is suggested that other arbitral tribunals resolving similar disputes make reasonable judgement on the relevant issues with solid industry and professional knowledge.

2. Typical arbitration practice related to automobile production and manufacturing

The subjects of the disputes involved in the automobile manufacturing process are mainly the auto manufacturers and their suppliers (including secondary suppliers). Generally, the suppliers are "close" cooperation partners of the auto manufacturers

with a win-win common goal. However, there is a complex benefit gaming relationship between the auto manufacturers and their suppliers, which results in frequent disputes. By searching the legal database of Wolters Kluwer, with the combination of "automobile + supplier", "automobile + parts" and "automobile + mould" as the keywords with a search period of nearly 3 years (as of the end of March 2023), there are more than 2,100 civil cases of first instance retrieved.

In order to prevent or deal with disputes relating to the manufacturing process, in the early stage of cooperation or when a problem is emerging but has not yet developed into a dispute, the auto manufacturers should establish rules on their own initiative so as to cope with shifting events by sticking to a fundamental principle. For example, they shall formulate the transaction documents such as general rules of procurement, purchase contracts, purchase orders, etc. with clear rights and obligations, responsibilities and feasible effect; appropriately increase the number of alternative suppliers based on commercial considerations and actual conditions; know and grasp the changes of the profitability of suppliers as far as possible, predict the cooperation situation and take corresponding precautions and controls, which also may effectively avoid and reduce disputes with suppliers.

(1) Typical arbitration case: dispute over parts purchase contract

Company A (supporting supplier of parts) and Company B (auto manufacturer) entered into a *Framework Contract*, under which Company B shall purchase from Company A components, supplies, tools, raw materials and consigned manufacturing (hereinafter referred to as "supply parts") necessary for manufacturing vehicles. From 2014 to 2016, there was a huge gap between the product quantity in the demand plans issued by Company B to Company A and that actually received by Company B. The invoiced

amount of the products actually received by Company B was 26 million yuan less than the total amount provided in the demand plans, including the inventory losses of raw materials procured and products manufactured by Company A with a value of more than 10 million yuan. Therefore, Company A requested to rule that Company B shall compensate for the losses in the amount of 26 million yuan as a result of its breach of the contract.

After analyzing the relevant evidence, the arbitral tribunal held that:

(a) Annual production plan, purchase orders, monthly orders, forecast and kanban

Firstly, the purpose of annual production plan is to guarantee a steady supply of parts by Company A to Company B, and such plan cannot be used independently as the basis for determining the required and actual purchase quantities of Company B. Nevertheless, Company A needs to make an overall arrangement for annual production preparation in order to stabilize the supply of parts, and the annual production plan of Company B, as an automobile manufacturer, has certain instructive significance for the annual production arrangement of Company A, as the parts supplier.

Secondly, the parties' agreement on the specific matters to be stipulated in the monthly orders shows that the monthly orders serve as direct basis for the actual purchase quantities of both parties, and except for the changes in the contract, Company A shall supply according to the monthly orders, and Company B shall purchase and receive the products according to the monthly orders.

Thirdly, with respect to the forecast of the order plan for the 2 months following the next month involved in the monthly orders (hereinafter referred to as "monthly forecast"), although it is agreed in the *Framework Contract* that Company A's reference information

shall be used, since the parties trade the components used for automobiles, it would take certain lead time for Company A to manufacture, transport and deliver the components as the supplier, and Company B acknowledged during the hearing that the lead time for the supply of goods is one to two months, so the monthly forecast may be used as a reference for determining the purchase quantity between the parties.

Fourthly, regarding Company B's claim for implementation based on the "Kanban", according to the provisions in the *Framework Contract*, Company B may require Company A to adjust the delivery period other than the quantity of delivery through the "Kanban" at any time. Therefore, "Kanban" shall not be used as the basis for determining the quantity that Company B shall purchase.

(b) Inventory loss

The arbitral tribunal organized the parties to verify the inventory of Company A according to the following classification: finished products inventory, work-in-progress inventory, supporting purchasing parts inventory, measuring tools inventory, equipment, tooling wearing parts and auxiliary devices, auxiliary materials inventory. Finally, the parties only completed verification of partial inventory.

The arbitral tribunal held that Company B's failure to purchase in full quantity the supply parts of Company A strictly in accordance with the monthly orders placed would lead to Company A's reasonable inventory. With respect to the inventory counted but not agreed upon, the arbitral tribunal deemed that the rolling inventory is a factor to be taken into account by the supplier in fulfilling its supply obligation. However, in the present case, Company B demanded the products based on "Kanban" and failed to strictly execute the monthly orders. Under such circumstances, it is unreasonable to require Company A to keep a rolling inventory recognized or calculated by Company B.

Company A failed to provide sufficient evidence to rebut Company B's allegations that the name of the relevant product does not correspond effectively to the finished products requested in the order and the parts in inventory are irrelevant to Company B. Although the arbitral tribunal did not deny the rational inventory of Company A, it was unable to determine the value of such portion of the inventory solely based on the claim made by Company A. With respect to the inventory that has not been counted, although the arbitral tribunal did not deny the corresponding reasonable inventory of Company A, since the failure of follow-up inventory counting was mainly attributable to Company A, the tribunal was unable to fix the value of the relevant inventory solely based on the claim made by Company A.

In addition, the tribunal considered that the shortage of order quantities would not only result in inventory but also lead to the reduction of production of Company A and the tribunal would take into account the loss of partial production cut. Therefore, the tribunal at its discretion decided that Company B should compensate Company A for a total amount of 3,500,000 yuan relating to the inventory losses and production cut losses.

(2) Dispute observation and practical suggestions

Generally, an auto manufacturer will sign framework contracts with a supplier such as the *General Rules of Procurement* to specify the cooperation content and basic rights and obligations of both parties. Then the auto manufacturer will complete the process of product preparation, transportation and delivery by placing orders and signing the *Pricing Agreement* with the supplier, etc. The reason for the reasonable inventory is that it is the industry practice for the supplier to stock in advance. However, if the purchaser's production volume decreases, it will lead to the failure of supplier to predict the supply

quantity and further lead to the stock loss of idle materials, semi-finished products, finished products, etc. However, the supplier will by no means assume the responsibility for the idle materials, semi-finished products and finished products beyond the purchase order in any case. The rationale for affirming the reasonableness of inventory is that when the auto manufacturer places orders, it should have foreseen that in order for the supplier to perform the orders (especially orders other than monthly orders), the supplier must first purchase appropriate quantities of raw materials for production and processing. The supplier should also foresee the reasonable stock needed in a certain period according to the annual production plans, semi-annual orders and other matters.

This case fully demonstrates the advantages of a tribunal that is familiar with the automotive industry in hearing and ruling of such type of complex cases. First of all, the subject matter of the contract in this case is the supply parts used for the automobiles. The tribunal held that according to the industry practice, it takes certain lead time for the supplier to purchase raw materials, manufacture, transport and deliver products, and the production plans for automobiles may constantly change, and the purchase quantities cannot be determined only based on monthly orders. The tribunal confirmed the existence of reasonable inventory in light of the characteristics of the automotive industry and organized the parties to conduct inventory count. Afterwards, the tribunal specified the value of different categories of inventory one by one and took into account whether the components and parts are universal in determining the inventory value. This case involves many industry-specific terminologies, such as "Kanban" and "rolling inventory", as well as the relationship between the two. The legal experts in the automotive industry are more familiar with such terms and the industry practice, which will help them to understand this case as a whole.

In addition, the determination of the nature of "annual production plan, monthly

order and monthly forecast" and the methods for determining the loss of "reasonable inventory" in this case have important reference for both the auto manufacturers and parts suppliers. On the part of the auto manufacturers, they shall attach importance to and scientifically and reasonably formulate monthly forecast, semi-annual order and annual plan in addition to the monthly order containing specific matters. On the part of the suppliers, they shall fully communicate with the auto manufacturers, attach importance to the forecast or plan that may affect the supply volume in addition to the monthly order, procure and put into production as needed, avoid premature and excessive investment, and meanwhile take a scientific management approach to reduce inventory.

In the meantime, this case also provides certain reference for the arbitral tribunal to hear other similar cases, especially assisting the parties in dispute resolution on the basis of being familiar with and making good use of knowledge related to the business flow and the industry practice or trade practice of the automotive industry chain.

3. Typical arbitration practice related to international marketing of automotive products

China's automobile production and sales have ranked first in the world for 14 consecutive years. At the same time, affected by the slowdown of economic growth and the epidemic for three years, plus the overall low utilization rate of domestic auto capacity, the "involution" (rat race) of China's auto industry may be far more fierce than that of other countries' auto markets. Thus, in recent years, Chinese automakers have generally quickened the pace of "going global". According to the exploration and practice of "going global", two main models are adopted at present: one is capacity output model to make territorial investment to build factories or make territorial KD or CKD for auto products, and the other is product sales model to seek local dealers

for cooperative distribution. The choice of the two models is mainly based on different industries, fiscal and tax policies and comparative advantages of the products themselves. Under the product sales model, Chinese automakers often sign exclusive or non-exclusive distribution agreements with local dealers to determine the overall arrangements for the sale of their automotive products in a certain territorial area, including general terms and conditions such as purchase of automotive products, dealer channel management, product certification and approval, intellectual property rights, after-sales service and other rights and obligations of both parties. The specific provisions for each product order, such as product model, quantity, price, trade terms, etc., are generally made in detail in the vehicle sales contract negotiated and signed by both parties separately, and the standard text of the sales contract is generally attached to the distribution agreement.

With the giant stride of "going global" for China's automobile enterprise, various disputes associated therewith are gradually increasing. By searching the legal database of Wolters Kluwer with the combination of "automotive + export/overseas + distribution/sale" as the keyword with a search period of recent 3 years (as of the end of March 2023), there are more than 90 civil cases of first instance retrieved. In particular, since the Belt and Road Initiative was put forward, cases involving the Belt and Road Initiative accepted by various arbitration institutions have surged in quantity and involved large sum of money.

(1) Typical arbitration case: dispute over exclusive distribution right

In 2012, Company A in China signed an *Exclusive Distribution Agreement* (hereinafter referred to as the "Distribution Agreement") with Company B in a foreign country, under which Company A appointed Company B as its exclusive distributor in the said country to be responsible for selling the automotive products manufactured by Company

A within a distribution term of 60 months. Both parties agreed to negotiate on the product for each order separately and sign a vehicle sales contract. From April 2014 to May 2016, both parties concluded 12 vehicle sales contracts.

Company A claimed that after the performance of its delivery obligations agreed in the aforesaid vehicle sales contracts, Company B failed to fully perform its payment obligations. Company A called for payment to Company B by e-mail, text message and other means, but failed. Company A then initiated arbitration proceedings, requesting Company B to make payment for the goods and compensate for losses. Company B argued that Company A had committed numerous breaches of contract and lost its business reputation, which made Company B uneasy and entitled to withhold the corresponding payment of the goods. Company B did not acknowledge the amount in arrears and relevant losses claimed by Company A and further made a counterclaim, requesting Company A to indemnify Company B for losses caused by its acts of breach of contracts, including Company A's failure to fulfill orders, interference with payment by Company B's customers to Company B and its direct sales to end customers.

Upon hearing, the tribunal found that the facts of arrears by Company B were clear and other disputes between the parties were relatively clear. The focus of dispute in this case is whether Company A interfered with the exclusive distribution right and shall indemnify for losses. Firstly, with respect to interference in the payment by end customers, Company A and Company W in the same foreign country signed a document agreeing to defer the deadline of payment by Company W to Company B and the parties thereto agreed to sign a *Contract on the Sale of 100 City Buses*. Company B was the exclusive distributor of Company A in the said country and, according to commercial practices, such exclusive distributorship excludes Company A's own activities, such as promotion, advertising, preparation for sale and conclusion of sale memorandum/letter of intent.

The signing of the above-mentioned documents between Company A and Company W interfered with the payment by end customers to Company B and infringed upon Company B's exclusive distributorship. Accordingly, the tribunal concluded that such acts of Company A constituted a breach of contract, and Company A shall bear the liability for breach of contract and indemnify Company B for losses. Secondly, with respect to the direct sales, as the documents signed by Company A and Company W did not contain information on the price, quantity, specification, delivery and payment of vehicles, such documents did not constitute a real and enforceable vehicle sales contract. Therefore, the tribunal concluded that Company A did not make the direct sales.

(2) Dispute observation and practical suggestions

This is a typical case arising from the performance of the automobile distribution and sales contract with the local distributors under the mode of product export in the "going global" process of China's automakers, which has a strong reference to the management of overseas distributors and channels of automakers, the management of authorization for business personnel and the prevention of contract risks.

In this case, although Company A well designed the terms of the contract and fixed evidence of business communication, and finally achieved a satisfactory award, some problems and loopholes in management are also exposed. For instance, in terms of sales by local distributors to end customers, Company A appeared to be relatively passive, and Company B also made a counterclaim; and Company A was also awarded to indemnify Company B for its interference with the payment made by end customers to Company B. In order to better safeguard the legitimate rights and interests of auto manufacturers in "going global", retain the business initiative of the auto manufacturers to the maximum extent and avoid the occurrence of such disputes, it is suggested that

the relevant enterprises in the automotive industry shall properly carry out the following work: Firstly, they shall strengthen sales channel management, make full efforts in selection of distributors and arrangement of agreements and take precautions. The relevant enterprises in the automotive industry shall, on the basis of full research and understanding of local regulations and policies, formulate proper clauses such as right reservation and business exit mechanism in the distribution agreement. For instance, the enterprises may reserve the right to directly sell products to specific organizations or institutions in the distribution territory; retain government bidding, procurement and other key customer business in the distribution territory, and the right to terminate the contract when the auto products in the distribution territory do not meet expectations in order to avoid being bound by inferior distributors. In addition, the relevant enterprises also need to formulate response strategies based on the specific industry or trade policies and fix such strategies in the terms of the agreement. Secondly, they shall continuously strengthen the compliance training for their employees dispatched overseas, especially those in key positions, reinforce authorization management and continuously enhance the employees' awareness of legal risk prevention. Thirdly, they shall regulate the basic management of business and contracts, tighten the contract review and signing process, strengthen the process supervision of contract performance and proactively prevent contract and business risks.

The arbitral tribunals hearing similar cases are necessary to be familiar with the automobile distribution business, especially overseas sales business. Their familiarity with the overseas sales model and sales management model of the auto manufacturers may be helpful in resolving such type of disputes.

4. Typical arbitration practice related to auto financial leasing

In recent years, auto financial leasing business has gradually become an important part of the transformation and upgrading of the automobile industry. The financial leasing model not only provides financing and promotes investment, but also helps automobile consumers purchase and use automobiles at a more affordable cost and with a lower threshold. When auto financial lease gradually becomes a "prestigious doctrine" in the auto finance link, the auto financial leasing is also attracting more and more attention from the theory and practical circles. On July 11, 2023, the National Administration of Financial Regulation promulgated the *Administrative Measures for Auto Finance Companies* (the *Administrative Measures*), which expand the business scope of auto finance companies to include automobile add-on financing and financial leasing business under the model of leaseback. Meanwhile, it is required that the leaseback business must be based on the real trade background of the vehicles, and the leased property must be truly owned by the lessee and not be bought at a higher price for a lower value.

As the market share of the auto financial leasing business increases, the number of disputes arising from financial leasing as well as the number of cases handled by courts and arbitration institutions also remain high in practice. Some scholars find through empirical research that, "the main business, financial leasing property, business model and contract text of the companies in the sample cases tend to be the same, and most prominently, the financial leasing property is mostly vehicle."[15] From 2016 to November 15, 2021, the Primary People's Court of Tianjin Pilot Free Trade Zone alone accepted a total of 11,817 cases of financial leasing contract disputes and closed 10,935 cases. By November 15, 2021, a total of 4,525 cases in the current year were accepted, a surge of

15 WANG Pengpeng and ZHOU Zhiyao, *Reflections on and Solutions to the Imbalance of Interests between Both Parties in Financial Leasing Legal Relationships – An Empirical Study Based on 2,181 Financial Leasing Cases Handled by Minhang Primary Court, Volume 18, 2022, p. 182, Shanghai Legal Studies.*

11 times compared to 2016.[16] Secondly, in terms of proportion of cases, the number of cases involving auto financial leasing has increased rapidly, accounting for more than 90% of the total accepted cases in 2021.[17] In addition, according to cases publicly available, the number of financial leasing disputes accepted by Chinese courts remains on the rise. In terms of arbitration, take CIETAC as an example, since the end of the last century, the CIETAC has been accepting financial disputes including financial leasing cases. Since 2004, the CIETAC has accepted more than 2,000 financial leasing cases, with an annual average of about 200 cases in recent years, accumulating considerable experience. On May 11, 2021, the CIETAC took the lead in the establishment of the CIETAC Shanghai International Arbitration Center for Securities/ Futures and Financial Disputes, actively exploring the development of the arbitration system for the capital market industry and exploring the way to carry out the pilot program for arbitration in the securities and futures industries.[18] As a transaction method combining trade and finance, financial leasing is highly innovative and specialized. As the international leasing business has gradually increased, difficulties and problems have emerged one after another. The resolution of relevant disputes requires a large number of high-quality arbitrators with interdisciplinary knowledge, rich practical experience and international perspectives.

(1) Typical arbitration case: dispute over financial leasing contract

16 See Primary People's Court of Binhai New Area, Tianjin and Primary People's Court of Tianjin Pilot Free Trade Zone: *White Paper on the Trials of Financial Leasing Cases, p. 2.*

17 See Primary People's Court of Binhai New Area, Tianjin and Primary People's Court of Tianjin Pilot Free Trade Zone: *White Paper on the Trials of Financial Leasing Cases, p. 6.*

18 See the *Unveiling Ceremony of CIETAC Shanghai International Arbitration Center for Securities/Futures and Financial Disputes & the Seminar on Dispute Resolution and Building of International Financial Center Successfully Held in Shanghai*, http://www.cietac.org/index.php?m=Article&a=show&id=17596, last visited on August 4, 2023.

In 2018, Company A, as the lessor, and Company B, as the lessee, entered into a *Financial Leasing Agreement*, whereby Company B shall lease 50 commercial vehicles from Company A by means of leaseback. Company B, according to its own needs, selected the Seller and the leased property at its sole discretion and directly entered into a sales contract on the leased property with the Seller and obtained the ownership of the leased property. Upon an application of Company B, Company A purchased the leased property from Company B and leased back the leased property to Company B for use. Company B shall lease the leased property from Company A in accordance with the agreed terms and conditions and pay the rent and any other payables to Company A under the agreements. Both parties agreed that, until the Seller delivered the vehicles to Company B and passed the acceptance inspection under the sales contract, all the risks relating to the leased property shall be borne by Company B. Company B delivered the vehicles to Company A in the form of transfer and constitutum possessorium (change of possession), and Company A acquired the title to the vehicles. Company B signed the *Vehicle Delivery Sheet*, it shall be deemed that Company A has delivered the vehicles and leased them to Company B for use. The two deliveries shall be made at the same time. Company A shall pay Company B the purchase price of the leased property in the amount of 30 million yuan under the agreement.

Company A paid 30 million yuan to Company B for purchasing the leased property under the *Financial Leasing Agreement*. Company B signed the Lease Acceptance Certificate and Vehicle Delivery Sheet acknowledging its receipt of the leased property involved in the case. Subsequently, Company B paid the rents of the 1-7 installments in accordance with the *Financial Leasing Agreement* and made no payment thereafter. Company A then initiated arbitration proceedings to require Company B to pay the rent, liquidated damages and so on. Company B held that the *Financial Leasing Agreement* provided a private lending in the name of financing lease. The reason was that the two

parties signed the *Vehicle Mortgage Contract* at the time of execution of the Financial Leasing Agreement and completed mortgage registration procedures, which contradicted Company A's claim that it was the owner of the vehicle. The disputed contract only had the nature of financing without the attribute of financed property, so it should be identified as private lending according to law. Company A held that the leased property involved in this case did exist, and the financial lease contract between the two parties was legal and effective. The mortgage of vehicle was just an appearance of right made for the purpose of protecting its ownership and against a bona fide third party, without changing the nature of the legal relationship between the two parties.

In order to properly resolve the dispute in this case, after fully listening to the opinions of both parties on the focus of dispute, the arbitral tribunal made appropriate interpretation on the current status of legal disputes in the auto financial lease, explained certain matters that both parties should pay attention to from the perspective of maintaining continuous cooperation between the two parties and correspondingly restored the financial lease relationship agreed upon by both parties based on the available evidence. Presided over by the arbitral tribunal, both parties had an in-depth understanding of the nature of the transaction, the problems and the disputed points of this case. Both parties reached an amicable settlement, and Company A applied to withdraw the case. This case is a typical one among the auto financial lease disputes. It is easy to see that arbitration is not limited to the resolution of disputes between the two parties through adjudication, and mediation and amicable settlement are highly valued by arbitration as well.

(2) Dispute observation and practical suggestions

Generally, in determining the legal relationship in a financial lease, the arbitral tribunal will consider such factors as whether the leased property actually exists and is specified,

whether the leased property is consistent with the contract, whether there is a major difference between the value of the leased property and the rent, and whether the procedures for the transfer of ownership are in compliance with relevant laws and regulations. With regard to a contract in the name of a financial lease, if there is no actual financial lease legal relationship, the arbitral tribunal will examine the actual legal relationship in order to determine the nature of the contract and the rights and obligations of the parties according to law. In this case, Company B argued that the ownership of the financial leased property was never transferred from the seller to Company A, and that the legal relationship between the parties was not financial lease, but a loan. There are views that, although the lessor agrees to purchase the vehicles under the name of the lessee and then leases back to the lessee in accordance with the contract, and the lessee agrees to transfer the ownership of the vehicles to the lessor, the ownership of the leased property is not actually transferred as the two parties failed to conduct registration and even set a mortgage over the leased property.[19] However, some views hold that, as for special movable properties such as motor vehicles, registration is only an element against a bona fide third party, and the ownership of the movable properties is transferred as soon as the lessor and the lessee complete the delivery of the real rights of the movable properties, and in practice, such delivery is usually made by means of change of possession, rather than actual delivery, so that even if the lessee is still in possession of the movable properties in form, the ownership of such properties has actually been transferred. The lessee shall not claim that the legal relationship in financial lease is invalid simply on the ground that the leased property including motor vehicle is registered under its name. Therefore, financial leasing subjects in the automotive industry should prudently consider the attribution and definition of the ownership and right of

19 See Civil Judgments (Zhe 02 Min Zhong [2022] No. 5752, Yun 29 Min Zhong [2023] No. 195 and Ji 01 Min Zhong [2021] No. 6107).

use when designing the transaction structure and establishing the leasing model, so as to avoid unnecessary disputes.

The arbitration practice of this case also reminds the arbitral tribunal accepting similar cases that, when hearing a case with heated dispute over the key issues between the parties, the arbitral tribunal should not only analyze and make judgments from the business and legal aspects, but also attach importance to the organic combination of arbitral award and mediation or settlement, and should not focus on arbitral award as the way to resolve disputes, otherwise the advantages of expert arbitration will not be fully demonstrated.

IV. Suggestions for Improving the Mechanism of Arbitration for Resolution of Legal Disputes in the Automotive Industry and the Future Outlook

A. Suggestions for Improvement

At present, relevant enterprises and persons in the automotive industry have a deep understanding of arbitration, but further improvement is required. It is urgent to solve the relative shortage of arbitration experts in the automotive industry. Therefore, the following four suggestions are put forward in order to improve the arbitration mechanism for settlement of legal disputes in the automotive industry to serve a modest spur to induce others to come forward with valuable contributions.

1. Promoting the establishment of an arbitration center in automobile industry

(1) Demonstration cases of industrial arbitration in China

The *Articles of Association of the CIETAC* specify industry-specific arbitration centers

as dispatched agencies of CIETAC rather than independent arbitral institutions whose establishment shall be submitted by the CIETAC to the China Council for the Promotion of International Trade (China Chamber of International Commerce) for approval. The arbitration centers of specific industries are also dispatched agencies of CIETAC and shall provide services for the resolution of disputes in specific industries upon the written authorization of the Secretariat. At present, from the perspective of organizational structure, the CIETAC Industry Committee has set up the Grain Industry Dispute Arbitration Center, Special Commerce Committee and Special Financial Committee. In addition, the Online Dispute Resolution Center (the "Domain Name Dispute Resolution Center"), Intellectual Property Arbitration Center, CIETAC Shanghai International Arbitration Center for Securities/Futures and Financial Disputes, CIETAC Tianjin International Economic and Financial Arbitration Center, etc. established under CIETAC also have the characteristics of industry arbitration centers. In addition to CIETAC, other well-known domestic arbitration institutions have also established arbitration courts or arbitration centers with specific characteristics for their own industries. For example, Shanghai International Arbitration Center established the Shanghai International Aviation Court of Arbitration, Assets and Equity Exchange Arbitration Center and Data Arbitration Center; Shanghai Arbitration Commission established the Shanghai Court of Financial Arbitration, Shanghai Arbitration Court of International Shipping, Shanghai Arbitration Court of Construction, etc.; and Shenzhen Court of International Arbitration established the China (Shenzhen) Securities Arbitration Center. Furthermore, in the automobile industry, Hangzhou Arbitration Commission has established the Auto Trade Arbitration Court[20], the Nanjing Arbitration Commission has established the Automobile Consumer Dispute

20 See *Hangzhou Auto Trade Arbitration Court Officially Launche*d, http://www.cada.cn/Trends/info_92_1722.html, visited on August 1, 2023.

Arbitration Center[21], the Yantai Arbitration Commission and Yantai Automobile Chamber of Commerce have jointly established the Automobile Consumer Arbitration Center of Yantai Arbitration Commission[22], etc.

(2) Practical experience on extraterritorial industrial arbitration

In the United Kingdom, various industry associations may formulate standard contracts with strong practicability according to the development rules of their respective industries and establish a special dispute resolution system for contract disputes, such as the Grain and Feed Trade Association arbitration[23], the Federation of Oil Seed and Fats Association arbitration[24], the London Maritime Arbitrators Association arbitration[25] and other industrial arbitration systems. Different from ordinary commercial arbitration, the United Kingdom's industrial arbitration system has greater advantages. In order to enhance the specialization of industrial arbitration, it is stipulated in the relevant industry arbitration rules that only persons engaging in industrial practice shall be eligible to be appointed as arbitrators. Where a dispute arises, the parties may directly resort the dispute to an industrial arbitration institution pursuant to the standard arbitration clauses. During the process of arbitration, the parties may at any time seek expert opinions from a third party who is not involved in the case on professional or

21 See *Introduction to the Automobile Consumer Dispute Arbitration Center of Nanjing Arbitration Commission*, http://www.njqchyxh.com/ns_detail.asp?id=502198&nowmenuid=500413, visited on August 1, 2023.

22 See *Automobile Consumer Arbitration Center of Yantai Arbitration Commission Established, published on WeChat official account "Yantai Arbitration"*, https://mp.weixin.qq.com/s/eIdUS5NJKZEPWBzACAWAUQ, visited on August 1, 2023.

23 See *Gafta Arbitration,* https://www.gafta.com/Arbitration (last visited Aug 7, 2023).

24 See *Arbitration Rules Guides and Code of Practice*, https://www.fosfa.org/arbitration/arbitration-rules-and-code-of-practice/(last visited Aug 7, 2023).

25 See *PROCEDURAL RULES & GUIDELINES*, https://lmaa.london/the-lmaa-terms/(last visited Aug 7, 2023).

legal issues, which is conducive to efficient and fair resolution of the dispute.

In Canada, there is arbitration service specifically for vehicle consumption. The Canadian Motor Vehicle Arbitration Plan ("CAMVAP") is a program for resolving disputes involving vehicle defects or implementation of the manufacturers' new vehicle warranty. It is currently the largest consumer products arbitration institution in Canada. The CAMVAP is a federally incorporated not for profit organization whose members are representatives of the automotive industry, provincial and territorial governments and consumers. The automobile industry funds the plan but holds a minority of seats on the Board of Directors. The CAMVAP Board of Directors provides overall governance and direction for the program and monitors its ongoing effectiveness. The participating manufacturers of the CAMVAP include 15 well-established vehicle manufacturers, such as Ford Motor Company, General Motors, Mazda and Mercedes-Benz, which represent more than 94% of annual vehicle sales.[26] The arbitrators used by CAMVAP are also independent from the program. The manufacturers are not involved in their appointment to the CAMVAP roster, their training, or their selection to hear cases. When a case is set to go to arbitration, the Provincial Administrator selects the next arbitrator. A brief résumé for the arbitrator is sent to the consumer and the manufacturer.[27] The advantages of CAMVAP are that, on the one hand, CAMVAP has no legal fees or other costs associated with litigation, reducing the cost of consumer rights protection. On the other hand, it is located in every province and territory in Canada and adopts uniform standards, avoiding judicial uncertainty. Moreover, the system can ensure the manufacturer to take consumer claims seriously from the outset.

26 See *PARTICIPATING MANUFACTURERS*, https://www.camvap.ca/participating-manufacturers/~english(last visited Apr 28, 2023).

27 See *PROGRAM STRUCTURE*, https://www.camvap.ca/program-structure/~english(last visited Apr 28, 2023).

When the manufacturer recognizes that dissatisfied vehicle consumption is likely to enter a free and expedited arbitration process, such recognition will lead to an active handling of claims by the manufacturer before the CAMVAP arbitration process is initiated.[28]

Given that litigation is still the main way to resolve commercial disputes in the automotive industry, the industry does not have a sufficient understanding of the value of arbitration, especially the unique advantages of arbitration in terms of professionalism, impartiality, efficiency and confidentiality, which further leads to the fact that the application of arbitration shall be further strengthened in the automotive industry as a dispute resolution method. To some extent, the establishment of an automobile industry arbitration center will be of great significance for enriching and improving the dispute resolution mechanism in China's automotive industry.

On the basis of existing domestic and overseas practical experience, efforts may be made to establish an arbitration center for the automobile industry based on existing well-developed and highly internationalized arbitration institutions. By learning from the model of international arbitration cooperation, the automobile industry arbitration center may be composed of domestic and foreign automobile industry experts as well as practitioners with rich experience in the automotive industry. Meanwhile, industry associations such as the CAAM may actively recommend their members to resolve disputes in the automotive industry through arbitration and incorporate dispute resolution clauses with respect to the automobile industry arbitration center in the standard contracts for various services in the automotive industry.

2. Strengthening the exchange and cooperation between arbitration agencies and

28 See YAN Luoluan, *Significance of CAMVAP for China, published in Journal of Southwest Agricultural University (Social Science Edition)*, 2011 Issue No. 9, p.19.

industry associations

Arbitration agencies should strengthen the exchange and communication with relevant industry associations such as the China Association of Automobile Manufacturers (CAAM) and the China Automobile Dealers Association (CADA) and make in-depth publicity in the automotive industry. Arbitration agencies may enter into strategic cooperation agreements with industry associations to deepen the understanding of the importance of arbitration to resolve legal disputes in the automotive industry, further reach consensus on promoting arbitration as the first choice for legal disputes in the automotive industry and further enhance the credibility of arbitration and arbitration agencies.

To be more specific, firstly, industry associations such as the CAAM may conduct trainings for arbitrators and case secretaries in the specialized areas, such as articles of association of industry associations, industry conventions, industry service standards, industry trading rules and practices, industry quality standards, etc., so that such personnel can have a better understanding of the expertise and business practices of the automotive industry. Secondly, arbitration agencies may provide arbitration-related consulting or arbitration materials to industry associations and conduct overall publicity on the advantages of arbitration, so as to raise the awareness of resolving disputes through arbitration.

3. Formulating and improving arbitration rules and panel of arbitrators for the automotive industry

In light of the particularity and importance of the automotive industry, arbitration agencies should raise awareness of cases involving legal disputes in the automotive industry and formulate arbitration rules that are more suitable for the characteristics of

legal disputes in the automotive industry. Secondly, if necessary, the arbitration agencies should specify the expertise areas of arbitrators in the panel of arbitrators by industry, so as to expand the scope of choices available to the parties and make them more pertinent and attract more legal experts in the automotive industry to join the arbitrators. Meanwhile, the parties are allowed to choose impartial and more professional experts from outside the panel of arbitrators as arbitrators for the settlement of disputes. In the future, in terms of serving the development of the automotive industry, arbitration agencies can, by fully mobilizing the expert resources in the legal and automotive industries and making use of the digital intelligence platform and the established arbitration platforms, etc., provide further support and guarantee and improve the quality and efficiency of arbitration services for legal disputes in the automotive industry.

4. Promoting contract templates in the automotive industry

The relevant contractual terms concerning the choice of dispute resolution methods and application of law are the most important terms for establishing commercial terms and reasonably balancing and determining the substantive rights and obligations in contracts among the manufacturers, suppliers, dealers and other entities, which are valued by the relevant parties competing with each other in the automotive industry. Arbitration agencies may, on their own initiative or together with industry associations, launch contract templates in different phases or links of the whole process of the automotive industry, which may make the parties in the automotive industry more favorable to the arbitration as the dispute resolution method and thus significantly enhance the competitiveness of arbitration agencies. For example, the dispute resolution clause could explicitly select experts with the background of the automotive industry to act as arbitrators for the possible arbitration cases under this contract, which may ensure the arbitration agencies to pay more attention to the particularity of arbitration in the

automotive industry, improve the standardization of the choice of dispute resolution mechanism and avoid the burden of litigation due to jurisdiction objection. Meanwhile, the industrial contract template is also an important manifestation to highlight the competitiveness between arbitration agencies.

B. Prospects and Outlook

The specialization of arbitration is crucial to the parties, which has laid the foundation for the rapid development of industry arbitration. It will be an inevitable trend for industry arbitration to embody and give play to the advantages of expert arbitration to a greater extent, and the automotive industry arbitration is an indispensable form of arbitration in the automotive industry. The importance of the automotive industry, the particularity and diversity of legal disputes in the automotive industry and the specialized nature of arbitration make it inevitable to carry out automotive industry arbitration. Top arbitration agencies represented by the CIETAC attach great importance to and have started to carry out the practice of automotive industry arbitration. In particular, the expert arbitration of existing cases has provided a better model for the resolution of legal disputes in the automotive industry.

It is believed that with the continuous efforts and promotion of arbitration agencies and industry organizations, and with strong commendation and active participation of relevant enterprises in the automotive industry, arbitration in the automotive industry will have seen greater development, it will be normal to choose arbitration to resolve legal disputes in the automotive industry, the credibility of arbitration will be further enhanced, and the business environment under rule of law in the automotive market will be further optimized.

Chapter Five

Cases of Judicial Review of International Commercial Arbitration in China and Legal Issues Involved

In this Chapter, the research team of the Civil Adjudication Tribunal No. 4 of the Supreme People's Court, based on the cases and data submitted by various high people's courts and in light of the effective written judgments on judicial review of arbitration made available via China Judgments Online (https://wenshu.court.gov.cn/), Internet as well as other channels (as of June 30, 2023), makes a retrospective analysis of the facts and applicable laws of the cases of judicial review of international commercial arbitration in the past year and gives comments on the important legal issues involved.

In 2022, the Courts nationwide accepted 364 judicial review cases of arbitration with foreign elements and involving Hong Kong, Macao and Taiwan. Among them, there were 203 foreign-related cases, 135 cases involving Hong Kong, 8 cases involving Macao and 18 cases involving Taiwan region, accounting for 2.68% of all newly accepted cases of judicial review of arbitration (13,585 cases) by the Courts nationwide.

The main facts and legal issues involved in the above cases are as follows:

I. Legal Issues Concerning Applications for Determining the

Validity of an Arbitration Agreement Involving a Foreign Country, Hong Kong, Macao or Taiwan

A. Governing Law for Determining the Validity of an Arbitration Agreement Involving a Foreign Country or Hong Kong, Macao or Taiwan

In the case[1] *Xiangsheng Real Estate Group Co., Ltd. ("Xiangsheng Company") v. Flash Advance Opportunity VII Limited, Anji Xiangsheng Real Estate Co., Ltd., Wenling Xianghe Real Estate Development Co., Ltd. and Hefei Xiangchuang Real Estate Co., Ltd. involving an application for determination of the validity of an arbitration agreement, the Letter of Guarantee*, the *Pledge Agreement I* and the *Pledge Agreement II* involved in the case all provided that any dispute shall be submitted to the China International Economic and Trade Arbitration Commission ("CIETAC") for arbitration in Beijing in accordance with the then-effective arbitration rules. The claimant argued that the arbitration clause in this case shall be invalid because of the inconsistency between the jurisdiction clause agreed in the master contract and that in the guarantee contract. The Court held that an arbitration agreement reflects the parties' free will to choose a dispute resolution method, and a lawful and valid arbitration agreement is the prerequisite for an arbitration agency to legally settle a dispute between the parties. Article 16 of the *Interpretation of the Supreme People's Court on Issuers Relating to the Application of the Arbitration Law of the People's Republic of China*[2] provides that, "The laws agreed upon by the parties shall apply to the determination of the validity of a foreign-related arbitration agreement; the laws of seat of arbitration shall apply if the parties have not agreed upon the applicable laws but have agreed upon the seat of arbitration; if the parties have agreed upon neither the

1 Civil Ruling (Jing 04 Min Te [2022] No.650), Beijing Fourth Intermediate People's Court, December 27, 2022.

2 The website of the Supreme People's Court of the People's Republic of China: https://www.court.gov.cn/zixun-xiangqing-1053.html,last visit on June 29, 2023

applicable laws nor the seat of arbitration or if they fail to clearly agree upon the seat of arbitration, the laws of the place where the Court is located shall apply." Since the *Letter of Guarantee*, the *Pledge Agreement I* and the *Pledge Agreement II* do not provide for the law applicable to review the arbitration agreement, but do provide for the seat of arbitration, the law of the People's Republic of China, the seat of arbitration, shall be applied to determine the validity of the arbitration agreement involved in the case. In this case, the arbitration agreement stipulated a clear intention for arbitration, arbitration matters and arbitration agency, which conformed to the formal and substantive elements for a legal and valid arbitration agreement in Article 16 of the *Arbitration Law of the People's Republic of China*[3] *("Arbitration Law")* and did not fall under any circumstance of invalidity as provided in Article 17 of the *Arbitration Law*, so it shall be deemed legal and valid. The reasons proposed by Xiangsheng Company that the dispute resolution method stipulated in the guarantee contract is inconsistent with that in the master contract and that the invalidity of the master contract may cause the guarantee contract to be invalid do not constitute the causes of affecting the validity of the arbitration agreement. Therefore, the Court ruled to reject the application of Xiangsheng Company.

In the case[4] *TANG v. CGC Management Limited involving an application for determination of validity of an arbitration agreement*, the CGC Management Limited and TANG Haojun entered into a *Limited Partnership Agreement*, in which Article 12.11 dispute resolution agreed that, any dispute, controversy or claim arising out of or in connection with this Agreement, including the interpretation, breach, termination or validity thereof, shall be referred to and finally resolved by arbitration conducted by the Beijing Arbitration Commission in accordance with the arbitration rules in force on the date

3 The website of the National People's Congress:http://www.npc.gov.cn/npc/c30834/201709/c8ca14070ead4c6d904610eea0f535fb.shtml, last visit on June 29, 2023.

4 Civil Ruling (Jing 74 Min Te [2022] No.21), Beijing Financial Court, August 25, 2022.

of commencement of arbitration. The Court held that the arbitration clause in this case was a foreign-related arbitration clause. For the purpose of examining the validity of a foreign-related arbitration agreement, the people's court shall first confirm the governing law to be applied and then make a judgment according to the rules on determination of the validity of arbitration agreement under the chosen governing law. In accordance with Article 18 of the *Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations*[5] (hereinafter the *Law on the Application of Laws to Foreign-related Civil Relations* in short), the parties may reach an agreement to choose the law applicable to the arbitration agreement; if the parties fail to so choose, the law of the place where the arbitration agency is located or seat of arbitration shall apply. Article 16 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China*[6] (hereinafter the *Judicial Interpretation on the Arbitration Law* in short) provides that, "The laws agreed upon by the parties shall apply to the determination of the validity of a foreign-related arbitration agreement; if the parties have not agreed on the applicable laws but have agreed on the seat of arbitration, the laws of the seat of arbitration shall apply; if the parties have agreed on neither the applicable laws nor the seat of arbitration or the seat of arbitration is not clearly agreed upon, the laws of the place where the Court is located shall apply." Article 13 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Cases Involving Judicial Review of Arbitration*[7] provides that, "Where the parties reach an agreement to choose the law applicable to determine the validity of a foreign-related arbitration agreement, they shall make an explicit expression of intent. If they have only agreed on the law applicable to the contract, such law shall

5 TThe website of the National People's Congress, http://www.npc.gov.cn/zgrdw/huiyi/cwh/1117/2010-10/28/content_1602779.htm, last visit on June 29, 2023.

6 The Supreme People's Court, https://www.court.gov.cn/zixun-xiangqing-1053.html, last visit on June 29, 2023.

7 Supreme People's Court, https://www.court.gov.cn/fabu/xiangqing/75872.html, last visit on June 29, 2023.

not apply to determine the validity of the arbitration clause in the contract." According to the independence of arbitration clause and the principle of universality mastered in judicial practices, the law agreed by the parties to a contract shall not automatically be deemed as the governing law for determining the validity of arbitration agreement in the contract. In the circumstance that the *Limited Partnership Agreement* has not expressly agreed on the governing law for the validity of arbitration clause and the seat of arbitration and only explicitly selected Beijing Arbitration Commission as the dispute resolution agency, the law of the People's Republic of China shall apply in the examination of the validity of the arbitration agreement involved in this case because Beijing Arbitration Commission and the Court are both located in the People's Republic of China.

When a court hears cases to determine the validity of foreign-related arbitration agreements, the governing law of the arbitration agreements is determined according to Article 18 of the *Law on the Application of Laws to Foreign-related Civil Relations*. According to this Article, the parties may choose the law applicable to their arbitration agreements by agreement; if the parties fail to do so, the law of the place where the arbitration agency is located, or the seat of arbitration shall apply. Article 14 (Article 12 after Amendment in 2020) of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (I)*[8] (hereinafter the Judicial Interpretation (I) on the Application of Law in short) further specifies that if there is no agreement or unclear agreement on the arbitration agency or the seat of arbitration, the law of the People's Republic of China shall apply to determine the validity of an

8 The website of China Court, https://www.chinacourt.org/article/detail/2021/10/id/6328619.shtml, last visit on June 29, 2023.

arbitration agreement. It can be seen that the governing law to determine the validity of an arbitration agreement, in order of priority, is the law chosen by the parties as agreed, law of the place where the arbitration agency is located or the arbitration takes place, or the Chinese law. The Law on the *Application of Laws to Foreign-related Civil Relations* came into effect on April 1, 2011. According to Article 2 of the *Judicial Interpretation (I) on the Application of Law*, the people's court shall determine the applicable law for a foreign-related civil relation occurred prior to the effectiveness of this Law in accordance with the relevant laws and regulations in effect at the time of occurrence of such foreign-related civil relation. For determining the validity of arbitration agreements, the governing law as determined by Article 16 of the *Judicial Interpretation on the Arbitration Law* shall apply.

There is no substantive difference between Article 16 of the *Judicial Interpretation on the Arbitration Law* and Article 18 of the Law on the Application of *Laws to Foreign-related Civil Relations*. In accordance with the principles of the aforesaid two articles, the law agreed by the parties shall prevail. In the absence of such agreement or such agreement is unclear, the law of the seat of arbitration shall apply. Different from Article 18 of the *Law on the Application of Laws to Foreign-related Civil Relations*, although Article 16 of the *Judicial Interpretation on the Arbitration Law* does not mention the application of the law of the place where the arbitration agency is located, it provides that the law of the forum shall be the third in order for the choice of governing laws. For a case heard by a Chinese court to determine the validity of an arbitration agreement, the law of the forum shall be the law of China. In addition, in case that the arbitration agency agreed upon by the parties is a domestic arbitration body, the "place where the arbitration agency is located" is also definite and undisputed.

As for cases of determining the validity of arbitration agreements involving Hong

Kong, Macao or Taiwan, according to Article 19 of the *Judicial Interpretation (I) on the Application of Law* (Article 17 after amendment in 2020), the *Law on the Application of Laws to Foreign-related Civil Relations* shall apply mutatis mutandis to issues concerning the application of laws to civil relations involving Hong Kong and Macao. Pursuant to Article 1 of the *Provisions of the Supreme People's Court on Issues concerning the Application of Laws to the Hearing of Taiwan-related Civil and Commercial Cases* (hereinafter the Taiwan-related Provisions in short), the people's courts shall apply the relevant provisions of laws and judicial interpretations in hearing Taiwan-related civil and commercial cases. If it is determined that the civil laws of Taiwan shall be applied according to the rules for selecting applicable laws in laws and judicial interpretations, the people's courts shall apply such laws. In a press conference[9] for the release of the *Taiwan-related Provisions*, an official from the Supreme People's Court pointed out that, the "rules for selecting applicable laws" referred to in the *Taiwan-related Provisions* mean the rules for application of laws to foreign-related civil and commercial relations, i.e. rules of conflict, including those stipulated in Chapter VIII of the former *General Principles of the Civil Law of the People's Republic of China and the Law on the Application of Laws to Foreign-related Civil Relations*. It can be seen that people's courts shall refer to relevant provisions on foreign-related cases when hearing cases of the determination of the validity of an arbitration agreement involving Hong Kong, Macao or Taiwan.

B. Whether the Parties Consent to Arbitration

In the case[10] *Indagro SA v. Upper Sea Enterprises Limited (hereinafter referred to as "Upper Sea") involving an application for determining the validity of an arbitration agreement,*

9 The Supreme People's Court, https://www.court.gov.cn/zixun-xiangqing-1999.html, last visit on June 29, 2023.

10 Civil Ruling (Jing 04 Min Te [2022] No.584), Beijing Fourth Intermediate People's Court, December 27, 2022.

Indagro SA and Upper Sea entered into a sales contract, in which they agreed to submit any dispute to the CIETAC for arbitration in China in accordance with CIETAC arbitration rules. The claimant, Indagro SA, claimed that the sales contract was not concluded by it and Upper Sea, and the parties failed to reach a consensus on arbitration and requested the Court to identify that there was no valid arbitration agreement between them in accordance with the law. Upper Sea claimed that an arbitration agreement was stipulated in the sales contract, and the arbitration agreement complied with the provisions of Article 16 of the *Arbitration Law* and did not fall under any of the circumstances of invalidity as provided for in Article 17 of the *Arbitration Law*. The Court held that an arbitration agreement reflects the parties' free will to choose a dispute resolution method, and a lawful and valid arbitration agreement is a prerequisite for an arbitral agency to legally settle the dispute between the parties. Based on the notarized and certified subject materials of Upper Sea and the specific status of execution of the sales contract, the Court determined that Upper Sea, which had affixed its seal to the sales contract was the same subject as the respondent in this case, and Upper Sea was a party to the sales contract. Except for Upper Sea and Indagro SA, there was no other third party's name in the sales contract. In addition, the name of Upper Sea was stated in the first part of the sales contract, so it can be determined that Indagro SA had sufficient opportunity to know and verify the information of the counterparty before affixing its company seal, and there was no factual basis for any misunderstanding. Furthermore, considering the fact that both parties recognized the authenticity of the company seals affixed to the sales contract, the Court believed that both Indagro SA and Upper Sea had the true intention to submit the dispute in the sales contract to arbitration. The arbitration agreement involved in this case should be determined as lawful and valid, as the matters to be arbitrated and the arbitration agency were clearly stipulated in the arbitration agreement, which conformed to the formal and substantive requirements

for an arbitration agreement to be lawful and valid as provided in Article 16 of the *Arbitration Law* and did not fall under any circumstance of invalidity as provided in Article 17 of the *Arbitration Law*. In summary, The Court held that there was a lawful and valid arbitration agreement between the parties.

An arbitration agreement is a contract in essence. For determining whether the parties have reached a consensus on arbitration, the provisions on offer and acceptance under the *Contract Part of the Civil Code of the People's Republic of China*[11] shall apply. A contract is established when the acceptance becomes effective, that is, a contract is established when both parties have reached a consensus on the acceptance. For the purpose of an arbitration agreement, if the parties have not reached an agreement to submit their dispute to arbitration, the arbitration agreement shall be deemed unestablished, and they cannot resolve their dispute through arbitration. The establishment of an arbitration agreement is a precondition for an arbitration agreement to take effect. Therefore, when a party applies for determination of the validity of an arbitration agreement on the ground that there is no arbitration agreement, such case should also be included in the scope of judicial review of arbitration. It should be noted that the invalidity of an arbitration agreement and the non-existence of an arbitration agreement are two different issues. In practice, the parties sometimes argue that they have not reached a consensus on arbitration, the key point in the judicial review under such circumstance should be whether the arbitration agreement has been established.

C. Determination of Eligible Subject of an Arbitration Agreement

In the case[12] *SLACK & PARR LTD. v. Slack Precision Machinery (H.K.) Limited*

11 The website of the National People's Congress, http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml, last visit on June 29, 2023.

(hereinafter referred to as "Slack Company") involving an application for determination of validity of an arbitration agreement, SLACK & PARR LTD. requested the Court to confirm that there was no arbitration agreement between it and Slack Company. The Court found out that Slack Company and Hong Kong Wealth Industry Development Limited ("Wealth Company") entered into a *Power of Attorney*, whereby Slack Company entrusts Wealth Company to purchase gear pump equipment and components from SLACK & PARR LTD. on its behalf. The Wealth Company entered into a Contract No. W-TANGU-180425 with SLACK & PARR LTD. The Contract provides that any dispute shall be submitted to the CIETAC in Beijing for settlement according to its rules and procedures. The party not involved in the case, Jilin Tangu Carbon Fiber Co., Ltd. ("Jilin Tangu") entered into a *Gear Pump Disposal Agreement* with the Slack Company and SLACK & PARR LTD. in which the dispute resolution clause agreed that any dispute shall be submitted to CIETAC for arbitration in accordance with its arbitration rules in force. The Court held that the Slack Company was not a subject of the *Contract* between Wealth Company and Slack & PARR LTD. and was not the counterparty to the Contract at the time of signing the *Contract*. The system of arbitration by agreement is a basic system of *Arbitration Law*, reflects the principle of voluntary arbitration, and is the basis of the entire arbitration activities. An arbitration agreement is established on the basis that the parties voluntarily submit their disputes to arbitration for resolution, and the acceptance of disputes by an arbitration agency shall be authorized by the parties upon agreement. In a case involving determination of the validity of an arbitration agreement, the people's court shall, in accordance with the law, examine whether the parties have expressed their true intention by agreeing to submit their disputes to arbitration. In addition to examining the intention of the parties in

12 Civil Ruling (Jing 04 Min Te [2022] No.163), Beijing Fourth Intermediate People's Court, December 27, 2022.

entering into the contract, the people's court shall also pay attention to the prevailing judicial interpretation on arbitration, which provides that under certain circumstances, the subject who succeeds the rights and obligations of the contract may also be a party to the arbitration, and the validity of the arbitration agreement shall extend to such party, provided that it shall be judged in accordance with the Arbitration Law and the relevant provisions of judicial interpretations.

In this case, although Slack Company submitted evidence such as the *Power of Attorney*, it should not have obtained the right to resolve disputes through arbitration as agreed in the *Contract* on the basis of a principal-agent relationship. The legal provisions on the contractual rights and obligations between a principal and a third party when the agent enters into a contract in its own name with a third party are rules applicable in substantive law to solve the rights and obligations of the parties to a contract, which are different from arbitration rules which are a method for dispute resolution. The independence of arbitration clauses is not affected by the principal-agent legal relationship. Therefore, Slack Company's claim for succession of the rights in respect of arbitration in the *Contract* on the basis of a principal-agent relationship shall not be supported. However, based on the facts found out, the Court determined that the relevant rights and obligations in the course of performance of the *Contract* involved the *Gear Pump Disposal Agreement*. As a contract signed later, the Gear Pump Disposal Agreement not only succeeded part of the rights and obligations of the *Contract*, but also contained arbitration clauses that were basically the same as the *Contract*, both designating the CIETAC as the arbitration agency. Therefore, even if Slack Company was not involved in the execution of the *Contract*, the performance of the Contract and execution of the *Gear Pump Disposal Agreement* both involved Slack Company and SLACK & PARR LTD. The Court held that the dispute in this case should be settled through arbitration, which was in line with the legislative spirit and provisions of the

Arbitration Law, was consistent with the parties' declaration of choice of arbitration and was more conducive to a fair and efficient resolution of the dispute. The request of SLACK & PARR LTD to apply for confirmation of the absence of an arbitration agreement between itself and Slack Company was not supported.

In the case[13] *LIN v. Fujian Jinjiang Sanmu Garment Industry Co., Ltd ("Sanmu") involving an application for confirmation of validity of an arbitration agreement*, the claimant LIN requested the Court to confirm according to law that the arbitration clause contained in the *Contract for Jinjiang Sanjin Toys Garment Co., Ltd.* (the "*Contract*") signed by and between the party not involved in the case, Sanjin Toys Garment Trade Co., Ltd. (the "Hong Kong Sanjin") and Sanmu was legally binding on both parties. Sanmu argued that LIN was not a subject of contract, and that the arbitration clause in the *Contract* was not binding on her. The Court held that the Hong Kong Sanjin was incorporated pursuant to the laws of the Hong Kong, and that LIN was its founder and sole shareholder. A *Legal Opinion* issued by a law firm in Hong Kong clearly stated that: pursuant to the laws of the Hong Kong, LIN shall enjoy the rights and bear the obligations incurred by Hong Kong Sanjin in the course of business operation. In this regard, Sanmu failed to produce evidence to the contrary. Now, Hong Kong Sanjin has been wound up, and therefore its sole natural person shareholder, LIN, succeeds the rights and the obligations arising from the conclusion of the *Contract* during its existence, and may apply for a judicial review of the validity of the arbitration clause in the *Contract*. It was ruled to confirm that the *Contract* executed by and between Hong Kong Sanjin and Sanmu was legally binding on LIN and Sanmu.

D. Circumstance under Which the Name of an Arbitration Institution is

13 Civil Ruling (Jing 04 Min Te [2022] No.945), Beijing Fourth Intermediate People's Court, April 10, 2023.

Inaccurate

In the abovementioned case[14] *LIN v. Sanmu involving an application for confirmation of validity of an arbitration agreement*, the respondent Sanmu argued that the arbitration clause should be invalid because there was an ambiguity in the agreement between the parties on the arbitration commission. The Court held that the arbitration commission agreed in the contract in this case was the "Foreign Economic and Trade Arbitration Commission of the China Beijing Council for the Promotion of International Trade", which was a defective expression. Although the name of any arbitration commission located in Beijing was not exactly the same as the description in the above agreement, considering the fact that the former name of CIETAC, i.e. the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, was very similar to the description agreed by the parties, and that the names of other arbitration commissions were quite different from the description agreed by the parties, it can be ascertained that the true intention of the parties was to submit their dispute to CIETAC for settlement. According to Article 3 of the *Judicial Interpretation on the Arbitration Law*, "where the name of an arbitration agency as agreed upon in an arbitration agreement is inaccurate, but the specific arbitration agency can still be identified, it shall be ascertained that the arbitration agency has been selected", the defective description of the arbitration commission in the arbitration clause shall not affect the ascertainment of the specific arbitration agency selected by the parties.

In the case[15] *Xi'an Momo Information Technology Co., Ltd. (hereinafter referred to as "Momo") v. Great British Teddy Bear Company involving an application for determining*

14 Civil Ruling (Jing 04 Min Te [2022] No.945), Beijing Fourth Intermediate People's Court, April 10, 2023.

15 Civil Ruling (Shan 01 Min Te [2021] No.665), Xi'an Intermediate People's Court, Shaanxi Province, May 26, 2022.

the validity of an arbitration agreement, the claimant and the respondent entered into a License Agreement, whereby the respondent authorized the claimant to use the character image of Great British Teddy Bear Company, and Article 11 of the License Agreement stipulated that, "this Agreement shall be governed and interpreted by the substantive laws of China. Any disputes, controversies or claims arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be resolved by the Xi'an Court of International Arbitration Centre after delivery of a Notice of Arbitration in accordance with the arbitration administration regulations. The arbitration shall be conducted in English. This Agreement shall be drafted in English. If there is a translation of this Agreement into another language, the English version shall prevail." The claimant Momo argued that there were currently two arbitration commissions in Xi'an, and since the arbitration agreement in this case could not specify a definite arbitration agency, the arbitration clause involved in the case shall be deemed invalid. The Court held that the arbitration agency as agreed upon in the arbitration agreement was the Xi'an Court of International Arbitration Centre, while there were two arbitration agencies in Xi' an, i.e., the International Commercial Arbitration Court, a branch of the Xi'an Arbitration Commission, and the Silk Road Arbitration Center of the CIETAC. The name of the arbitration agency as agreed upon in the arbitration agreement was different from the Chinese and English names of the two existing arbitration institutions in Xi'an. Article 3 of the *Judicial Interpretation on the Arbitration Law* provides that, "Where the name of an arbitration institution as agreed upon in an arbitration agreement is not accurate, but a specific arbitration institution can be identified, the arbitration institution shall be deemed to have been selected." Comparing the Chinese and English names of the arbitration institution agreed upon by the parties with the Chinese and English names of the two existing arbitration institutions in Xi'an, we can find that the Xi'an

Court of International Arbitration Centre is significantly different from the Silk Road Arbitration Center of CIETAC, but closer to the International Commercial Arbitration Court, a branch of the Xi'an Arbitration Commission. Although the names of the two institutions were not exactly the same, such a case fell under the circumstance that the name of the arbitration institution was not standardized by the parties, and it could be determined that the arbitration institution as agreed upon in the arbitration agreement was the International Commercial Arbitration Court, a branch of the Xi'an Arbitration Commission, which does not affect the intention of the parties to submit their dispute to such arbitration institution for arbitration. Therefore, the arbitration clause involved in the case contained the contents of Article 16 of the *Arbitration Law* and was not subject to circumstances of invalidity, so it shall be determined as valid.

The above case involved a circumstance where the name of an arbitration body agreed upon by the parties was not accurate. Article 16 of the *Arbitration Law* provides that an arbitration agreement shall have three elements: the expression of intention to apply for arbitration, the matters for arbitration and the arbitration commission selected. Article 18 stipulates that if an arbitration agreement has not specified or has not specified clearly the matters for arbitration or the choice of an arbitration commission, the parties may reach a supplementary agreement. If no supplementary agreement is reached, the arbitration agreement shall be null and void. In practice, there is circumstance under which the parties fail to agree on an arbitration institution. In most cases, the name of the arbitration institution agreed on by the parties in the arbitration agreement is inaccurate as a result of unfamiliarity with the arbitration institution. In other words, the parties fail to explicitly designate the relevant arbitration institution in their agreement. The inaccurate name of an arbitration institution agreed upon by the parties in the arbitration agreement is generally manifested by the use of the former name of the arbitration institution, omission of any words in the name of the arbitration institution,

erroneous designation of arbitration institution, or the impossibility of the designated arbitration institution for arbitration, but it can be reasonably ascertained from other provisions or relevant languages and circumstances in the arbitration agreement that the parties' true intention at the time of signing the arbitration agreement includes a certain arbitration institution, or the arbitration institution can be reasonably presumed to conduct the arbitration.

In judicial practice in many countries around the world, as long as the parties stipulate in the contract that any matter shall be settled through arbitration, even if the name of the arbitration institution specified in the arbitration agreement is incomplete or inaccurate, the Court will usually deem the arbitration agreement as valid under the principle of autonomy of the will of the parties. Article 3 of the *Judicial Interpretation on the Arbitration Law* also stipulates that, "Where the name of an arbitration institution as stipulated in an arbitration agreement is inaccurate, but is nevertheless identifiable, the arbitration institution shall be deemed to have been selected." Under the circumstance that the name of the arbitration institution agreed upon by the parties concerned is inaccurate in practice, the people's court shall, during the examination, fully respect the arbitration will of the parties concerned, interpret the arbitration agreement in good faith and determine the jurisdiction of the arbitration institution reasonably, rather than simply denying the validity of the arbitration agreement on the ground that its content is unclear.

E. Determination of the Validity of Arbitration Clauses on General Matters

In the case[16] *Hainan Hengqian Material Equipment Co., Ltd. v. Simtec Systems GmbH involving an application for confirmation of the validity of an arbitration agreement*, the

claimant requested the Court to confirm the invalidity of the arbitration agreement between it and Simtec Systems GmbH based on one ground that the matter of arbitration was too abstract, and the arbitration clause was unclear for the matter of arbitration. The Court held that the matters that the parties agree to resolve through arbitration shall be expressly stipulated in the arbitration clause, which is the necessary condition for the validity of the arbitration agreement. According to Article 2 of the *Judicial Interpretation on the Arbitration Law*, "Where the parties summarily agree that the matters to be arbitrated are contractual disputes, any dispute arising as a result of the formation, validity, modification, transfer, performance, liability for breach, interpretation, rescission, etc. of the contract may be deemed as a matter to be arbitrated." In light of the actual situation of this case, the parties have all agreed in the eleven procurement and service contracts involved that any disputes relating to the contracts shall be subject to arbitration. Although the abovementioned matters are general, they are in line with the provisions of the *Judicial Interpretation on the Arbitration Law* on matters expressly agreed to be arbitrated, and the parties should be deemed to have expressly agreed on matters of arbitration. The arbitration clause that has both formal and substantive elements of legality and validity shall be deemed as legal and valid.

In judicial review of arbitration, the Court should have a loose understanding of contract-related disputes. As long as the dispute between the parties is closely related to the contract involved in the arbitration clause, any dispute arising from the formation, validity, modification, transfer, performance, liability for breach, interpretation, rescission, etc. of the contract may be referred to arbitration under the arbitration clause.

F. Determination of the Validity of Unilateral Option Arbitration Clauses

16 Civil Ruling (Jing 04 Min Te [2021] No.905), Beijing Fourth Intermediate People's Court, March 28, 2022.

In the case[17] *(Cambodia) Fiber Optic Communication Network Co., Ltd. ("Cambodia Fiber Optic Company") v. China Development Bank involving an application for confirmation of the validity of an arbitration agreement,* on July 28, 2015, Cambodia Fiber Optic Company and China Development Bank entered into a Pledge Agreement, in which Article 23.1 provides that, "Unless otherwise selected by the pledgee (i.e. China Development Bank), all disputes, differences or claims arising out of or in connection with this Agreement, including the existence, validity, interpretation and performance thereof, shall be submitted to the CIETAC for arbitration in Beijing in accordance with the arbitration rules of CIETAC in effect at the time of applying for arbitration. The arbitral award shall be final, and the arbitration shall be conducted in English." Article 23.2 provides that, "Notwithstanding Article 23.1, the parties shall submit to the non-exclusive jurisdiction of the Courts of Cambodia if so selected by the pledgee." In October 2021, CIETAC accepted the arbitration application filed by China Development Bank under the arbitration clause of aforesaid agreement. The claimant, Cambodia Fiber Optic Company petitioned the Court to confirm the invalidity of the arbitration clause involved in this case on the main ground that the clause in this case constitutes an "arbitration or suit" clause stipulated in Article 7 of the *Judicial Interpretation on the Arbitration Law*, and is obviously unfair. The Court was of the opinion that the definition standard of an "arbitration or suit" agreement shall be a concurrent or optional agreement between these two means of dispute resolution, i.e. arbitration and litigation, and may give rise to a dispute over jurisdiction. In this case, the dispute arbitration clause is a unilateral option dispute resolution clause, the nature of which is dependent on the choice of China Development Bank. The agreement is the result of consensus between the parties upon negotiation and is not prohibited by law, and such agreement is insufficient to

17 Civil Ruling (Jing 74 Min Te [2022] No. 4), Beijing Financial Court, October 31, 2022.

constitute an obviously unfair agreement concerning the rights and obligations of the parties. Therefore, the autonomy of will of the parties should be respected in this case. The agreement involved in the case provides that the dispute is to be arbitrated by the CIETAC, which does not violate Article 6 of the *Arbitration Law,* and the arbitration agency selected by the parties upon agreement is unique, so it does not fall under the circumstances of unclear agreement on an arbitration agency referred to in Article 18 of the *Arbitration Law*. Under the circumstance that China Development Bank had applied to the CIETAC for arbitration and expressly waived the right to bring a lawsuit to a court, the dispute resolution clause in this case had formed a definite and exclusive arbitration consensus, which was not an "arbitration or suit" clause identified as invalid in the *Judicial Interpretation on the Arbitration Law*, but met the requirements of the Arbitration Law for valid arbitration clause and should be deemed as legal and valid.

A unilateral option arbitration clause, also known as an asymmetric arbitration clause, is a jurisdiction clause which entitles a specific party to a commercial contract the right to choose whether to submit a dispute to litigation or arbitration after the occurrence of the dispute. [18]"This clause reflects that one party to the contract is in a superior bargaining position, with special rights settings enabling it to choose between litigation and arbitration after the occurrence of a dispute, thus ensuring that the dispute will be heard in a platform that is most favorable to that party. The party with the advantage of having the right to choose is usually referred to as the beneficiary[19], and the party without the right to choose is referred to as the non-beneficiary[20].

18 SANG Yuanke, *A Study on the Validity of Asymmetric Arbitration Clauses, published in Chinese Yearbook of Private International Law and Comparative Law*, Vol. 24, 2019.

19 See Bas van Zelst, Unilateral Option Arbitration Clauses in the EU: *A Comparative Assessment of the Operation of Unilateral Option Arbitration Clauses in the European Context*, Journal of International Arbitration, Vol.33,No.4,365,367(2016).

Unilateral option arbitration clauses have three characteristics: hybrid, asymmetry and unilaterality. Hybrid means that the unilateral option arbitration clauses include two dispute resolution methods, namely arbitration and litigation; asymmetry means that only one party to a contract is given the right to choose between arbitration and litigation, while the other party does not have this option, that is, one party to a contract has more choice of means for dispute resolution than the other party; unilaterality means that the choice of means for the resolution of disputes after occurrence thereof is decided unilaterally by the beneficiary, and there is no need for another round of negotiation with the non-beneficiary or to obtain the additional consent of the non-beneficiary. [21]Different from the traditional arbitration agreement, the unilateral option arbitration clause has its own peculiarity, that is, the clause contains a consent to both arbitration and litigation, and a specific and unique way of dispute resolution is designated when and only when the beneficiary makes its choice. On the face of it, the unilateral option arbitration clause is asymmetric and unbalanced, because one party has additional choices, while indirectly depriving the other party of the same procedural rights.

In practice, there are different understandings of the validity of unilateral option arbitration clauses. Courts in different countries and regions hold different positions on the validity of unilateral option arbitration clauses. Some countries deny the validity of such clauses on the grounds that such clauses are against public policy, lack of bilateral nature, clarity or reasonableness.

At present, there is no special regulation on this issue in China, and there are different

20 See Pavlo Malyuta, *Compatibility of Unilateral Option Clauses with the European Convention on Human Rights*, UCL Journal of Law and Jurisprudence, vol.8, No.1,4 (2019).

21 QIN Xihan, *Determination of the Validity of Asymmetric Arbitration Clauses in China, published in Beijing Arbitration Quarterly*, Vol. 3, 2021 (total Vol. 117).

opinions in judicial practice, with mainly three opinions as follows: Firstly unilateral option arbitration clause is invalid, represented by a typical case[22] *CHEN et al. v. DBS Bank (China) Limited, Shanghai Branch for confirmation of the validity of an arbitration agreement*. The Court held that such arbitration clause in fact gives the parties to the contract the right to choose either arbitration or forum recourse. According to Article 7 of the *Judicial Interpretation on the Arbitration Law*, the arbitration agreement involved in the case shall be ruled as invalid. The above opinion obviously treats the unilateral option arbitration clause as equivalent to the "arbitration or suit" clause. Secondly, unilateral option arbitration clause is partially valid. That is, such arbitration clause shall be split. According to Article 35 of the *Civil Procedure Law*[23] (Amended in 2021), if the agreement on a competent court in the contractual dispute resolution method conforms to the law, such agreement shall be recognized as valid. For example, in the case a Hainan Micro-lending Co., Ltd. v. *a Hainan Real Estate Development Co., Ltd. and ZHOU involving the jurisdiction*[24], the Court did not deny the overall validity of the unilateral option arbitration clause, however it determined that the agreement on arbitration was invalid but the agreement on competent court was valid. Third, unilateral option arbitration clause is valid. For example, in the case[25] *a Xiamen Chemical Co., Ltd. v. MB Barter& Trading S.A. involving a dispute over sales contract*, The Court held that although the agreement granted one party the unilateral right to decide the dispute resolution method, it was based on voluntariness of both parties, and the autonomy of will of the parties should be respected. Such agreement was not prohibited by law, and

22 Civil Ruling (Jing 02 Min Te [2016] No. 93), Beijing Second Intermediate People's Court.

23 The national database of laws and regulations for the *Civil Procedure Law of the People's Republic of China*, https://flk.npc.gov.cn/detail2.html?ZmY4MDgxODE3ZWQ3NjZlYTAxN2VlNmFiOTlhZDFjYmM%3D, last visit on June 29, 2023.

24 Civil Ruling (Qiong Min Xia [2020] No.2), Hainan High People's Court.

25 Civil Ruling (Hu 01 Min Zhong [2016] No.3337), Shanghai First Intermediate People's Court.

The Court held that the agreement was not sufficient to cause unfairness in the rights and obligations of the parties. In the above-mentioned case[26] *(Cambodia) Fiber Optic Communication Network Co., Ltd. applying for confirmation of the validity of an arbitration agreement*, the unilateral option arbitration clause was deemed valid by similar reasoning.

So, how to accurately determine the validity of unilateral option clauses? A unilateral option arbitration clause is different from an "arbitration or suit" clause. An "arbitration or suit" clause means that the parties may either apply for arbitration or bring a lawsuit to the Court. Such clause is essentially an expression of the parties' intention to submit their case for arbitration which is not unique. According to Article 7 of the *Judicial Interpretation on the Arbitration Law*, in principle, such an arbitration agreement shall be deemed as invalid (if one party applies to an arbitration agency for arbitration, but the other party fails to raise any objection before the first hearing, the arbitration agreement shall be deemed valid because the parties have reached a consensus to resolve the dispute through arbitration). In fact, the unilateral option arbitration clause only gives the right holder a choice between arbitration and other options for dispute resolution. Once made, a specific and unique option shall be determined eventually. Therefore, a unilateral option arbitration clause is different from an "arbitration or suit" clause, and the invalidity of an arbitration clause cannot be determined directly on the basis of Article 7 of the *Judicial Interpretation on the Arbitration Law*.

In the practical background of international economic exchange, the unilateral option arbitration clause is in fact a product of the genuine consensus of commercial parties, and a reflection of commercial rationality in practice. The unilateral option arbitration clause provides the international commercial parties with more diversified options, effectively

26 Civil Ruling (Jing 74 Min Te [2022] No. 4), Beijing Financial Court, October 31, 2022.

prevents the parties from submitting the dispute to inconvenient procedural mechanisms and more effectively protects their legitimate rights and interests. In recent years, it has become a common dispute resolution clause in the international financing field. When determining the validity of such an arbitration clause concluded by commercial parties, we should not overemphasize the complete equivalence of the parties in respect of the choice of dispute resolution mechanism, but pay more attention to the true intention of the parties when concluding the clause. To determine the validity of unilateral arbitration clause, the contracting process of both parties shall be comprehensively examined. Such arbitration clause shall be deemed as valid if there is no coercion, fraud or other circumstances, and it is the agreement concluded by the parties voluntarily. In practice, it shall be noted that, if the unilateral option arbitration clause involves vulnerable groups such as consumers and employees, the party with economic advantages should not be allowed to abuse the option, otherwise the interests of the vulnerable party may be prejudiced. The application of unilateral option arbitration clause may be governed by the relevant provisions on "determination of the validity of an asymmetric jurisdiction agreement" in Article 2 of the *Minutes of the National Symposium on Foreign-related Commercial and Maritime Trial Work of Courts*[27] promulgated by the Supreme People's Court on December 31, 2021 by reference. Such clause is more often applied between commercial parties with equal status of contracting. In certain areas, where the positions of the parties in contracting are significantly unequal, it is necessary to review the validity of such clause from the perspective of standard form contracts with a view to protecting the interests of the weak.

G. Determination of the Validity of Arbitration Clauses in Standard Form

27 China International Commercial Court of the Supreme People's Court, https://cicc.court.gov.cn/html/1/218/62/409/2172.html, last visit on June 29, 2023.

Contracts

In the case[28] *TANG v. CGC Management Limited involving an application for determination of the validity of an arbitration agreement (hereinafter referred to as "TANG's determination of the validity of an arbitration agreement")*, TANG requested the Court to determine the invalidity of the arbitration clause in the Limited Partnership Agreement signed with CGC Management Limited on the ground that the Limited Partnership Agreement was an English standard form contract, and CGC Management Limited failed to perform the obligation of prompting or explanation of the arbitration clause therein to TANG, causing TANG's lack of understanding of the clause and the adoption of arbitration to resolve the dispute was not TANG's true intention. CGC Management Limited claimed that the disputed agreement was not a standard clause and did not meet the definition of a standard form contract, and the arbitration clause contained in the standard form contract did not fall under the circumstances of claiming invalidity of a contract. The Court held that Article 497 of the *Civil Code of the People's Republic of China* stipulates the circumstances in which the standard clauses are invalid. The arbitration jurisdiction agreement is a mutual consent of the parties, and is substantive, but is a procedural clause in nature. It stipulates the jurisdiction over dispute resolution, but does not directly stipulate the civil rights and obligations of the parties, cannot bring economic benefits to the parties, nor exclude the main rights of the parties, but is intended to provide them with a way to seek remedy. TANG claimed that the Limited Partnership Agreement containing the arbitration agreement in this case was concluded under duress and other circumstances against his true intention, but he failed to provide sufficient evidence, so the arbitration agreement involved in the case should be deemed valid. The Court ruled to reject TANG's application.

28 Civil Ruling (Jing 74 Min Te [2022] No.21), Beijing Financial Court, August 25, 2022.

In the case[29] *(Cambodia) Fiber Optic Communication Network Co., Ltd. (the "Cambodia Fiber Optic Company") v. China Development Bank involving an application for confirmation of validity of an arbitration agreement (the "Cambodia Fiber Optic Company Case")*, the claimant requested for determining the invalidity of the arbitration clause in the disputed *Foreign Exchange Loan Contract* based on one ground that: the arbitration clause in the *Foreign Exchange Loan Contract* was a standard clause unilaterally drafted by China Development Bank, and China Development Bank had not given any prompt or explanation. Therefore, according to law, the arbitration clause in the *Foreign Exchange Loan Contract* should not constitute a part of the contract or be invalid. China Development Bank held that the arbitration clause in the disputed *Foreign Exchange Loan Contract* was an agreement reached between the parties through negotiations on an equal footing and was not a standard clause. As the disputed arbitration clause did not exempt the liability of China Development Bank, nor did it increase the liability of the counterparty, nor exclude any material rights of the counterparty, it was not a standard clause subject to special prompt or explanation. Therefore, the disputed arbitration clause was not an invalid clause. The Court held that, all the three *Foreign Exchange Loan Contracts* between Cambodia Fiber Optic Company and China Development Bank provided for arbitration clauses, and the disputed arbitration clause should be deemed as an arbitration agreement reached between the parties before the dispute occurred. The arbitration agreement shall be valid, since it contained definite expression of intention to request arbitration and matters for arbitration and selected CIETAC to conduct the arbitration and had the necessary elements that an arbitration agreement shall have according to the law. Moreover, the arbitration agreement did not fall under the circumstance of invalidity. Cambodia Fiber Optic Company argued that the

29 Civil Ruling (Jing 74 Min Te [2022] No.5), Beijing Financial Court, May 23, 2022.

arbitration clause was a standard clause without prompting or explanation. However, it failed to prove to the Court that the text of the *Foreign Exchange Loan Contract* was prepared by China Development Bank in advance for repetitive use without consultation of the parties. In addition, even though the text of the Contract contained standard clause, the dispute resolution method was applied equally to the parties, which was not an exemption clause, nor a clause of increasing the liability of Cambodia Fiber Optic Company. Therefore, the claim of Cambodia Fiber Optic Company lacked legal basis and was inadmissible.

Standard clauses are contract clauses which are prepared in advance for repetitive use by one party, and which are not negotiated with the other party in concluding the contract. [30]As the name implies, an arbitration clause in a standard form contract (hereinafter referred to as a "standard arbitration clause") refers to an arbitration clause in a standard form contract. There are divergent understandings in theory and practice on the factors that need to be examined to judge the validity of a standard arbitration clause. One view holds that a standard arbitration clause, as a dispute resolution clause, is a procedural clause. It does not directly specify the civil rights and obligations of the parties, cannot exclude the main rights of the parties, has the three elements that an arbitration agreement shall have as stipulated in Article 16 of the *Arbitration Law* and does not fall under the circumstances of invalidity as stipulated in Article 17 of the *Arbitration Law*, therefore it shall be valid. Such view is adopted in the above-mentioned *case of TANG's determination for the validity of an arbitration agreement* and the *Cambodia Fiber Optic Company case*. Another view holds that a dispute resolution clause is a main clause of a contract, which has a significant stake in the parties, and therefore the party providing the standard arbitration clause shall perform its obligations of prompting and

30 Article 496 of the *Civil Code of the People's Republic of China.*

explanation. The Court adopted this view in the case[31] *SU v. Beijing Zhongxiao Linghang Education Technology Co., Ltd. involving an application for determining the validity of an arbitration agreement.*

A standard arbitration clause implies a contradiction between "consent to arbitrate" and "no full negotiation on the standard form contract". According to Article 16 of the *Arbitration Law*, the expression of intention to apply for arbitration is an essential element in reviewing whether an arbitration clause is established, which inevitably involves the issue of whether the party accepting the standard arbitration clause has expressed an intention to arbitrate, that is, "whether it is aware of and agrees to the arbitration clause". When determining the validity of a standard arbitration clause, the Court shall, on the basis of the facts of the case, comprehensively examine whether the two parties have reached a consensus voluntarily. If the party providing the standard arbitration clause takes advantage of its dominant position to force the counterparty to sign such clause, the parties cannot freely express themselves as to whether or not to arbitrate, which arbitration agency and which arbitration rules to choose, which, as a matter of fact, deprives the accepting party of the standard arbitration clause of the right to choose dispute resolution and arbitration agency and arbitration rules, thus the accepting party shall be granted the right to raise an objection. In practice, attention shall also be paid to distinguishing such different circumstances as contracts signed between commercial subjects, contracts signed between operators and consumers, etc., so as to accurately judge the validity of a standard arbitration clause.

II. Legal Issues Concerning Applications for Setting Aside a Foreign-related Arbitral Award or an Arbitral Award Involving

31 Civil Ruling (Jing 04 Min Te [2023] No.269), Beijing Fourth Intermediate People's Court, May 4, 2023.

Hong Kong or Macao

A. Scope of Judicial Review

In the case[32] *Shenzhen Xingwang International Travel Agency Co., Ltd., Nanjing Branch v. GREEN ISLAND TRAVEL & TOURS SDN. BND* involving an application for setting aside an arbitral award, the claimant applied for setting aside the arbitral award on the ground that the facts found by the arbitral tribunal in the case were wrong, and the counterparty concealed the facts and provided a false contract, which led to the erroneous award made by the arbitral tribunal. The Court held that, pursuant to Article 70 of the Arbitration Law, where a party provides evidence proving that a foreign-related arbitral award falls under any of the circumstances prescribed in Article 258.1 (or Article 281 after amendment in 2021) of the Civil Procedure Law, the people's court shall, after examination and verification by its collegiate bench, rule to revoke the award. The ascertainment of facts and the application of law are both within the scope of performance of duties by the arbitral tribunal and are not within the scope of judicial review of arbitration conducted by the people's court. The ground based on which the claimant argued that the counterparty concealed facts and provided a false contract, which led to the erroneous award by the arbitral tribunal does not fall within the scope of review of foreign-related arbitral awards by the people's court under Article 70 of the Arbitration Law and other legal provisions, and therefore the case shall not be reviewed in accordance with the law.

In the case[33] *WANG Qingliang v. Shenzhen Huayuan Rongchuang Industry Co., Ltd. (hereinafter referred to as "Huayuan Company"), HE Zhiping, Shenzhen Yaotong Consulting*

32 Civil Ruling (Jing 04 Min Te [2022] No.757), Beijing Fourth Intermediate People's Court, July 29, 2022.

33 Civil Ruling (Jing 04 Min Te [2022] No.525), Beijing Fourth Intermediate People's Court, November 15, 2022.

Management Enterprise (Limited Partnership) (hereinafter referred to as "Yaotong Partnership" and WANG Haibo involving an application for setting aside an arbitral award, the claimant requested for revocation of the arbitral award on the ground that Huayuan Company, HE Zhiping and Yaotong Partnership concealed evidence which was sufficient to affect the impartiality of the arbitral award and the arbitrators perverted the law in the arbitration. The Court held that, pursuant to Article 70 of the *Arbitration Law*, the provisions of Article 281 of the *Civil Procedure Law* shall apply in the judicial review of a foreign-related arbitral award conducted by a people's court. The reasons for application proposed by the party that do not comply with the above provisions shall not be the basis for setting aside the foreign-related arbitral award. In this case, the reasons for application given by the claimant were that the counterparty concealed evidence which was sufficient to affect the impartiality of the arbitral award, and that the arbitrators perverted the law, neither of which fall within the scope of review of arbitral award involved in the case by the people's court.

In the case[34] *Shanghai Hydraulics & Pneumatics Co., Ltd. v. Kunshan Asia Machinery Co., Ltd. involving an application for setting aside an arbitral award*, the claimant requested for revocation of an arbitral award on the ground that the arbitral award made by the arbitral tribunal was contrary to facts, the evidence found to be forged, and the counterparty concealed evidence which was sufficient to affect the impartiality of the arbitral award. The Court held that the case involved judicial review of foreign-related arbitral award, pursuant to Article 70 of the *Arbitration Law*, the provisions of Article 281 of the Civil Procedure Law shall apply in the judicial review. The reasons for application proposed by the party that do not comply with the above provisions shall not be the basis for setting

34 Civil Ruling (Jing 04 Min Te [2022] No.432), Beijing Fourth Intermediate People's Court, November 15, 2022.

aside the foreign-related arbitral award.

B. Composition of an Arbitral Tribunal

In the case[35] *Shenzhen Gloshine Technology Co., Ltd. v. AED DISPLAY NV involving an application for setting aside an arbitral award,* the claimant requested for revocation of an arbitral award on the grounds that the amount in dispute of the arbitration case exceeded 5 million yuan but the arbitral tribunal did not consult with the two parties, and applied the summary procedure with a sole arbitrator hearing the case, which was contrary to the arbitration rules. The Court held that, in accordance with Article 56.1 of the arbitration rules, unless otherwise agreed by the parties, the summary procedure shall apply where the amount in dispute does not exceed 5 million yuan, or the amount in dispute exceeds 5 million yuan yet one party applies for arbitration under the summary procedure in writing and obtains the written consent of the other party or both parties have agreed to apply the summary procedure. The Court held that the "subject matter in dispute" refers to the contractual obligations claimed by the parties, rather than the specific amount of the claim. Therefore, in light of the facts that the arbitral tribunal heard the case and made an award, the application of the summary procedure to the case was not inappropriate since the amount in dispute did not exceed 5 million yuan, and there was no circumstance under which the arbitral tribunal would deprive the parties of their right to appoint arbitrators due to the application of the summary procedure. Therefore, the claimant's argument that the composition of the arbitral tribunal was inconsistent with the arbitration rules was untenable.

C. Failure to Hold a Court Session for Modification or Addition to

35 Civil Ruling (Jing 04 Min Te [2022] No.637), Beijing Fourth Intermediate People's Court, December 27, 2022.

Claims After Trial

In the case[36] *China Intelligent Transportation Systems (Holdings) Co., Ltd. (hereinafter referred to as "ITS") v. Beijing Zhonghe Shengtai Technology Co., Ltd. (hereinafter referred to as "Zhonghe") involving an application for setting aside an arbitral award*, the claimant requested for revocation of an arbitral award on one of the grounds that the arbitral tribunal failed to conduct another hearing and cross-examination with respect to Item (2) of the amended claim, depriving of the claimant's right to make a counterclaim and a defense to this claim and violating the statutory procedures. The Court held that "violation of the statutory procedures" refers to the circumstances where the arbitration procedures provided in the Arbitration Law are violated and where arbitration rules selected by the parties may affect the correct ruling of the case. The discretion of the arbitral tribunal within the scope permitted by the arbitration rules cannot be regarded as a violation of the statutory procedures. Based on the information clearly stated in the award, The Court held that ITS had provided adequate defense to Item (2) of the arbitration claim, and that the arbitration did not fall under the circumstance of "failure to make statement due to reasons not attributable to the respondent". In this case, the arbitral tribunal handled the written application for amendment of arbitration claims submitted by Zhonghe after the hearing in the manner it deemed appropriate, which neither violated the arbitration rules, nor fell within the scope of violation of the statutory procedures. Therefore, the Court rejected the application filed by ITS.

D. Identification of the Obligation of Disclosure and Circumstance of Recusal

36 Civil Ruling (Jing 04 Min Te [2023] No.1), Beijing Fourth Intermediate People's Court, March 2, 2023.

In the case[37] *Beijing Yi'an Taiyu Trade Co., Ltd. (hereinafter referred to as "Yi'an Company") v. Ascend International Education Group Co., Ltd. (hereinafter referred to as "Ascend Company") involving an application for setting aside an arbitral award*, the claimant requested for revocation of arbitral award on one of the grounds that the presiding arbitrator SUN had conflict of interests with the respondent's agent and the partner of the law firm where the agent works, which might affect the impartiality of the award and should have been disclosed but failed to do so, and the composition of the arbitral tribunal was in violation of the statutory procedures. The respondent argued that the presiding arbitrator SUN did not have matters which shall be disclosed as required by the law. The Court held that, pursuant to Article 31 "Disclosure" of the *Arbitration Rules of the CIETAC*[38], "(1) An arbitrator nominated or appointed shall sign a Declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. (2) If circumstances that need to be disclosed arise during the arbitral proceedings, the arbitrator shall promptly disclose such circumstances in writing." Therefore, reasonable disclosure is the obligation that shall be performed by arbitrators in order to protect the parties' right to know. For circumstances that may lead to justifiable doubts as to arbitrators' impartiality and independence, the parties to the arbitration may apply to the arbitration commission for recusal of the arbitrator in due time based on the information disclosed by the arbitrator. Generally speaking, the information to be disclosed should include that the arbitrator has interest relationship with the parties to the arbitration or with the result of the arbitration. The general connections between persons arising out of social activities do not fall under circumstances that may give rise to justifiable doubts as to arbitrators' impartiality and

37 Civil Ruling (Jing 04 Min Te [2022] No.540), Beijing Fourth Intermediate People's Court, November 18, 2022.

38 CIETAC, http://www.cietac.org.cn/index.php?m=Page&a=index&id=65, last visit on June 29, 2023.

independence, and therefore should not be disclosed by arbitrators. As the matter for recusal raised by the claimant fell within the scope of general connections in social activities, it could not be directly determined that the presiding arbitrator SUN had an interest relationship with Ascend Company or the result of the arbitration. Therefore, the participation of the presiding arbitrator SUN in the arbitral tribunal for arbitration did not constitute a violation of the arbitration rules. The application of Yi'an Company was not supported.

In the case[39] *SESDERMA, S.L. v. GOLONG CO., LIMITED (hereinafter referred to as "GOLONG") involving an application for setting aside an arbitral award*, the claimant requested for revocation of the arbitral award based on main reasons that arbitrator DAI failed to perform the obligation of disclosure, both DAI and the presiding arbitrator LIU should have recused but failed to do so, and the composition of the arbitration tribunal or the arbitration proceedings did not comply with the arbitration rules. The Court held that the disclosure and recusal were procedural arrangements to ensure that arbitrators could perform their duties in a compliant manner and hear the case impartially, and that arbitrators should hear the case impartially and independently in accordance with the laws and the arbitration rules. According to Article 31 of the *Arbitration Rules* of CIETAC, "(1) An arbitrator nominated or appointed shall sign a Declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. (2) If circumstances that need to be disclosed arise during the arbitral proceedings, the arbitrator shall disclose such circumstances in writing promptly. (3) The Declaration and/or disclosure of the arbitrator shall be submitted to the arbitration court of the arbitration commission and transmitted to the parties." Article 34 of the *Arbitration Law* stipulates that, "In any of the following

39 Civil Ruling (Jing 04 Min Te [2023] No.88), Beijing Fourth Intermediate People's Court, April 10, 2023.

circumstances, an arbitrator must recuse from the arbitration and the parties shall have the right to apply for such recusal: (1) he/she is a party to the case or a close relative of the party or its agent; (2) he/she has a personal interest in the case; (3) he/she has some other relationship with a party to the case or its agent, which may affect the impartiality of the arbitration of the case; or (4) he/she has privately met a party or its agent, or has accepted a treat or gift from the party or its agent." Because reasonable disclosure is a valid prerequisite for recusal, an arbitrator shall voluntarily disclose all facts or circumstances that may affect his/her impartiality or independence, so as to ensure that arbitration commission and the parties to the arbitration are reasonably informed and to further decide whether the arbitrator should recuse. However, as no social activity is isolated, people will inevitably form relevance and connections in their daily lives. Therefore, the judgment of reasons for disclosure or recusal should not only be based on the general relevance and connections existing in social life, but shall focus on whether the arbitrator has direct or indirect interest in the parties to the case and the arbitration result, and whether the specific facts or circumstances will lead to justifiable doubt of the arbitrator's impartiality or independence. Generally speaking, the people's court shall judge a case based on matters provided by laws and arbitration rules.

The Court held that arbitrator DAI left T&C Law Firm in 2002, which exceeded the period "of working for the same entity with a party or its agent currently or within two years" as specified in Article 7 of the Survey of Arbitrators, and the communication between lawyers of T&C Law Firm and Zhejiang High Mark Law Firm took place on October 19, 2018, not during the hearing of the arbitration case. Such communication should be recognized as normal relevance and connection in social life. Therefore, the existing evidence is insufficient to prove that arbitrator DAI falls under circumstances that are sufficient to raise justifiable doubt as to his impartiality and independence as provided under the *Arbitration Law* and the arbitration rules. Arbitrator DAI's failure

to disclose the matters raised by SESDERMA, S.L., or to recuse from the arbitration case, would not cause the composition of the arbitration tribunal against the arbitration rules. As to the recusal of the presiding arbitrator, SESDERMA, S.L. had raised the same argument as that raised in this case during the arbitration proceedings. CIETAC responded, holding that it did not fall within the scope of circumstances of recusal as provided in the Arbitration Law and the arbitration rules, and therefore made a decision on no recusal of arbitrator LIU. The arbitration proceedings shall proceed. The above decision is appropriate. The arbitration tribunal rejected the application of SESDERMA, S.L.

In the case[40] *Ruili Airlines Co., Ltd., Yunnan Jingcheng Group Co., Ltd. and DONG v. CLC Aircraft Leasing (Tianjin) Co., Ltd. (hereinafter referred to as "CLC") involving an application for setting aside an arbitral award*, the claimants requested for revocation of the arbitral award on one of the grounds that the employer of Rollin Chan, the arbitrator appointed by CLC, had significant interests in IMF Bentham Limited, the third-party financing institution; and the Nixon Peabody CWL, the law firm where arbitrator CHAN worked, had business dealings with HSBC Group and JPMorgan Group, the de-facto controllers of the two major shareholders of IMF Bentham Limited of the CLC. Arbitrator CHAN failed to disclose the above situation, nor did he recuse from the arbitration case on his own initiative. Therefore, the composition of the arbitral tribunal was inconsistent with the arbitration rules. The Court held that the disclosure of information by an arbitrator should be based on the premise that the arbitrator knew or should have known of the existence of facts and circumstances that might lead to reasonable doubts upon his/her impartiality and independence, and the requirement for recusal should be based on the satisfaction of the conditions for recusal as provided by the law or the arbitration rules. The arbitrators shall not be held in violation of the

40 Civil Ruling (Jing 04 Min Te [2022] No.368), Beijing Fourth Intermediate People's Court, November 4, 2022.

information disclosure obligation or the procedural provisions on recusal if the affiliated relationship existing in their social life and contacts fails to reach the extent that it is sufficient to affect the independent and impartial hearing and award of the arbitration as prescribed by law and the arbitrators should not have been aware of such affiliated relationship. In this case, existing evidence was insufficient to prove that arbitrator CHAN had an interest in the third-party financing institution involved in this case, and there were no circumstances in which he should have recused but failed to do so under the Arbitration Law or the arbitration rules, which might affect the impartiality of the award. The arbitrator performed his information disclosure obligation in accordance with the provisions of the arbitration rules on arbitrators' information disclosure, and existing evidence was also insufficient to prove that CHAN and the third-party financing institution involved in this case were subject to any facts or circumstances that might give rise to reasonable doubts as to their impartiality and independence. Therefore, the Court did not uphold the claimants' argument that the arbitrator's failure to perform his information disclosure obligation and violation of the recusal provisions, resulting in the composition of the arbitral tribunal against the arbitration rules.

The above cases involve the identification of disclosure obligation of arbitrators and the circumstances of recusal. The disclosure and recusal system for arbitrators is a concrete measure to ensure the independence and impartiality of arbitrators. Based on the obligation of independence and impartiality, arbitrators have a duty to disclose any circumstances that are "likely" to give rise to reasonable doubts as to their impartiality.[41] The *UNCITRAL Model Law on International Commercial Arbitration*[42](hereinafter the

41 Article 12.1 of the *UNCITRAL Model Law on International Commercial Arbitration.*

42 UNCITRAL, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/zh/19-09954_c_ebook_1.pdf, last visit on June 29, 2023.

UNCITRAL Model Law in short) and the laws of many countries impose disclosure obligations on arbitrators. In practice, it is more difficult to grasp the scope of the arbitrator's disclosure obligation and the relationship between disclosure and recusal.

Firstly, the scope of arbitrator's disclosure obligation. According to Article 12 of the *UNCITRAL Model Law*, an arbitrator's disclosure obligation is to disclose any circumstances that are "likely" to give rise to reasonable doubts as to his/her impartiality. The *IBA Guidelines on Conflicts of Interest in International Arbitration*[43] provide clear and specific guidance on disclosure by arbitrators. The PRC Arbitration Law does not specify the arbitrator's disclosure, but the arbitration rules[44] of some arbitration institutions have provisions on the disclosure by arbitrators. It is generally and uniformly described as "facts or circumstances that are likely to give rise to reasonable doubts as to the arbitrator's impartiality or independence." In practice, it is not easy to determine which matters fall within the scope of arbitrator's disclosure and which ones do not need to be disclosed. For example, the arbitrator serves as the legal counsel of the party, and the consultant relationship has been terminated for less than 2 years; the agent of one party to the arbitration is the current arbitrator of the arbitration institution, or there is association or business dealings between the employer of the arbitrator and the service agency where the agent of the party works. We consider that, under normal circumstances, an arbitrator should disclose all the facts or circumstances that may affect his/her impartiality or independence in accordance with the law and the arbitration rules, so that the arbitral tribunal can decide whether or not to recuse him/her. The arbitrators

43 IBA, https://www.ibanet.org/MediaHandler?id=5b219797-0407-4233-a7e0-edb0543a0417, last visit on June 29, 2023.

44 Article 31 of *Arbitration Rules of the CIETAC, Article 22 of Arbitration Rules of the Beijing Arbitration Commission, Article 32 of Arbitration Rules of the Shenzhen Court of International Arbitration*, and Article 37 of Arbitration Rules of the Guangzhou Arbitration Commission.

shall not be deemed to be in breach of their information disclosure obligations if the association relationship that has existed in their social life and contacts does not reach the level required by law or arbitration rules to sufficiently affect the independent and impartial hearing and award of the arbitration, and the arbitrators are not supposed to have knowledge of such relationship.

Secondly, the relationship between disclosure and recusal. As mentioned above, according to Article 12 of the *UNCITRAL Model Law*, the duty of disclosure of an arbitrator is to disclose any circumstance that "may give rise" to justifiable doubts as to his/her impartiality; and "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence, or if he/she does not possess qualifications agreed to by the parties." This means that the scope of the duty of disclosure of an arbitrator is broader than that of grounds for challenge. In addition, the adverse effect of breach of the duty of disclosure may lead to the recusal of an arbitrator, and even revocation or non-enforcement of an arbitral award. Breach of the provision on recusal of arbitrators usually constitutes a ground for revocation or non-enforcement of an arbitral award.

E. Identification of Circumstances Beyond the Arbitral Authority

In the case[45] *Classic (Beijing) Investment Co., Ltd. v. Memo's International Development Limited and Hebei Memo's Furniture Co., Ltd. involving an application for setting aside an arbitral award*, the claimant requested for setting aside the arbitral award on one of the grounds that items (2) to (5) of the arbitration claim were not within the scope of arbitration, and thus Beijing Arbitration Commission had no authority to arbitrate. The

45 Civil Ruling (Jing 04 Min Te [2022] No.673), Beijing Fourth Intermediate People's Court, November 23, 2022.

Court was of the opinion that when a people's court conducted a review as to whether the award exceeded the scope of arbitration of the arbitration institution, the object of the review should be the items under the award rather than the arbitration claims. As the items under the award did not exceed the scope of arbitration as agreed in the arbitration clause in Article 10 of the *Letter of Intent* and did not exceed the scope of the claims, such ground of the claimant was not admitted. The Court rejected the application by Classic (Beijing) Investment Co., Ltd.

In the case[46] *Liu & Wang, Attorneys at Law (hereinafter referred to as "Liu & Wang" in short) v. Jiangsu Jiude Investment Management Co., Ltd. involving an application for setting aside an arbitral award*, the claimant requested for setting aside the arbitral award on one of the grounds that the matters of the award did not fall within the scope of the arbitration agreement or that the arbitration commission had no authority to arbitrate. The Court believed that a people's court shall review the response of the arbitral tribunal after the substantive hearing to the arbitration claim or counterclaim made by the parties under the award, which shall be specifically the section "the award is made as follows" after the opinions of the arbitral tribunal. The facts found by the arbitral tribunal based on the evidence may involve other contents relating to the contract or dispute involved in the case. The review of other related matters involved in the finding of facts by the arbitral tribunal does not constitute an award exceeding the scope of the arbitration agreement or matters that can be arbitrated by the arbitration commission. After reviewing all the grounds and bases put forward by Liu & Wang, the Court was of the opinion that the arbitral tribunal's examination of the *Listing Agreement* was to confirm whether the arbitration claim of Liu & Wang in relation to the *Cooperation Agreement*

46 Civil Ruling (Jing 04 Min Te [2022] No.175), Beijing Fourth Intermediate People's Court, September 28, 2022.

could be supported, the award did not exceed the scope of the arbitration agreement of the *Cooperation Agreement* and did not fall within the scope of matters that the arbitral award had no authority to arbitrate. Therefore, the grounds put forward by Liu & Wang that "the matters of the award did not fall within the scope of the arbitration agreement, or the arbitration commission had no authority to arbitrate" were untenable.

F. Review of an Arbitral Tribunal's Handling of an Application for Expertise

In the case[47] *CHEN v. another CHEN involving an application for setting aside an arbitral award,* the claimant requested for setting aside the arbitral award on one of the grounds that CHEN explicitly expressed refusal to accept the authenticity of the *Confirmation of Claims and Debts and the Debt-for-Equity Swap Resolution* and insisted on applying for handwriting authentication in oral or written form several times; however, the arbitral tribunal never started the authentication procedure, which violated the pre-legal procedure that jurisdiction should be examined and determined in advance for arbitration. The Court held that Article 35.1 of the Arbitration Rules provides that if a party applies for expertise and the arbitral tribunal agrees, or if a party does not apply for expertise but the arbitral tribunal deems it necessary, the parties may be notified to jointly select an expert within a time limit specified by the arbitral tribunal or the arbitral tribunal may designate an expert. Therefore, the arbitral tribunal was empowered to decide whether to start the appraisal procedure. For the application of CHEN, the arbitral tribunal decided not to approve the application after taking into account various factors and provided a full explanation in the arbitral award. The arbitral procedures

47 Civil Ruling (Jing 04 Min Te [2022] No.688), Beijing Fourth Intermediate People's Court, November 16, 2022.

involved in the case did not violate the relevant provisions of the *Arbitration Rules*. Therefore, CHEN's claim that the arbitration violated the legal procedure should not be supported.

G. Appropriate Notice of Arbitration

In the case[48] *LIU and Henan Fuerhaotai Hotel Co., Ltd. (hereinafter referred to as "Fuerhaotai Hotel") v. Tianrui Hotel Investment Co., Ltd. (hereinafter referred to as "Tianrui Hotel") and Super 8 (Beijing) International Hotel Management Co., Ltd. (hereinafter referred to as "Super 8 Hotel") involving an application for setting aside an arbitral award*, the claimants requested for setting aside the arbitral award on the grounds that the arbitral tribunal violated the legal procedure, by not effectively serving the documents on them. The Court found that the CIETAC sent relevant documents by express courier respectively to the addresses of LIU and Fuerhaotai Hotel as provided by Tianrui Hotel and Super 8 Hotel in the arbitration application. It was shown that the documents were returned. Thereafter, the arbitral tribunal served the above documents to LIU and Fuerhaotai Hotel by way of notarization. The Court held that, based on the statements of Tianrui Hotel and Super 8 Hotel as well as the explanations and evidentiary materials provided by CIETAC on the issue of service, the CIETAC had served the arbitration notice, the *Arbitration Rules* and the *Panel of Arbitrators* on LIU and Fuerhaotai Hotel in accordance with the arbitration rules. The service of arbitration did not violate the legal procedure, and the arbitration procedures are not in conflict with the arbitration rules.

H. Review of Violation of Public Interest

48 Civil Ruling (Jing 04 Min Te [2022] No.126), Beijing Fourth Intermediate People's Court, November 8, 2022.

In the case[49] *JST Logistics Co., Ltd. (hereinafter referred to as "JST") v. Jinchuan Maike Metal Resources Co., Ltd. (hereinafter referred to as "Jinchuan") involving an application for setting aside an arbitral award,* the claimant requested for setting aside the arbitral award on one of the grounds that Jinchuan conducted overseas futures trading in violation of licensing regulations and foreign exchange control regulations. The arbitral award requested JST to compensate Jinchuan for the losses arising from the illegal overseas futures trading and requested JST to pay the import value-added tax which should have been payable to the state to Jinchuan, which was contrary to the public interest. The Court held that the compensation for losses and lawyer's fee payable by JST to Jinchuan, which was confirmed in the arbitral award, only involved the two parties, not the public interest. Neither the claim nor the arbitral award contained the content of "payment of import value-added tax", and the arbitral award did not exceed the scope of the claim put forward by Jinchuan. Therefore, the Court rejected JST's application.

In the case[50] *LI and ZHONG v. Foshan North-South Huitong Micro-lending Co., Ltd. (hereinafter referred to as "North-South Huitong Company") involving a dispute over the application for setting aside an arbitral award*, the claimants requested for setting aside the arbitral award on the grounds that the actual lender in this case was the professional lender YAO, who signed a loan contract in the guise of a small loan company to cover up the facts of illegal lending by professional lenders under a legal form to obtain high illegal interests. Therefore, the arbitral award supporting his claim not only violated the law but also went against the public interest. Even if North-South Huitong Company used YAO's account to lend and receive money, it was also an illegal act to commit tax

49 Civil Ruling (Jing 04 Min Te [2022] No.570), Beijing Fourth Intermediate People's Court, November 23, 2022.

50 Civil Ruling (Yue 06 Min Te [2022] No.258), Foshan Intermediate People's Court, Guangdong, November 9, 2022.

evasion, and the arbitral award supported its claim, which damaged the national interest and public interest. The Court held that the so-called violation of the public interest refers to the act that violates the common interests of the most fundamental legal principles and moral standards with the public as the interest subject and endangers the whole society. The violation of the public interest proposed by LI and ZHONG shall be represented by the form of violations of the basic system and standards of the Chinese law, violations of the basic values of the social and economic life, endangering the public order and life order, and violations of the basic moral standards commonly recognized and observed by all members of the society. The arbitral award involved in the case deals with the dispute arising from the loan contract between LI, ZHONG and North-South Huitong Company. It only involves the creditor's rights and debts between the parties, and the existing evidence cannot prove that the arbitral award is contrary to the public interest. Therefore, the arbitral award rejected the application of LI and ZHONG.

In the case[51] *Sinopec Chemical Commercial Holding (Hong Kong) Company Limited (hereinafter referred to as "Sinopec Hong Kong") v. Supmaterial Pte. Ltd. (hereinafter referred to as "Supmaterial") involving an application for setting aside an arbitral award*, the claimant requested for setting aside the arbitral award on the main grounds that the arbitral tribunal determined that Supmaterial had performed the obligation to deliver the goods based on the cargo receipt issued by the warehouse company, which was consistent with the evidence in the Criminal Judgment (Lu Xing Zhong [2018] No. 111) identifying the fact of fraudulent transaction. The determination that Supmaterial had performed the obligation to deliver the goods based on such receipt confirmed

51 Civil Ruling (Jing 04 Min Te [2022] No.333), Beijing Fourth Intermediate People's Court, December 27, 2022.

the legality of its criminal act and was contrary to the public interest. Meanwhile, an arbitration case heard by the CIETAC in 2015 involved the same dispute and basic facts as this arbitration case and involved criminal litigation. The rulings of the two arbitration cases were completely contradictory to each other, damaging the judicial authority and violating the public interest. The Court held that the arbitral award of this case had stated clearly that the document transaction itself was insufficient to ascertain the fact of occurrence of a legal relationship of sale and purchase; the arbitral tribunal's ascertainment of the facts was based on the specific provisions of the contracts in question, the interrogation transcripts of JIAO Chen, the emails sent by Sinopec to Supmaterial, etc. Therefore, the reasons proposed by Sinopec Hong Kong that the arbitral tribunal's ascertainment of facts on the basis of illegal and criminal act could not be established. Secondly, the arbitral award of this case clearly stated that the basic facts of this arbitration case were different from those of another arbitration case, and the facts ascertained by the arbitral tribunal fell within the scope of the exercise of arbitration power, rather than a statutory cause for revocation of an arbitral award as provided in Article 281 of the *Civil Procedure Law*; therefore, the arbitral tribunal had the power to ascertain facts and render an award in accordance with the law, and the act of ascertaining facts did not violate the public interest. Moreover, the arbitral tribunal ascertained the facts based on lawful evidence, and the award only affected the parties, but did not involve the public interest. The arbitral tribunal rejected the application of Sinopec Hong Kong.

In the above cases, the Court did not determine that the arbitral award violated the public interest, mainly because the arbitral award mainly affected the interests of the parties and did not involve the public interest.

When the Court judges whether the arbitral award violates the public interest, it

needs to consider two identifying characteristics of "public policy"[52] in the process of arbitration-related judicial review, namely systematic (fundamental) and public nature. Systematic (fundamental) nature is the main identifying characteristic of the concept "public policy". The systematic nature of the concept "public policy" is mainly reflected in that it reflects "the vital interests of the state or society or the basic principles of law and morality of a country". Systematic nature and public nature are complementing each other. On the basis of public nature, "public policy" inevitably contains at the same time systematic or fundamental value content. However, having the public feature does not necessarily constitute "public policy". Merely having the public feature, an interest is likely to merely constitute a public interest event or a public interest view. Only when systematic or fundamental conditions are superimposed, may an interest become a social public interest.

Public nature is another identifying characteristic of "public policy". Some scholars believe that social public interest is the public interest usually referred to in theory of law, it refers to the interest of all members of the society. The core content of the category of social public interest is its public nature, the basic connotation of which is public value abstracted from private interest to meet the public needs of all or most members of the community through public procedures and led by the government under specific social and historical conditions. [53]The public characteristic of "public policy" makes this concept different from other interest categories lacking public characteristics in the concept of "public policy", such as interests of specific parties to disputes frequently arising in commercial arbitration, interests of non-specific small groups radiated and influenced by the interests of parties to arbitration, interests

52 In the legislation of PRC, "public policy" is expressed as "public interest" or "public order and good morals".

53 JIANG Bixin, ed. *A Practical Guide to Understanding and its Application of the Civil Procedure Law of the People's Republic of China*, Law Press China, 2015, p. 226.

of other individual groups in society, interests of local governments, etc. From the perspective of arbitration-related judicial review, the public nature of "public policy" mainly refers to whether it violates the common interests involving the whole country and social levels in terms of politics, law, economy, culture, morality with the public as the interest subject.

It is worth noting that what constitutes "public nature" cannot be judged simply by the legal relations or the number of parties to the arbitral award. The "public nature" pays attention to the scope radiated and influenced by interest, principle or value, not the original subject of interest, principle or value. According to the standard of "public nature", the task of judicial review is to explore how to establish a reasonable logical relationship in the specific case or between the interests of the parties and the public interest. If such reasonable logical relationship is lacking, if there is no fine deduction and distinction of the composition of "public nature", then almost all the arbitration matters related to individuals or local governments can eventually fall into the fence of "public policy". The way to solve this problem is that when defining the elements of "public nature", we must take "fundamental nature" into the consideration, and "public nature" must be the "public nature" that reflects the "fundamental nature".[54]

III. Legal Issues Concerning Applications for Acknowledgement (Recognition) and Enforcement of Foreign Arbitral Awards, and Arbitral Awards Made in Hong Kong or Macao

A. Scope of Judicial Review

54 LI Na, *A Study of "Public Policy" in the Practice of Judicial Review of Arbitration, published in Beijing Arbitration Quarterly*, Vol. 1, 2022 (total Vol. 119).

In the case[55] *Novator Co., Ltd., Volgograd, Russian Federation (hereinafter referred to as "Novator Russia") v. Wudi Deda Agriculture Co., Ltd. (hereinafter referred to as "Wudi Deda") involving an application for recognition and enforcement of the Arbitral Award No. M-74/2021 issued by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation*, the respondent refused to recognize and enforce the arbitral award in dispute on the main grounds that the respondent was not the subject of contract involved in the case; and Wudi Deda Agriculture Company registered in Hong Kong was the contract subject involved in the case. The Court held that the Russian Federation, where the arbitral award in question was rendered, was a contracting state of the *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[56] (hereinafter referred to as the "*New York Convention*"), and the dispute resolved by the arbitral award fell under the scope of disputes arising from a commercial legal relationship under PRC law, thus the *New York Convention* shall apply in the review of the arbitral award in question. Novator Russia had submitted the documents prescribed in Article 4 of the New York Convention, including the arbitral award and the arbitration agreement between the parties (i.e., the arbitration clause in the *Raw Materials Supply Contract*), which had been confirmed by the Court.

In this case, the respondent refused to recognize and enforce the arbitral award on the main ground that the respondent was not the subject of contract involved in the case but Wudi Deda Agriculture Company registered in Hong Kong. Upon review, The Court held that the contract in this case clearly stated that the seller was Wudi Deda Agriculture Company, with its domicile in Wudi, and the payee was Wudi Taijia Agriculture

55 Civil Ruling (Lu 16 Xie Wai Ren [2022] No.2), Binzhou Intermediate People's Court, Shandong, February 3, 2023.

56 UNCITRAL, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/zh/new-york-convention-c.pdf, last visit on June 29, 2023.

Development Co., Ltd. Moreover, the parties to the foreign-related arbitral award in this case were also the claimant and the respondent. Therefore, the respondent was a party to the contract in this case and the respondent's claim that it was not a party to the contract in this case cannot be established. In terms of the matters reviewed by the Court ex officio, upon review of the arbitral award, The Court held that the matters in dispute between the two parties can be resolved by means of arbitration in accordance with PRC law, and the recognition or enforcement of the arbitral award does not constitute a violation of public order. Therefore, the arbitral award in question does not fall under any of the circumstances of refusal of recognition and enforcement set forth in Article 5 of the *New York Convention*, and thus it shall be recognized and enforced.

In the case[57] *IBIAR Corporation (hereinafter referred to as "SIBIAR") involving an application for the recognition and enforcement of arbitral award No. M-1/2020 issued by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation*, the respondent did not raise a defense of non-recognition of the award when it received the arbitral award. Its argument was that the principal due was consistent with the claim of the claimant, but the respondent, Kema Company had already commenced bankruptcy proceedings. According to the provisions of the *Enterprise Bankruptcy Law of the People's Republic of China*, the corresponding interest on overdue payments should be calculated until the date on which the Court ruled to commence the bankruptcy proceedings, i.e. February 3, 2021. The Court held that this case involved an application for the recognition of a foreign arbitral award. According to Article 290 of the *Civil Procedure Law of the People's Republic of China*, if an award made by a foreign arbitral institution needs to be recognized and enforced by courts of the

57 Civil Ruling (Su 02 Xie Wai Ren [2022] No.1), Wuxi Intermediate People's Court, Jiangsu, December 21, 2022.

People's Republic of China, the party shall directly apply to the intermediate people's court of the place where the person subject to enforcement is domiciled or where such person's property is located. The people's court shall deal with the case pursuant to the international treaties concluded or acceded to by the People's Republic of China or under the principle of reciprocity. China and the Russian Federation have concluded the *Sino-Russian Treaty on Judicial Assistance*[58], Article 21 of which stipulates that, "Contracting parties shall recognize and enforce arbitral awards made in the territory of the other party in accordance with the Convention on recognition and enforcement of foreign arbitral awards signed on June 10, 1958 in New York." Therefore, the review shall be conducted in accordance with the relevant provisions of the New York Convention. In this case, the respondent, Kema Company, failed to make a defense of non-recognition of the arbitral award according to Article 5.1 of the New York Convention. After examination, the Court found that the arbitral award in question did not fall under the circumstances for refusal of recognition and enforcement under Article 5.2 of the *New York Convention*. The Court ruled that the arbitral award in question shall be recognized.

In the case[59] *Winteam Corporation Limited ("Winteam") v. Langcheng Real Estate Development (Dalian) Co., Ltd. involving an application for acknowledgement of a HK arbitral award*, the respondent acknowledged the receipt of a partial award and final award rendered by the HKIAC, but did not acknowledge the arbitral award in this case. The Court held that the arbitral award applied for acknowledgement by Winteam was an arbitral award made in the HKSAR in accordance with the *HKIAC Administered*

58 *Treaty on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the Russian Federation*, Ministry of Justice of the People's Republic of China, http://www.moj.gov.cn/pub/sfbgw/flfggz/flfggzflty/fltymsssfxzty/201812/t20181225_151340.html, last visit on June 29, 2023.

59 Civil Ruling (Liao 02 Ren Gang [2022] No.3), Dalian Intermediate People's Court, Liaoning, January 12, 2023.

Arbitration Rules[60], and therefore should be reviewed in accordance with the provisions of the *Arrangement of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*[61] (hereinafter referred to as the "*Arrangement*") and the Supplementary Arrangement of the *Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*[62]. Upon review, the Court found that there are no circumstances in respect of which a non-enforcement ruling may be rendered for the arbitral award in question as provided for in Article 7 of the Arrangement. The Court ruled that the arbitral award rendered by the HKIAC be recognized.

B. Review of Materials Submitted by the Parties

In the case[63] *ECOM AGROINDUSTRIAL CORP. LTD. SWITZERLAND v. Qingdao Jinhuadong International Trade Co., Ltd. involving an application for the recognition and enforcement of a foreign arbitral award*, the claimant applied to the people's court for recognition and enforcement of the foreign arbitral award in this case. The Court held that the arbitral award in question was made in the United Kingdom, and the United Kingdom and China are both members of the *New York Convention*. The relevant provisions of the *Civil Procedure Law* and the *New York Convention* shall apply to the review standards for the recognition and enforcement of the arbitral award involved in this case.

60 HKIAC, https://www.hkiac.org/zh-hans/arbitration/rules-practice-notes/hkiac-administered-2018, last visit on June 29, 2023.

61 The Supreme People's Court, https://www.court.gov.cn/shenpan-xiangqing-108.html, last visit on June 29, 2023.

62 Supreme People's Court, https://www.court.gov.cn/zixun-xiangqing-303291.html, last visit on June 29, 2023.

63 Civil Ruling (Lu 02 Xie Wai Ren [2021] No.3), Qingdao Intermediate People's Court, Shandong, February 25, 2022.

Article 4 of the *New York Convention* provides that, to obtain the recognition and enforcement, the party applying for the recognition and enforcement shall, at the time of the application, supply: (1) a duly authenticated original award or a duly certified copy thereof; (2) an original agreement or a duly certified copy thereof; and (3) if the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. Upon investigation, the claimant has submitted notarized and certified copies and the Chinese translation of the arbitral award and the agreement, and the submission of documents complies with the provision of Article 4 of the *New York Convention*, so the Court shall examine and approve the application.

As one of the conditions to initiate the recognition and enforcement procedure, Article 4 of the *New York Convention* provides the formal elements of the application for recognition and enforcement of foreign arbitral awards and specifies the materials to be submitted by the claimant. The said materials include original arbitral award that has been notarized and authenticated or a duly certified copy thereof; original arbitration agreement or a duly certified copy thereof. If the award or agreement is not made in the language of the country in which the award is relied upon, the claimant shall furnish a translation certified by an official or sworn translator or by a diplomatic or consular agent.[64]

Prior to the formal initiation of the recognition and enforcement procedure, the claimant shall submit relevant application documents in accordance with the formal requirements provided for in the Convention. Failure to provide them or to fully provide them will produce adverse consequences in terms of procedures. In order to avoid excessive delay

64 LI Shuangyuan, OU Fuyong, eds., Private International Law (5th ed.), Peking University Press, 5th edition 2018, p. 504.

in proceedings due to lack of formal elements after acceptance of a case, it is necessary for the Court accepting the case to impose a stricter obligation to submit documents on the claimant in the stage of examination and case filing in accordance with the provisions of the *New York Convention*. According to Article 105 of the *Minutes of the National Symposium on Foreign-related Commercial and Maritime Trial Work of Courts promulgated* by the Supreme People's Court on December 31, 2021, where the materials submitted by an claimant do not conform to Article 4 of the *New York Convention*, the people's court shall determine that the application does not meet the conditions for acceptance and make a ruling not to accept the application.

The situations after acceptance of cases become complicated. After putting a case on file, if the materials submitted by the claimant are found not in conformity with Article 4 of the *New York Convention*, there are different approaches in practice as to how to handle the case. If, after acceptance of a case, the materials submitted by the claimant are still found not in conformity with Article 4 of the *New York Convention*, the Court may conduct a comprehensive assessment taking into account the reasons for the claimant's failure to submit, the type and contents of materials to be supplemented, the time needed to submit such materials and other factors. If the submission of relevant supplementary materials may cause excessive delay in the review proceedings, the application shall be rejected by a ruling in accordance with the provisions of Article 105 of the aforesaid Minutes.

C. Arbitrability of the Matters in Dispute

In the case[65] *Louis Dreyfus Company Suisse SA v. Qingdao Free Trade Zone Cotton Exchange*

65 Civil Ruling (Lu 02 Xie Wai Ren [2021] No.19), Qingdao Intermediate People's Court, Shandong, March 16, 2022.

Market Co., Ltd. involving an application for the recognition and enforcement of a foreign arbitral award, the claimant applied to the Court for the recognition and enforcement of an arbitral award issued by the International Cotton Association; however, the respondent did not appear in court to present its opinions, nor did it submit written opinions. The Court held that the matters under arbitral award in this case are disputes over international commercial contracts and fall within the scope of disputes that may be resolved through arbitration in accordance with the provisions of the *Civil Procedure* Law and the *Arbitration Law*.

The arbitrability of disputes refers to what disputes can be resolved and what disputes cannot be resolved through arbitration as a means of dispute resolution.[66] It is generally considered that the issue of arbitrability is in fact a limitation on the scope of arbitration imposed by a country's law. An "arbitrable" dispute is one that a country permits to be settled by arbitration, while a "non-arbitrable" dispute is one that a country prohibits arbitration by law and insists on being heard by a national court (or other statutory body). Traditionally, the determination of arbitrability is based on the distinction between statutory claims and contractual claims. Disputes based on contracts are usually related to the formation of contracts, the laws governing the contracts, the performance of the contracts and the liability for breach of the contracts, etc., and they involve the rights that an individual may freely dispose of and that can be submitted to arbitration by agreement. Disputes based on laws (statutory laws), such as bankruptcy law, competition law, currency exchange law, import and export law, tax law, securities trading, etc., are usually beyond the scope of those that can be settled by arbitration upon agreement and do not have arbitrability.[67]

66 YANG Honglei, *Research on Issues Concerning the New York Convention from the Perspective of Judicial Practice in Mainland China*, Law Press China, 2006 Edition, p.326.

67 See Thomas E. Carbonneau with François Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, in 2 Tul. J. Int'l & Comat L. 193(1994), at 196.

Based on the existing provisions of the Arbitration Law of China, the matters that may be arbitrated are generally stipulated and the contents that cannot be arbitrated are also enumerated. Contractual disputes and other disputes over property rights and interests between citizens, legal persons and other organizations of equal status may be arbitrated. The following disputes cannot be arbitrated: (1) disputes over marriage, adoption, guardianship, maintenance and inheritance; (2) administrative disputes that shall be settled by administrative authorities according to law. In practice, it should be noted that the disputes to be settled by administrative authorities are usually closely related to the exercise of powers by administrative authorities. For example, disputes over the ownership of trademark often involve the legitimacy of the grant of power by a competent trademark authority, so it is understandable that such disputes are excluded from the arbitration jurisdiction. Furthermore, the request for invalidation or revocation of a patent cannot be submitted to arbitration, as such procedure affects the rights granted by a state administrative act, which cannot be disposed of by agreement of the parties. Therefore, such rights should be resolved through judicial means, which can establish or modify legal relationships that are binding on the parties concerned, but also on all.[68]

D. Procedures for Service of Arbitration

In the case[69] *ECOM AGROINDUSTRIAL CORP. LTD. SWITZERLAND v. Qingdao Jinhuadong International Trade Co., Ltd. involving an application for recognition and enforcement of a foreign arbitral award*, the Respondent refused to recognize and enforce

68 See Daniel Paul Simms, *Arbitrability of Intellectual Property Disputes in Germany*, in Arbitration International, Vol. 15, No. 2 (1999), at 194 to 197.

69 Civil Ruling (Lu 02 Xie Wai Ren [2021] No.3), Qingdao Intermediate People's Court, Shandong, February 25, 2022.

the arbitral award on one of the grounds that the respondent had not received the arbitration application nor the notice on the arbitration hearing, causing the arbitral tribunal to issue the arbitral award by default, and thus the arbitral proceedings were unlawful. The Court found out that the address of the Respondent was contained in the contract signed by the parties, but the registered address of the respondent was changed thereafter in business registration. The arbitral tribunal sent relevant materials such as the panel of arbitrators, the code of conduct of arbitrators and the arbitral award by e-mail to the e-mail box of the Respondent. The Respondent acknowledged in the hearing that × × @ 163.com was the e-mail box used by it. The Court held that the arbitral tribunal had served the Arbitration Notice, the Application for Arbitration, the Notice of Appointment of Arbitrators and the Arbitration Award on the Respondent via e-mail. Service by the arbitral tribunal to such e-mail box is in compliance with the arbitration rules and shall be deemed as successful. As for the respondent's defense that it failed to receive the notice of time and venue of the arbitration hearing, the Court ruled that no oral hearing was made, and it is not necessary to notify the Respondent of the time of the arbitration hearing. However, the arbitral award provided that the venue of the arbitration was Liverpool, England, which was in compliance with the requirements of the contract and the arbitration rules. Therefore, the respondent's defense is dismissed.

E. Failure to State Opinion for Cause

In the case[70] *N5 Capital Fund I, L.P. (hereinafter referred to as " N5 Capital") applying for the recognition and enforcement of an arbitral award HKIAC/A 20001 made by the HKIAC in Hong Kong*, N5 Capital applied for the recognition of the arbitral award

70 Civil Ruling (Jin 02 Ren Gang [2022] No.1), Tianjin Second Intermediate People's Court, December 28, 2022.

in this case made by the HKIAC. The respondent, Dharmall Group Ltd. (hereinafter referred to as "Dharmall Group"), claimed that since it was unable to state its opinion for cause, according to the provisions of Article 7.1.2 of the Arrangement, the arbitral award in this case should not be enforced in the Mainland. The Court held that Part Four of the arbitral award, "Procedural History", recorded in detail the communication process between the arbitral tribunal and the parties, including the detailed situation of the arbitral tribunal's service of relevant notices and instructions on the two respondents through paper documents and emails. The arbitral tribunal also received feedback from Dharmall Group and LI by email. As the service via email complies with the HKIAC administered arbitration rules, the notice served by the arbitral tribunal via email was also valid. Dharmall Group and LI also acknowledged that they were in contact with the arbitral tribunal before December 20, 2020, but after December 20, 2020, according to the records of the arbitral award, the arbitral tribunal did not conduct any other proceedings that may affect the rights and interests of the two respondents, and the two respondents did not adduce evidence to prove it. Therefore, their claim for the arbitral award in this case falls under the situation where the respondent fails to state its opinions for cause as provided for in Article 7.1.2 of the *Arrangement* has no sufficient basis. It was ruled to recognize and enforce the arbitral award in this case.

F. Subject Eligibility of a Party Not Involved in the Case for Applying for Non-Enforcement

In the case[71] *CITIC-CP Asset Management Co., Ltd. (hereinafter referred to as "CITIC-CP") applying for reconsideration*, the Court found that, in the arbitral award dispute between Golden Dragon International Investment Enterprise Limited (hereinafter

71 Enforcement Ruling (Jing Zhi Fu [2019] No.193-1), Beijing High People's Court, July 27, 2022.

referred to as "Golden Dragon International") and Beijing American Orient Bioengineering Co., Ltd. (hereinafter referred to as "Beijing American Orient"), the party not involved in the case CITIC-CP applied for non-enforcement of the arbitral award to Beijing Second Intermediate People's Court (hereinafter referred to as the "Beijing Second Court"). The Beijing Second Court held that existing evidence was insufficient to prove the legality of the rights or interests claimed by CITIC-CP and ruled to reject its application for non-enforcement. CITIC-CP applied to Beijing High People's Court (hereinafter referred to as the "Beijing High Court") for reconsideration. Both courts held that the following four conditions shall be met when the party not involved in the case applies for non-enforcement of an arbitral award: (1) the party not involved in the case is a subject of the rights or interests; (2) the rights or interests claimed by the party not involved in the case are legitimate and true; (3) there is a fictitious legal relationship between the parties to the arbitration case and the facts of the case are fabricated; and (4) part or all of the results concerning the handling of civil rights and obligations of the parties in the main text of the arbitral award or conciliation statement are wrong, thereby damaging the legitimate rights and interests of the party not involved in the case. In addition, the party not involved in the case should bear the burden of proving the aforesaid conditions. Based on the facts found out, Beijing High Court held that, in view of change of the facts of this case, CITIC-CP has the two constitutive elements that "a party not involved in the case is a subject of the rights or interests" and "its rights or interests are legitimate and true". Therefore, CITIC-CP is a qualified party not involved in the case and has the right to apply for non-enforcement of the arbitral award. In addition, subject to the extent of review of arbitral award enforcement procedures, existing evidence is insufficient to convince that there is a fictitious legal relationship between Golden Dragon International and Beijing American Orient and the case facts are fabricated. Therefore, it is difficult to support the application of CITIC-CP for non-

enforcement of the arbitral award. The application for reconsideration filed by CITIC-CP for non-enforcement of the arbitral award was rejected.

G. Where the Person Subject to Enforcement has No Property to be Enforced

In the case[72] *Louis Dreyfus Company Suisse SA v. Qingdao Free Trade Zone Cotton Exchange Market Co., Ltd. involving an application for recognition and enforcement of a foreign arbitral award*, the Court, in the process of enforcement, sent an enforcement notice to the person subject to enforcement according to law, ordering it to perform obligations within a certain period of time; however, the person subject to enforcement failed to perform its obligations within the period of time. The Court searched property information of the person subject to enforcement via inquiry and control system, including real estate, bank deposits, vehicles, securities and insurance, and did not find any other enforceable property of the person subject to enforcement so far. A property under the name of the person subject to enforcement awaiting seizure in turn could not be disposed of in this case. After an on-site investigation, it was found that the person subject to enforcement ceased its business operations, and the Court included the said person into the list of persons subject to restriction for high-level consumption. After a talk to the enforcement claimant for termination of the current enforcement procedure, the enforcement claimant agreed to terminate the enforcement procedure and applied for transfer from enforcement to bankruptcy since it was unable to provide clues to other enforceable property. In summary, the enforcement procedure shall be terminated in this case, and the enforcement claimant may apply for resumption of the enforcement when the conditions for enforcement are satisfied. The Court ruled to terminate the enforcement procedure.

72 Enforcement Ruling (Lu 02 Zhi [2022] No.262), Qingdao Intermediate People's Court, Shandong Province, on June 6, 2022.

Brief Summary

As an internationally accepted way to resolve economic and trade and investment disputes, arbitration plays an indispensable role in handling international commercial disputes, optimizing business environment and promoting international rule of law. China has always attached great importance to and supported the development of arbitration. With the promotion of the revision process of the Arbitration Law, the Ministry of Justice and the Supreme People's Court have successively released guiding cases and guiding documents on arbitration, encouraging to give full play to the advantages of arbitration, creating a good legal environment for improving and developing diversified dispute resolution mechanisms, stimulating continuous progress of arbitration practice and academic research, and promoting the healthy development of China's arbitration undertaking. Looking back on 2022-2023, China's theoretical research and practice of international commercial arbitration have mainly focused on the following hot issues and achieved positive progress:

Firstly, an overview of the development of international commercial arbitration in China. In 2022, China's arbitration undertaking has basically recovered to the level before the COVID-19 pandemic; the international influence and representativeness of arbitration institutions in China, as represented by CIETAC, has further expanded, and their international status and voice of such arbitration institutions in China have improved significantly. Under circumstance of the overall unfavorable impact on the number of arbitration cases accepted by arbitration institutions worldwide, the number of cases accepted by CIETAC has increased for the past three consecutive years, and the total amount in dispute has exceeded RMB100 billion yuan for five consecutive years. The degree of internationalization has been improved significantly, and the number

of foreign-related cases has increased greatly. In particular, international commercial arbitration involving the Belt and Road Initiative has yielded fruitful results. Among the 83 countries and regions involved in foreign-related cases, 32 are countries along the Belt and Road, covering all ten ASEAN countries. The types of cases are diversified, with construction engineering cases ranking the first in terms of both increase rate and number of cases. CIETAC has independently and impartially handled cases with complicated legal relationship, various transaction participants, high difficulty in hearing and high social concern represented by disputes in equity investment, finance, securities and construction projects according to the law, which are widely recognized and concerned in the industry. The team of arbitrators has been continuously enriched, adjusted and optimized. CIETAC has appointed a total of 591 foreign arbitrators, with the country coverage of foreign arbitrators expanded to key areas of the world, including the 112 countries and regions that have signed cooperation documents on the Belt and Road Initiative, covering six continents, thus achieving a global team of arbitrators. CIETAC's informatization and convenience of trade arbitration services have been significantly enhanced. In 2022, the number of online acceptance of cases accounted for nearly one third of the total number of cases accepted by CIETAC, and the number of online hearings accounted for nearly one half of the total number of hearings by CIETAC, with the cases involving parties from 49 countries and regions involved. The development of an electronic service platform for arbitration documents and an electronic signature and stamping system have significantly improved the process management efficiency. By holding the China Arbitration Week, the China Arbitration Summit Forum and the International Investment Arbitration Summit Forum, the joint promulgation of the Beijing Joint Declaration on Cooperation Mechanism among Arbitration Institutions for the Belt and Road Initiative and other influential international arbitration branding, CIETAC has been expanding the influence of arbitration in China, actively participated

in the formulation of international rules in the field of international arbitration, and built a bridge of cooperation, which reflects CIETAC's influence and new responsibility in international arbitration exchange and cooperation as a flag of China's international commercial arbitration sector.

Secondly, rethinking of the criteria for identifying and reviewing repetitive arbitration, comparing and summarizing case practices, analyzing the specific reasons for identifying repetitive arbitration, and accurately understanding the criteria for identifying repetitive arbitration, will provide a path for the self-correction of arbitration and the judicial review of repetitive arbitration by the courts. Repetition of arbitration is an important issue in the field of arbitration and judicial review. However, the relevant legislations and judicial interpretations in China have not explicitly put forward or defined the specific composition of the concept of repetition of arbitration and the criteria for identification thereof. Therefore, there are controversies in theory and practice on how to determine the unity of the subject matter of arbitration and how a court shall examine the issue of repetitive arbitration. The practice of current cases finds that, with respect to the ascertainment of "new facts" after the arbitral award for a previous case is rendered, courts and arbitral bodies generally tend to adopt a more flexible and expansive interpretation of the "new facts". Taking into consideration the value of arbitration itself, the judicial review of repetitive arbitration shall focus on the dispute resolution of individual cases, and flexibly determine the legal rules and theories adopted according to the basic facts of the cases, so as to achieve the fundamental goal of fair and reasonable dispute resolution. During the process of judicial review of arbitration, with respect to the identification of the subject matter of arbitration and "new facts", courts should, to the greatest extent possible, respect the theoretical views and understanding to the facts of the case adopted by the arbitral tribunal, and maintain judicial modesty, and should not apply the theoretical standards that courts are inclined to adopt to the determination

of repetitive arbitration.

Thirdly, this Annual Report sorts out the development and changes of international commercial arbitration rules that have important influences in the past five years, and explores the motives behind their evolution, in order to provide a model and reference for the development of China's arbitration undertaking. International commercial arbitration rules are not only the code of conduct for arbitrators, parties and other arbitration participants participating in arbitration activities, but also an important part of the core competitiveness of arbitration institutions. In recent years, under the circumstances of changes in user demands, catalyzed by scientific and technological revolution and boosted by the pandemic situation, important international commercial arbitration institutions such as the ICC International Court of Arbitration and the London Court of International Arbitration have modified their arbitration rules, which show the following development trends in the following five aspects: (a) humanism. The current international commercial arbitration rules place more emphasis on the parties as the center, and the third party funding system has been introduced one after another to provide the parties with funds for dispute resolution, while improving the transparency of the arbitration process and protecting the parties' right to know and right to supervise; (b) informatization. Remote hearing, electronic service of process and other technological means have become increasingly important to the promotion of arbitration proceedings and have been applied more and more widely in arbitration proceedings. Major international arbitration institutions have incorporated such technological means into their new arbitration rules, providing the parties and arbitral tribunals with a direct basis for operation; (c) high efficiency. Various arbitration institutions have issued arbitration rules for summary arbitration, expedited arbitration and small claims arbitration procedures, allowed multi-contract arbitration, consolidated arbitration, and the inclusion of a third party, introduced early rules of dismissal of arbitration

applications, adopted the emergency arbitrator system, simplified evidence discovery, shortened the time of hearing, promoted written trial, encouraged reconciliation, and strengthened such measures as the accounting of arbitrators' remuneration and expenses, and took other measures to save arbitration time and reduce arbitration costs; (d) integration. International commercial arbitration has absorbed and simplified evidence discovery, cross examination and other practices in the common law system. The systems of summary procedure, arbitration secretary and other systems that have been effectively implemented in China's arbitration practice for many years have been gradually adopted by the western arbitration system; and (e) convergence. The amendments to and solutions of international commercial arbitration rules are highly consistent, and arbitration institutions have learned from each other in competition. Chinese arbitration institutions should pay close attention to the latest evolution of international commercial arbitration rules, adhere to the party centralism, strive to improve the arbitration efficiency, adhere to scientific and technological empowerment to facilitate arbitration, and resonate with the comprehensive deepening of the reform of the arbitration mechanism and system. On the one hand, it is necessary to continue to learn from the advanced experience of international commercial arbitration. On the other hand, it is required to extract the "Chinese wisdom" from systems such as the combination of arbitration and mediation, summary procedure and the arbitration secretary, actively promote institutional innovation, promote the construction of an international arbitration center in the new era, so as to provide higher-quality arbitration services and guarantees for Chinese modernization.

Fourthly, it is required to study the practice of arbitration for legal disputes in the automotive industry from a whole-process perspective. With the rapid development of China's automotive industry, the continuous expansion of relevant business types in the automotive industry, and the popularization and upgrading of automotive consumption,

a number of problems and disputes have gradually become prominent. The legal disputes in the automotive industry are mainly characterized by the large number of cases, diversified types of disputes, complex disputes and strong specialization. By analyzing the typical arbitration practices of the automotive industry disputes, it is found that the procedural legal issues in arbitration cases in the automotive industry mainly lie in the determination of arbitration jurisdiction. Since many agreements may be signed during the long -term cooperation in the automotive industry, the expanded application of the arbitration clause of the master contract to the ancillary contract is reasonable from the point of view of ascertaining facts and ending disputes. However, the cornerstone of the commercial arbitration system is the autonomy of the parties, so more powerful theories are needed to support the expanded application of the arbitration clause of the master contract. Substantive legal issues run through the whole process of the automotive product R&D, manufacturing, international marketing and financial leasing, mainly involving legal difficulties such as the definition of the scope of technical materials in the technology license contract, the identification of the annual production plan, monthly order, the nature of monthly preview in parts purchase contract disputes and the identification of reasonable inventory, disputes over the overseas exclusive distribution agreement, leaseback and financial leasing. Arbitration for an industry is the inevitable trend of the development of arbitration system. For the future development of arbitration for the automotive industry, we may focus on the establishment of an arbitration center for the automotive industry based on the existing well-developed and more internationalized arbitration institutions, strengthen the exchange and cooperation between the arbitration institutions and the industry associations, formulate and improve the arbitration rules for the automotive industry, promote the contract templates for the automotive industry, greatly enhance the competitiveness and credibility of the arbitration institutions, and provide a favorable business environment under the rule of

law for the healthy development of the Chinese automotive market.

Finally, it has become a consensus that people's courts conduct limited judicial review of arbitration and support the promotion of arbitration proceedings and the enforcement of arbitral awards. This Annual Report continues to review and analyze the cases involving judicial review of international commercial arbitration conducted by the people's courts in China in the past year and comment on the legal issues involved. In terms of the application for determination of the validity of an arbitration agreement involving foreign elements or Hong Kong, Macao or Taiwan, the major issues mainly involve the governing law for the validity of an arbitration clause involving foreign elements, whether the parties have reached a consensus on arbitration, the determination of the eligible subject of an arbitration agreement, the inaccurate name of an arbitration institution, the determination of the validity of an arbitration clause on general matters, the determination of the validity of a unilateral arbitration clause, the determination of the validity of an arbitration clause in a standard contract, etc. In terms of the application for setting aside of an arbitral award involving foreign elements, Hong Kong or Macao, the major issues mainly focus on the composition of an arbitral tribunal, the claims changed or added after the hearing were not heard, the determination of the arbitral tribunal's obligation of disclosure and recusal, the determination of ultra vires ruling, the examination of the expertise application handled by an arbitral tribunal, the proper notice of arbitration, and the examination of whether the public interest is violated. In terms of the acknowledge (recognition) and enforcement of an arbitral award issued in a foreign country, Hong Kong or Macao Special Administrative Region, the major issues involved include the examination of materials submitted by the parties, the arbitrability of the disputed matter, the service procedure for arbitration, the failure to present a statement for some reasons, the eligibility of a non-party to the case to apply for non-enforcement, the treatment that the enforcee has no property available for enforcement,

and the definition of the violation of the public interest by the enforcement of an arbitral award.

The report of the 20th National Congress of the CPC emphasizes that it should be adhered to comprehensive law-based governance of the country and promoting the development of rule of law in China are the significant advantages of the socialist national system with Chinese characteristics and national governance system. It is imperative to strengthen legislation in key areas, emerging areas, and foreign-related areas, and promote the rule of law both at home and abroad on a coordinated basis, in order to promote development with good laws and guarantee good governance. This points out the direction for the development of the rule of law concerning foreign affairs and the development of international commercial arbitration. To promote the construction of a foreign-related rule of law system, it is necessary to improve the system of foreign-related laws and regulations, the system of foreign-related law enforcement, the system of foreign-related justice, and the system of foreign-related legal services, so as to form multi-party supports and social synergy. Arbitration institutions in China have always promoted the rapid development of the arbitration cause by relying on their voluntary efforts and unremitting exploration. Their exploration of advanced arbitration systems and concepts, expressed by sound arbitration rules, efficient case management, and high-quality arbitration services, has become the practical source of the development and improvement to the rule of law concerning foreign affairs.

In order to promote the development of the international arbitration governance system, we should adhere to advanced arbitration concepts, improve the arbitration system, increase the quality and enhance the credibility of arbitration, establish a "one-stop" mechanism for diversified dispute resolution that organically integrates litigation, arbitration and mediation, and give play to the leading and exemplary role of diversified

dispute resolution. We should also explore to build a first-class international commercial dispute resolution center and contribute China's wisdom and solutions. Meanwhile, we should adhere to inclusiveness, promote mutual learning in international arbitration, and enhance friendship between arbitrators and members of the international arbitration community, so as to work together to meet global challenges, provide high-quality and efficient legal services, help build an internationalized and rule-of-law business environment, and further promote the innovation and development of the mechanism for the resolution of international commercial disputes.