Annual Report on International Commercial Arbitration in China

(2014)

中国仲裁法学研究会
CHINA ACADEMY OF ARBITRATION LAW

地址：北京市西城区桦皮厂胡同2号国际商会大厦七层
邮编：100035
电话：（86 10）82217783
传真：（86 10）82217766 / 64643500
网址：www.arbitration.org.cn

中国仲裁法学研究会
CHINA ACADEMY OF ARBITRATION LAW

Table of Contents

Introduction

From 2015 onwards, China Academy of Arbitration Law has been carrying out special research for the preparation and publication of annual reports on China's International Commercial Arbitration in order to reflect its development, to learn from its past, to promote its theoretical research and to develop arbitral practice, to provide a reference for China's legislative and judicial authorities, to enhance cooperation and exchange information between domestic and foreign arbitration circles, to enhance China's influence and competitiveness in the field of international arbitration as well as to promote the improvement and further development of China's international commercial arbitration system.

The 2014 Annual Report on International Arbitration in China is the first annual report of the above-mentioned research program. It reflects the highlights in China's international commercial arbitration practice from macro, meso and micro perspectives both through empirical analysis and theoretical research. The purpose of the present Report is to make a comprehensive, in-depth and systematical analysis of the development of China's international commercial arbitration, based on the analysis of data about China's international commercial arbitration cases in 2014, following up the developments of China's legal system on international commercial arbitration, observing the efforts of China's international commercial arbitration commissions in order to update international commercial arbitration rules and practice and discussing China's judicial support and supervision in the field of international commercial arbitration.

There are four chapters besides the Introduction and the Annual Summary in the Report. Chapter One refers to the overview of the Development of China's international commercial arbitration and contains an introduction of the history and present situation of China's international commercial arbitration and analysis of the 2014 data. Chapter Two covers the development of China's legal system related to international commercial arbitration by introducing the applicable legislation and judicial interpretations in the field, especially those relating to the improvement and development of the relations between the arbitral and the judicial systems. Chapter Three deals with China's international commercial arbitration practice and reflects its latest trends through analyzing the data and characteristics of foreign-related, Hong Kong-related, Macau-related and Taiwan-related (HMT-related) cases handled by China International Economic and Trade Arbitration Commission (CIETAC), the most influential and representative international commercial arbitration institution in China with the longest history, and China Maritime Arbitration Commission (CMAC), which specializes in hearing maritime cases, and the development and features of their arbitration rules and practice. Chapter Four focuses on the judicial support and supervision of China's international commercial arbitration, including evidence and property preservation, confirmation of validity of arbitration clauses, setting aside and enforcement of awards, and discusses issues and reflections. A timeline of important events related to China's international commercial arbitration in 2014 is also attached to this Report.

The 2014 Annual Report on International Commercial Arbitration in China was

undertaken by the research team of Renmin University of China, commissioned by the China Academy of Arbitration Law. Professor Du Huanfang, Vice President of the Law School of Renmin University of China, and Ms. Yue Jie, Director of the Arbitration Research Institute of CIETAC are the team leaders. Other team members are professionals and practitioners from universities, arbitration commissions, the Supreme People's Court (SPC) and law firms. The division of task is as follows: The accomplishment of Chapter One was led by Professor Du Huanfang, Vice President of the Law School of Renmin University of China, and Mr. He Zhanran, a postgraduate, participated in part of the writing. The accomplishment of Chapter Two was led by Professor Song Lianbin, International Law School of China University of Political Science and Law, with Mr. Huang Baochi, a Ph.D. candidate, participating in part of the writing. The accomplishment of Chapter Three was led by Ms. Yang Fan, Deputy Director of the Arbitration Research Institute of CIETAC. The accomplishment of Chapter Four was led by Ms. Shen Hongyu, Judge of the 4th Civil Division of the SPC. Mr. Dong Xiao, Partner of Anjie Law Firm, contributed to the writing of part of the content. Relevant reference and data of arbitration commissions are from Ms. Yang Fan, Deputy Director of the Arbitration Research Institute of CIETAC, Ms. Deng Chun, case manager of the Arbitration Court of CMAC, Mr. Zhong Xiaodong, Head of the Development Department of Guangzhou Arbitration Commission, Mr. Hu Dawei, Office Director of Shenzhen Arbitration Commission, and Mr. Yao Yangang from the Development Department of Shanghai Arbitration Commission.

We hereby acknowledge the kind support and generous assistance from the Legal System Coordination Department of the Office of Legislative Affairs of the State Council, the Fourth Civil Division of the SPC, CIETAC, CMAC, Guangzhou Arbitration Commission, Shenzhen Arbitration Commission, Shanghai Arbitration Commission, Anjie Law Firm, the International Arbitration Research Institute of Renmin University of China, International Law School of China University of Political Science and Law, etc. for providing information, making written contributions and providing advise and assessment for this Report, and extend our gratitude to Ms. Gu Huaning, a CIETAC arbitrator, who translated this Report into English.

The Research Team of 2014 Annual Report on International Commercial Arbitration in China

8 September 2015

Chapter One. Overview of the Development of China's International Commercial Arbitration

International commercial arbitration is a dispute resolution method under which international commercial disputes are solved through arbitration. Such dispute resolution method, due to its features such as party autonomy, independence, impartiality, professionalism, flexibility, cost-effectiveness and appropriate judicial support, has been widely adopted in solving various disputes effectively in international commercial intercourse.[1]

For a nation, international commercial arbitration may be referred to as foreign commercial arbitration, which means commercial arbitration involving foreign or international elements. There may be different definitions of foreign, international and commercial, and different stipulations in different nations, but it is generally recognized that a broad definition of foreign or international shall be adopted.[2] In China, international commercial arbitration is normally referred to as foreign commercial arbitration or foreign arbitration. This Report uses both terms, *i.e.*, "China's international commercial arbitration" and "foreign commercial arbitration or foreign arbitration" to mean the same, unless otherwise stated specifically.

1 See Zhao Jian, "Judicial Supervision of International Commercial Arbitration", International Commercial Arbitration Series prefaced by Han Depei and Huang Jin, Law Press(2000), pp1-2..

2 See Huangjin, Song Lianbin, Xu Qianquan, "Arbitration Law", China University of Political Science and Law Press (2002 Revised Edition), pp165-166.

Article 1 of the Interpretations of the SPC on Several Issues Concerning Application of the Law of the People's Republic of China (PRC) on Choice of Law for Foreign-Related Civil Relationships (I) [Fashi (2014) No. 24] in force since 7 January 2013 stipulates:

"[W]here a civil relationship falls under any of the following circumstances, the people's court may determine it as foreign-related civil relationship:

1. where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons;

2. where the habitual residence of either party or both parties is located outside the territory of the PRC;

3. where the subject matter is outside the territory of the PRC;

4. where the legal fact that leads to establishment, change or termination of civil relationship happens outside the territory of the PRC; or

5. other circumstances under which the civil relationship may be determined as foreign-related civil relationship."

In China's judicial and arbitral practice, Hong Kong-related, Macau-related and Taiwan-related (HMT-related) cases are treated in the same way as foreign-related cases.[3] Therefore, China's international commercial arbitration covers HMT-

3 It is stipulated in Article 551 of the Interpretation of the Supreme People's Court in the Application of the Civil Procedure Law of the People's Republic of China that "People's courts may refer to special provisions on foreign-related civil procedures when hearing civil procedure cases involving Hong Kong SAR, Macau SAR and Taiwan district". It is stated in Article 19 of the Interpretations of the Supreme

related arbitrations apart from arbitrations involving foreign countries or regions.

According to the commercial reservation statement by China when acceding to the 1958 Convention of the Recognition and Enforcement of Foreign Arbitration Awards (the New York Convention), commercial disputes refer to contractual or non-contractual commercial legal relationship under Chinese laws, i.e., relationship involving economic rights and obligations under contract, tort or relevant legal provisions, such as disputes arising out of sales of goods, property leasing, project contracting, processing contracts, technology transfer, equity or contractual joint ventures, exploration and development of resources, insurance, credit, labor service, agency, consultation service, marine, civil aviation, railway or road passenger and cargo transportation, product liability, environment pollution, marine accidents and ownership disputes, excluding disputes between investors and host governments.[4]

In the past 60 years, China's international commercial arbitration has been through wind and rain, and developed from nothing towards internationalization and modernization. China has gradually become one of the international commercial dispute resolution centers in the world with abundant experience in handling international commercial arbitration cases and making remarkable achievements.

I. History and Present Situation of China's International

People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) that "[I]ssues concerning application of law in connection with civil relationships involving the Hong Kong Special Administration Region and the Macau Special Administration Region are subject to these Interpretations by analogy".

4 Article 3 of the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China.

Commercial Arbitration

1. History

China did not have a specific institution to handle international commercial arbitration before 1949. Chinese parties could only submit disputes occurred in international commercial transactions to foreign arbitration institutions. From June to November 1953 China Livestock Co. reached an agreement by telegram with British Oilseed and Oilcake Co. on purchase of 29 tons of sheep wool. After the agreement was reached, the British company mailed the printed confirmation to the Chinese company for examination and signature. It was stated in the confirmation that any dispute related to this transaction should be submitted to arbitration by British Branford Association (布兰福特尔协会). The Chinese company felt uncomfortable about arbitrating in the Great Britain, but there was no other way since China had no foreign-related arbitration institution then. China Livestock Co.'s dilemma was quite typical in China's foreign trade at that time.[5]

China's foreign-related arbitration was originated in 1950s. China Council for the Promotion of International Trade (CCPIT) was established in May 1952. Since its establishment, CCPIT had started research on establishing arbitration institutions to conduct China's foreign-related arbitration. According to the Decision by the Government Administration Council of the Central People's Government on 6 May 1954, Foreign Trade Arbitration Commission was established under the umbrella of CCPIT in April 1956 and CCPIT Maritime Arbitration Commission

5 See Tao Chunming and Wang Shangchang, "China International Economic and Trade Arbitration: Procedural Theories and Practices", Renmin China Publishing House (1992), pp.1-2.

was established in January 1959. Since then, the two important foreign-related arbitration institutions have been safeguarding the development of China's international commercial arbitration.

Along with the reform and opening-up of China in 1980's, foreign trade and investment expanded quickly quantities and categories of foreign-related economic disputes also greatly increased, which made the development of China's foreign-related arbitration in urgent need. The CCPIT Foreign Trade Arbitration Commission was renamed as CCPIT Foreign Economic and Trade Arbitration Commission in 1980, expanding its scope of case acceptance to disputes arising out of various foreign economic cooperation such as joint ventures, foreign investment and factory building, mutual loan between Chinese and foreign banks, etc. In 1988, the CCPIT Foreign Economic and Trade Arbitration Commission and CCPIT Maritime Arbitration Commission were renamed as China International Economic and Trade Commission (CIETAC) and China Maritime Arbitration Commission (CMAC) respectively.

Following the promulgation of the 1981 Economic Contract Law of the PRC and the 1983 Regulations for Arbitration of Economic Contract by the State Council, China has set up institutions for arbitration of economic contracts at all levels and established the system of arbitration of economic contracts. In 1982, CCPIT, as approved by the State Council, set up Shenzhen Office of CIETAC so as to support the opening up and economic development of Shanghai and Shenzhen Special Zone, to offer handy arbitration service to Chinese and foreign parties and to bring CIETAC into larger play. In 1988, upon the approval of the State

Council, the CCPIT decided to upgrade the CIETAC Shenzhen Sub-Commission (which was renamed as CIETAC South-China Sub-Commission in 2004), and to establish the CIETAC Shanghai Sub-Commission. In 2012, the former Shanghai Sub-Commission and South China Sub-Commission of CIETAC declared the so-called independence from CIETAC and stopped using such names. In December 2014, CIETAC re-organized its South China Sub-Commission and Shanghai Sub-Commission according to the Decision of CCPIT/CCOIC on Re-organizing South China Sub-Commission and Shanghai Sub-Commission of CIETAC. Along with the approved establishment of more sub-commissions of CIETAC, such as Tianjin Sub-Commission, Chongqing Sub-Commission, the foundation of a stable system has been gradually built up for China's international commercial arbitration.

In the past 60 years, CIETAC and CMAC have accumulated abundant experience for the establishment and improvement of China's international commercial arbitration system through arbitrating large number of international, foreign-related or HMT-related cases, making several amendments to their Arbitration Rules, constantly perfecting the arbitration system, maintaining a more comprehensive and professional panel of arbitrators, advancing with the times on its case management.

On 2 December 1986, the 18th session of the 6th Standing Committee of the National People's Congress (NPC) decided that China would accede to the 1958 New York Convention. China submitted the instrument of ratification on 22 January 1987. The Convention entered into force in China from 22 April 1987, which marks China's further integration internationally with regard to

international commercial arbitration. The Convention is the most important international convention on recognition and enforcement of arbitral awards with 156 member states,[6] providing essential safeguard to the recognition and enforcement of one nation's awards by others.

2. Present Situation

On 31 August 1994, the Arbitration Law of the PRC (the Arbitration Law) was adopted by the 9th Session of the Standing Committee of the 8th NPC. The Arbitration Law, as the first arbitration law of the after-liberation China, was promulgated under the background of establishing socialist market economy system. The Arbitration Law, through summing up China's arbitration practice and learning from international practice, adopted the basic practice in China's foreign-related arbitration while essentially reformed the practice of China's domestic arbitration. The general purpose was to realize the principles of party autonomy and impartiality, etc. and to establish China's civil and commercial arbitration system which admits arbitration based on arbitration agreements, the exclusion of litigation by arbitration agreements and the finality of arbitration. Such fundamental principles and system fit in with the needs of China's socialist market economy and international economic exchanges and is beneficial to the fair and efficient resolution of disputes. The Arbitration Law is a milestone in the development of China's arbitration legal system.

The domestic arbitration system and the foreign-related arbitration system

6 See the official website of the United Nations Commission of International Trade Law http://www.uncitral.org/uncitral/zh/uncitral_texts/arbitration/NYConvention_status.html, last visited on 30 August 2015.

under the Arbitration Law are fundamentally the same, but, due to the special features of foreign-related arbitration, there is a special chapter on foreign-related arbitration in the Arbitration Law under which more support is given to foreign-related arbitration in the aspect of judicial review of arbitral awards which further improved China's foreign-related arbitration system, facilitated its development and strengthened the relevant legal system. Stipulations on arbitration were supplemented or amended under the Decision of the Standing Committee of the NPC on Amending the Civil Procedure Law of the PRC adopted in the 28th Meeting of the Standing Committee of the 11th NPC on 31 August 2012.

In addition to the Arbitration Law, stipulations related to arbitration in other laws, bilateral or multi-lateral conventions entered into or acceded to by China, judicial interpretations issued by the SPC for the implementation of the Arbitration Law, judgments or awards made in judicial or arbitral practice in China, arbitration rules applicable to foreign-related commercial cases drafted or amended by various Chinese arbitration commissions, etc. may be taken as important reference for understanding and studying China's international commercial arbitration.

To cater to the need of the continuous deepening of reform, various arbitration institutions follow the international trend, adapt to the world situation and keep up with the times in amending arbitration rules. Chinese arbitration institutions such as CIETAC, CMAC and Beijing Arbitration Commission, etc. amended their arbitration rules in 2014 which turned to be an important year in the amendment of arbitration rules. For example, the 2015 CIETAC Arbitration Rules follows the international commercial arbitration trends and better realizes party-autonomy

principle by providing emergency arbitrator procedure, allowing additional parties and perfecting consolidation in arbitration.

In the 20 years after the promulgation of the Arbitration Law, China has vigorously developed its arbitration while Chinese arbitration institutions have improved greatly in their caseloads, qualities as well as institutional administration. There were 235 arbitration institutions in China by the end of 2014, including two arbitration commissions under China Chamber of International Commerce/CCPIT, *i.e.*, CIETAC and CMAC, four arbitration commissions in municipalities directly under the central government, i.e. Beijing Arbitration Commission, Shanghai Arbitration Commission, Tianjin Arbitration Commission and Chongqing Arbitration Commission, 27 arbitration commissions in cities where the people's governments of provinces and autonomous regions are located and 202 arbitration institutions in other prefecture-level cities. Chinese arbitration institutions have engaged large quantity of arbitrators including professionals in Mainland China, Hong Kong, Macau and Taiwan, as well as professionals from abroad. Those arbitrators, with their high professionalism and good reputation, ensure the efficiency of arbitration procedure and fairness of arbitral awards.

II. Data Analysis of China's International Commercial Arbitration Cases

1. National Data of Foreign-Related and HMT-related Cases[7]

7 Unless otherwise indicated, data in this section are quoted from the Situation Relevant to Chinese Arbitration in 2014 issued by the Coordination Division of the State Council Legislative Affairs Office in the 2015 Conference on China's Arbitration in March 2015.

In 2014, 235 arbitration commissions in China accepted a total of 113,660 cases including domestic, foreign-related cases and HMT-related cases, with an increase of 9,403 cases at the increase rate of 9% compared to the previous year. The total amount of dispute was RMB 265.6 billion, with an increase of RMB 101 billion at the increase rate of 61% compared to the previous year.

Among the 235 Chinese arbitration commissions, there were only 61 commissions which actually accepted foreign-related and HMT-related cases. In total, there were 1,785 foreign-related and HMT-related cases, with an increase of 189 cases at the increase rate of 11.8% compared to the previous year, accounting for 2% of the national total caseload. The ratio in 2013 was about the same. There were 665 foreign-related cases, accounting for 37.25%. There were 721 Hong Kong-related cases, 172 Macau-related cases and 227 Taiwan-related cases, accounting for 62.75%.

According to the statistics of the SPC, courts of all levels in China concluded 2.782 million first-instance commercial cases in 2014, among which 5,804 were foreign-related and HMT-related.[8] Therefore, the commercial arbitration cases accepted nationally accounted for about 4% of the concluded first-instance commercial cases by Chinese courts, while the foreign-related and HMT-related cases accounted for about 31% of the concluded first-instance commercial cases by Chinese courts.[9] It can be seen that there is still ample room for the

8 Source: Work Report of the Supreme People's Court by Zhou Qiang, President of the Supreme People's Court at the Third Session of the Twelfth National People's Congress on 12 March 2015.

9 We can only temporarily compare the accepted arbitration cases with the concluded court cases due to the limit of available data with neither statistics on the concluded arbitration cases in 2014 in the Situation Relevant to Chinese Arbitration in 2014 by the State Council Legislative Affairs Office nor data regarding case acceptance in the Work Report of the Supreme People's Court.

future development of Chinese arbitration. In particular, China's foreign-related arbitration has played a more and more important role in solving international commercial disputes.

2. Foreign-Related and HMT-related Cases Accepted by Representative Arbitration Institutions

Chinese arbitration institutions have accumulated more experience in handling foreign-related arbitration cases and enjoyed a higher reputation, along with the improvement in their case administration.

In 2014, CIETAC, CMAC, Guangzhou Arbitration Commission, Shenzhen Arbitration Commission and Shanghai Arbitration Commission altogether accepted 1,336 foreign-related and HMT-related related cases, accounting for 74.85% of the national figure. The data of the five arbitration commission are therefore of strong representativeness, and have reference significance for the analysis of the national data.

The above five commissions accepted 1,336 foreign-related and HMT-related cases, with an increase of 58 cases at the increase rate of 4.5% compared to the previous year. Among the 1336 cases, 487 were foreign-related cases, accounting for 73.23% of the national figure; 570 were Hong Kong-related cases, accounting for 79.06% of the national figure; 113 were Macau-related cases, accounting for 65.7% of the national figure; and 166 were Taiwan-related cases, accounting for 73.13% of the national figure. CIETAC alone accepted 261 foreign-related cases, ranking the first among Chinese arbitration commissions and accounting for

39.25% of the national figure.

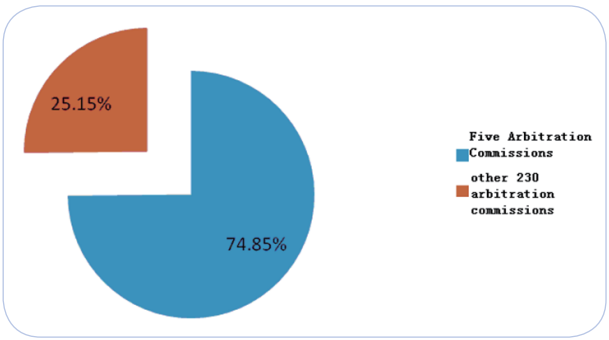

Figure 1.1 Proportion of foreign-related and HMT-related cases accepted by the five arbitration commissions and by other arbitration Commissions

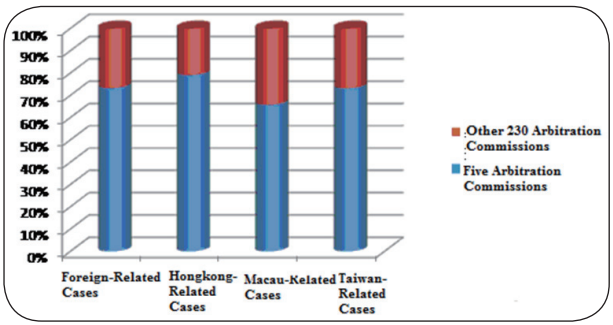

Figure 1.2 Statistics of foreign-related and HMT-related Cases Accepted by the five arbitration commissions and by other arbitration commissions

As to the amount in dispute, the total figure for foreign-related and HMT-related cases accepted by the five arbitration commissions in 2014 was RMB14.03434 billion[10] with an average of RMB 2.80687 billion for each commission. CIETAC

10 There is no statistics on the amount of dispute for foreign-related cases accepted by Chinese arbitration commissions in the 2014 Statistics of China's Arbitration by the State Council Legislative Affairs Office, so we cannot confirm the total figure or the proportion. The statistics from the five Arbitration Commissions

is on the top of the list with the amount of RMB 9.35097 billion.

3. Feature Analysis

Based on the data of the five arbitration commissions whose foreign-related and HMT-related caseload accounted for 3/4 of the national total, taking into consideration the overall situation in China, we can find the following features of China's international commercial arbitration.

Firstly, China's international commercial arbitration plays an essential role in solving international commercial disputes with increasing importance and advantages.

Secondly, along with the substantial increase of the national arbitration caseload, the foreign-related and HMT-related cases have increased accordingly, but its proportion in the national total caseload has not changed much.

Thirdly, HMT-related cases have a higher proportion, accounting for 63% of all foreign-related and HMT-related cases.

Fourthly, the development of international commercial arbitration is very unbalanced among Chinese arbitration institutions. Most institutions lack practice or experience in handling foreign-related and HMT-related cases.

accepting 74.85% of the foreign-related cases in China show that the amount of dispute for foreign-related cases accepted by CIETAC in 2014 is RMB 9.35097 billion, that by Guangzhou Arbitration Commission is RMB 3.24117 billion, that by Shenzhen Arbitration Commission is RMB 0.746 billion, that y Shanghai Arbitration Commission is RMB 0.47 billion, that by CMAC is RMB 0.2252 billion, totalling RMB 14.03434 billion.

Chapter Two. Development of China's Legal System Related to International Commercial Arbitration

The 1994 Arbitration Law has been enacted for 20 years while no amendment has been made thereon. However, breakthroughs have been made in the determination of the law applicable to arbitration agreements, pre-arbitration preservation, recognition and enforcement of foreign arbitral awards, etc. through stipulations on arbitration in other legislations since 2010. The internal reporting system for judicial review on arbitration cases by the Supreme People's Court (SPC) is unique in China's international commercial arbitration regime. Meanwhile, the SPC, through legal interpretations, has improved the operability of China's arbitration system regarding the confirmation of validity of arbitration agreements, application for setting aside arbitral awards, enforcement of arbitral awards, interregional mutual recognition and enforcement of arbitral awards, etc.[1]

I. Determination of the Law Applicable to Arbitration Agreements

The determination of the law applicable to arbitration agreements is directly related to the confirmation of their validity. There is neither specific stipulation on this in the Arbitration Law nor consistent practice. Previously, neither arbitration

1 The SPC's publicized typical cases and replies concerning individual cases are of the same guiding significance. For details, please refer to other parts of this Report.

commissions nor supervising courts with jurisdiction had good awareness or method of determining the law applicable to arbitration agreements. Some even directly apply the *lex fori* without any reason. Under the influence of the principle of party autonomy, it was for sure that the applicable law agreed on by the concerned parties should prevail. However, in practice, it is rare for parties to agree on the law applicable to arbitration agreements, especially in their arbitration clauses. In most cases, parties fail to agree on the law applicable to arbitration agreements even though they agree on the applicable law of the contracts containing arbitration clauses. In judicial practice, there are such different methods as applying the *lex fori*, the *lex arbitri* or the law of the place where the arbitration institution is located.

In order to implement judicial policy favorable to arbitration and keep consistency in judicial supervision, on 23 November 1998, Li Guoguang, Deputy President of the SPC, pointed out in his speech on the National Forum for Trial of Economic Affairs that in the confirmation of validity for foreign-related arbitration agreements, courts should apply the laws agreed upon by the parties as well as referring to international practice. Only when the concerned parties have explicitly agreed on the application of Chinese law should courts apply Article 17 and 18 of the Arbitration Law. The SPC made it clearer in the Minutes of the Forum on Current Trial of Economic Affairs in 1998 that the lex arbitri should be applied in the confirmation of validity for foreign-related arbitration agreements. In June 1999, the SPC stated in its Reply to the Higher People's Court of Hubei Province that "[T]he parties agreed in the arbitration clause of the contract that

arbitration should be conducted in Hong Kong under the ICC Arbitration Rules. Such arbitration clause is valid and enforceable as per the *lex arbitri, i.e.*, the laws of Hong Kong".[2]

China's first systematic stipulation on the law applicable to arbitration agreements are found in Article 16 of the SPC's Interpretation concerning Some Issues on the Application of the Arbitration Law of the People's Republic of China (PRC) (Judicial Interpretation of the Arbitration Law) (Fa Shi [2006] No. 7) in 2006. It provides that "[T]he laws agreed upon between the parties shall apply to the examination of the validity of a foreign-related arbitration agreement; where the parties did not agree upon the applicable laws but have agreed upon the place of arbitration, the laws at the place of arbitration shall be applicable; where they neither agreed upon the applicable laws nor agreed upon the place of arbitration or the place of arbitration is not obviously agreed upon, the laws at the locality of the court shall apply".

Furthermore, it is also supported in judicial practice that the law applicable to an arbitration clause shall be determined independently, which may not necessarily be the same as the law applicable to the main contract. For example, the SPC held in *Panyu Zhujiang Steel Tube Co. Ltd. v. Shenzhen Fanbang Global Forwarding Co., Ltd.*[3] that the arbitration clause in the charter party which stated "[P]lace of

2 Fa Jing (1999) No. 143, 21 June 1999.

3 The SPC' Reply on the Request for Instruction Regarding the Case Involving the Application for Determination of the Validity of the Arbitration Agreement Between the Claimant Panyu Zhujiang Steel Tube Co., Ltd. and the Respondent Shenzhen Fanbang Global Forwarding Co., Ltd.[(2009) Min Si Ta Zi No.7] on 5 May 2009. See the Guidance on Trial of Foreign-related Maritime Cases (vol. 1, 2009) compiled by the 4th Civil Division of the SPC published by the People' s Court Press in 2009, p85.

arbitration: Beijing, citing Chinese laws" contained "no agreement on the law applicable to the determination of the validity of the arbitration clause".

Based on the above-mentioned practice, Article 18 of the Law of the PRC on Choice of Law for Foreign-Related Civil Relationships (the Law on Choice of Law for Foreign-related Civil Relationships) states that "[T]he parties concerned may choose the laws applicable to arbitral agreement by consent. If the parties do not choose, the laws at the locality of the arbitral institution or of the arbitration shall apply". This is the first stipulation on the application of law for foreign-related arbitration agreements in China's legislation and may be regarded as a legislative breakthrough on an international scale. However, such stipulation has not fully reflected the legal practice and the mainstream academic views. Article 18 is apparently different from Article 16 of the 2006 Judicial Interpretation of the Arbitration Law. The second half of Article 18 is an unconditional conflict of laws rule under which the laws at the locality of the arbitration institution are of the same significance as *lex arbitri*. This is inconsistent with international commercial arbitration practice with too much emphasis on the relation between the locality of the arbitration institution and international commercial arbitration. Differently, the second half of Article 16 is a conditional conflict of law rule with emphasis on the role of *lex arbitri* and referring to the laws at the locality of courts as the default rule, which is more in line with the pro-arbitration international tendency and the "pro-effective" principle.

Back in 2000, it was stipulated in Article 151 of the Model Law of the Private International Law of the PRC formally published by Chinese Institute of Private

International Law that "[T]he validity of arbitration agreement, except the parties' capacity, shall be governed by the law chosen by the parties. In the absence of the parties' choice of law, the law of the place where the arbitration takes place or the award is made shall apply. In the absence of the parties' choice of law or in case the place of arbitration or issuance of the award is not definite, the *lex causae* of the disputes, notably the law applicable to the main contract or the law of PRC shall apply".[4] It is obvious that the above-mentioned Article 16 of the 2006 Judicial Interpretation of the Arbitration Law originated from that stipulation which in turn apparently borrowed from Article 178.2 of the Commonwealth Law on Private International Law of Switzerland. When drafting the Law on Choice of Law for Foreign-related Civil Relationships, the academic circle once suggested that the application of law for arbitration agreements be stipulated under the section of "Contract" as the follows: "[T]he law chosen by the parties shall apply to arbitration agreements. If the parties fail to agree on the applicable law, the law at the place of arbitration shall be applied. The law governing the issues in dispute, the law most closely connected with arbitration agreements or the PRC law may be applied when the place of arbitration is unclear."[5] Such draft follows the above-mentioned Swiss private international law with obvious improvement by introducing the principle of closest connection to make the adoption of transnational law method and substantive law application method

4 See Huang Jin (chief editor), "Draft and Illustration of the Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China" (2011), published by China Renmin University Press, p115.

5 See Huang Jin (chief editor), 'Draft and Illustration of the Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China' (2011), published by China Renmin University Press, p22.

possible. However, this draft was not adopted by the legislators. Only in the third review draft which came out just before the promulgation of the law was the stipulation on arbitration agreements added under the section of "Civil Subjects",[6] which is now Article 18 of the Law on Choice of Law for Foreign-related Civil Relationships.

It is necessary for the Law on Choice of Law for Foreign-related Civil Relationships to cover the issue of the law applicable to arbitration agreements due to the urgent need in the foreign-related judicial practice. Disputes involving the determination of the validity of arbitration agreements are quite common in the trial of foreign-related commercial affairs in China, which is indicated in the Guidance on the Trial of Foreign-related Commercial and Maritime Affairs consecutively published by the 4th Civil Division of the SPC which covers at least several replies regarding the validity of arbitration agreements in each volume. Determining the law applicable to arbitration agreements is the precondition of determining the validity of arbitration agreements. Article 18, to a certain degree, follows the "pro-effective" principle, showing the tendency of supporting arbitration.

However, it is undeniable that certain defects in the provision need to be tested and corrected in future practice. The proposal from the academic circle has influenced the SPC obviously. The supplementary provision is found in Article 14 of the SPC's Interpretations (I) on Several Issues Concerning Application of

6 See Huang Jin (chief editor),' Draft and Illustration of the Law of the Application of Law for Foreign-related Civil Relations of the People' s Republic of China' (2011) , published by China Renmin University Press, p147.

the Law of the PRC on Choice of Law for Foreign-Related Civil Relationships effective on 7 January 2013, which states that "[W]here the parties have made no choice of law applicable to a foreign-related arbitration agreement, or have not agreed on an arbitration institution or place of arbitration, or their agreement is unclear, the people's court may apply the laws of the PRC to determine the validity of such arbitration agreement". Such stipulation reconciles the discrepancy between the 2006 Judicial Interpretation of the Arbitration Law and the Law on Choice of Law for Foreign-Related Civil Relationships.

II. Internal Reporting System of Judicial Review over Foreign-Related Arbitration

The SPC released its judicial interpretations along with the implementation of the Arbitration Law. The internal reporting system which has attracted much attention was established just before the Arbitration Law came into effect.[7] Since then, the SPC has issued more than 30 judicial interpretations concerning or related to arbitration and published its Interpretation Concerning Some Issues on Application of the Arbitration Law of the PRC on 23 August 2006. These judicial interpretations have turned to be indispensable from China's arbitration system and offered stronger safeguards for foreign-related arbitration through satisfying new demands and solving new problems arising out of the quick development of arbitration after the implementation of the Arbitration Law while clarifying issues not clearly stipulated in previous regulations. The SPC has made itself the

7 See Song Lianbin, Zhaojian, 'Discussion on Various Issues Regarding Amendments on the 1994 P.R.C. Arbitration Law' for comments on the reporting system, Papers on International Economic Law, vol. 4, Law Press (2001), pp603-605.

sole authority for final decision regarding non-validity of arbitration agreements in foreign-related, Hong Kong-related, Macau-related or Taiwan-related (HMT-related) disputes, setting aside or non-enforcement of foreign-related arbitral awards or foreign awards through the establishment of the internal reporting system of judicial review over foreign-related arbitration, which fully reflects China's judicial support to international commercial arbitration and the judicial policy in favor of arbitration.

Based on the Notice on People's Courts' Handling Issues Relevant to Foreign-related or Foreign Arbitration (28 August 1995, Fa Fa [1995] No.18), the Notice on Issues Relevant to People's Courts' Setting Aside Foreign-Related Arbitral Awards (23 April 1998, Fa [1998] No.40) and the Stipulations on Issues Regarding Fees and Review Period for Recognition and Enforcement of Foreign Arbitral Awards (21 October 1998, Fa Shi [1998] No.28) issued by the SPC, the internal reporting system may be described as follows:

1. If a people's court deems that the arbitration agreement or arbitration clause agreed on by the parties at the time of or after the execution of the contract void, invalid or non-enforceable due to its ambiguity in a foreign-related or HMT-related case, the court must report the case to the people's court of higher level in the same jurisdiction for review before accepting and hearing the case. If the court of higher level agrees with the acceptance of the case, it shall report its opinion to the SPC. The court may temporarily refuse to accept the case before the SPC gives its approval.

2. In deciding on a party's application for the enforcement of an award made by a foreign-related arbitration commission or for the recognition and enforcement of an award made by a foreign arbitration institution, if a people's court deems that the foreign-related award falls within the circumstances specified in Article 260 (Article 274 after amendment, the same below—editor note) of the Civil Procedure Law or if the recognition or enforcement of the foreign award is not in accordance with international conventions acceded by China or the principle of mutual benefit, the court must report the case to the people's court of higher level in the same jurisdiction for review before making a ruling of non-enforcement or of refusal of the recognition and enforcement. If the court of higher level agrees with such decision, it shall report its opinion to the SPC. The court shall not make a ruling of non-enforcement or of refusal of the recognition and enforcement before the SPC gives its approval.

3. If, after examination of a party's application for setting aside a foreign-related arbitral award as per the Arbitration Law, a people's court deems that the award falls within the circumstances specified in Article 260.1 of the Civil Procedure Law, the court must report the case to the people's court of higher level in the same jurisdiction for review before deciding to set aside the award or remand the case to the arbitral tribunal. If the court of higher level agrees with such decision, it shall report its opinion to the SPC. The court shall not set aside or remand the case before the SPC gives its approval.

III. Improvement of Relationship between Arbitration

and Judiciary

The Decision on Amending the Civil Procedure Law of the PRC[8] (Decision) adopted on the 28th Meeting of the 11th Standing Committee of the NPC on 31 August 2012 and implemented as from 1 January 2013 either supplements new provisions or amends previous stipulations on six issues regarding the relationship between arbitration and the judiciary.

1. Pre-Arbitration Evidence Preservation

As per Article 17 of the Decision, Article 81.2 of the Civil Procedure Law is amended as "[W]here any evidence may be extinguished or may be difficult to obtain at a later time, if the circumstances are urgent, an interested party may, before filing an action or applying for arbitration, apply for evidence preservation to a people's court at the place where the evidence is located or at the place of domicile of the respondent or to a people's court having jurisdiction over the case", which is an important supplement to the system of evidence preservation in arbitration. The Arbitration Law only mentions evidence preservation after the initiation of arbitration in the section of "Hearing and Award" that "[I]n the event that the evidence might be destroyed or if it would be difficult to obtain the evidence later on, a party may apply for the evidence to be preserved. If a party applies for such preservation, the arbitration commission shall transfer the application to the basic-level people's court at the place where the evidence

8 See the official website of the Standing Committee of the NPC: www.npc.gov.cn/npc/xinwen/2012-09/01/content_1735849.htm, last visited on 22 July 2015.

is located'.[9] Compared with the Arbitration Law which only covers evidence preservation during arbitration, the amended Civil Procedure Law obviously offers stronger judicial support to arbitration with its provision on pre-arbitration evidence preservation. Actually it has already been clearly stated in Chapter 5 "Maritime Evidence Preservation" of the 1999 Special Maritime Procedure Law of the PPC that an interested party may apply for maritime evidence preservation before initiating an arbitration proceeding.[10] Therefore, the above amendment of the Civil Procedure Law is a cautious step after 10 years of small-scale practice in the maritime field.

2. Pre-Arbitration Property Preservation

As per Article 22 of the Decision, Article 101 of the Civil Procedure Law is amended as "[W]here the lawful rights and interests of an interested party will be irreparably damaged if it does not file an application for preservation immediately under urgent circumstances, the interested party may, before filing an action or applying for arbitration, apply to the people's court at the place where the property to be preserved is located or at the place of domicile of the respondent or to a people's court having jurisdiction over the case for taking preservative measures. The applicant shall provide security. If the applicant fails to provide security, the people's court shall issue a ruling to dismiss the application". However, it is stated in the section of "Application and Acceptance" of the Arbitration Law that

9 Article 46 of the 1994 Arbitration Law.

10 It is stipulated in Article 64 of the 1999 Special Maritime Procedure Law of the People's Republic of China that '[M]aritime evidence preservation shall not be restrained by a jurisdiction agreement or an arbitration agreement relating to the maritime claim as agreed upon between the parties'.

"[A] party may apply for property preservation if, as the result of an act of the other party or for some other reasons, it appears that an award may be impossible or difficult to enforce. If one of the parties applies for property preservation, the arbitration commission shall transfer to a people's court the application of the party in accordance with the relevant provisions of the Civil Procedure Law".[11]

Similar to the provisions on pre-arbitration evidence preservation, the amended Civil Procedure Law supplements the Arbitration Law which only provides for property preservation during arbitration with provisions on pre-arbitration property preservation, which is important to the system of preservation in arbitration as well as a progress in legislation. Pre-arbitration property preservation, similar to pre-arbitration evidence preservation, was first mentioned in the 1999 Special Maritime Procedure Law of the PPC.[12] The amendment on the Civil Procedure Law expands the applicable scope of such provision from maritime arbitration to general commercial arbitration.

3. Prohibition on Evading Performance of Obligations Determined in a Legal Instrument by Way of Arbitration

As per Article 24 of the Decision, Article 113 of the Civil Procedure Law is amended as "[W]here the party against whom enforcement is sought, maliciously in collusion with other persons, evades performance of obligations determined in a legal instrument by litigation, arbitration, mediation or any other means, a

11 Article 28 of the 1994 Arbitration Law.

12 It is stated in Article 14 of the 1999 Speicial Maritime Procedure Law of the People's Republic of China that '[M]aritime claims shall not be bound by procedure jurisdiction agreements or arbitration agreements relating to the said maritime claims between the parties'.

people's court shall impose a fine or detention according to the severity of the circumstances; and if such behavior constitutes any crime, the party shall be subject to criminal liability". Article 113, in resonance to the new provision in the amended Civil Procedure Law that "[I]n civil procedures, the principle of good faith shall be adhered to",[13] aims at proposing "good faith" as the governing principle when choosing a dispute resolution method and imposing punishment on evading performance of obligations determined in a legal instrument.

4. Strengthened Effect of Arbitration Agreements Excluding Court Jurisdiction

As per Article 28 of the Decision, Article 124.2 of the Civil Procedure Law is amended as "[T]he court shall notify the plaintiff to apply to an arbitral institution for arbitration, if, in accordance with law, both parties have reached a written arbitration agreement and are thus prohibited from filing an action in a people's court". The amendment deleted the expression "to voluntarily submit their contractual disputes" in Article 111.2 of the pre-amendment Civil Procedure Law so as to keep strict consistency with the relevant stipulations in the Arbitration Law in regards to the scope of arbitration.[14] It has changed the wording which limited the arbitration agreements' effect of excluding court jurisdiction to contractual disputes. In fact, it was not interpreted strictly in the judicial and arbitral practice as well. The amendment has fixed the obvious loophole of the

13 See Article 1 of the Decision on Amending the Civil Procedure Law of the People's Republic of China and Article 13 of the 2012 Civil Procedure Law.

14 According to Article 2 and Article 3 of the 1994 Arbitration Law, disputes over contracts and disputes over property rights and interests between citizens, legal persons and other organizations as equal subjects of law may be submitted to arbitration.

original Civil Procedure Law.

5. Annulment of an Arbitral Award in the Form of a Ruling

As per Article 33 of the Decision, Article 154.1.9 of the Civil Procedure Law is amended as that the form of a ruling shall be applicable to the "annulment or non-enforcement of an arbitration award". Similar to the above, such amendment is to make the wording of the Civil Procedure Law more precise and to stress that the annulment and non-enforcement of an arbitral award are of the same significance in law. Surely, such amendment also aims at keeping consistency with the Arbitration Law.

6. Unification of the Circumstances for Annulment and Non-enforcement of Domestic Arbitral Awards

As per Article 54 of the Decision, Article 237.2.4 and Article 237.2.5 of the Civil Procedure Law are amended respectively as "[T]he evidence for rending an award is forged" and "[T]he opposing party withholds any evidence from the arbitral institution, which suffices to hinder an impartial award". These provisions are a replacement of Article 213.4 and Article 213.5 of the pre-amendment Civil Procedure Law, *i.e.*, "[W]here the main evidence for finding the facts is insufficient" and "[W]here there is an error in the application of the law". After the amendment, the requirements under Article 237 of the Civil Procedure Law regarding non-enforcement of domestic arbitral awards with no foreign elements are the same as those under Article 58 of the Arbitration law regarding annulment of domestic arbitral awards with no foreign elements, thus

making up the unreasonable difference between the circumstances for annulment and non-enforcement. Though courts still review on merits when enforcing domestic arbitral awards with no foreign elements, the scope of review has been greatly reduced. Such stipulations, though not related to the annulment and non-enforcement of foreign-related arbitral awards, may indicate the possible integration of the dual-track system in China's judicial supervision over foreign-related and domestic arbitration.

The 2012 Amendment on the Civil Procedure Law further enriches and improves China's arbitration system. Furthermore, the SPC issued its Interpretation on Implementing the Civil Procedure Law of the PRC (Fa Shi [2015] No.5) on 4 February 2015, which is the longest judicial interpretation with the largest number of provisions by the SPC covering 552 articles in 23 chapters among which 17 articles are related to arbitration. On 29 June 2015, the SPC issued the Provisions on Recognizing and Enforcing Taiwan Arbitral Awards (Fa Shi [2015] No.13), which covers comprehensive provisions on recognizing and enforcing Taiwan arbitral awards. The above two Interpretations will surely have a significant impact on China's foreign-related arbitration system.

Chapter Three. Observation on China's International Commercial Arbitration Practice

Considering that China's international commercial arbitration is typically institutional arbitration and the research materials currently available, this Chapter endeavors to reflect the latest trends in China's international commercial arbitration practice mainly by analyzing the data and characteristics of foreign-related, Hong Kong-related, Macau-related and Taiwan-related (HMT-related) cases handled by China International Economic and Trade Arbitration Commission (CIETAC), the most influential and representative international commercial arbitration institution in China with the longest history, and China Maritime Arbitration Commission (CMAC) which specializes in hearing maritime cases, and the development and features of their arbitration rules and practice.

I. Data and Features of CIETAC and CMAC's Foreign-Related and HMT-related Cases

1. Caseload and Amount in Dispute

① CIETAC

In 2014, CIETAC accepted 387 foreign-related and HMT-related cases[1] with an

1 It should be noted that at least 80% of the domestic cases accepted by CIETAC involve joint ventures

increase of 12 cases at the increase rate of 3.2% compared to the previous year, accounting for 24.04% of its total caseload. Among such cases, 175 were subject to the summary procedure, the same number as the year before and accounting for 45.22% of the foreign-related and HMT-related cases. Amongst the foreign-related and HMT-related cases accepted, 261 were foreign-related ones, accounting for 67.44%, and 126 were HMT-related ones, accounting for 32.56%.

The parties of the foreign-related and HMT-related cases were from 48 countries and regions, with Hong Kong, Germany, U.S., South Korea, Singapore, Japan, the British Virgin Islands, Taiwan, Australia and U.K. as the top ten most involved ones.

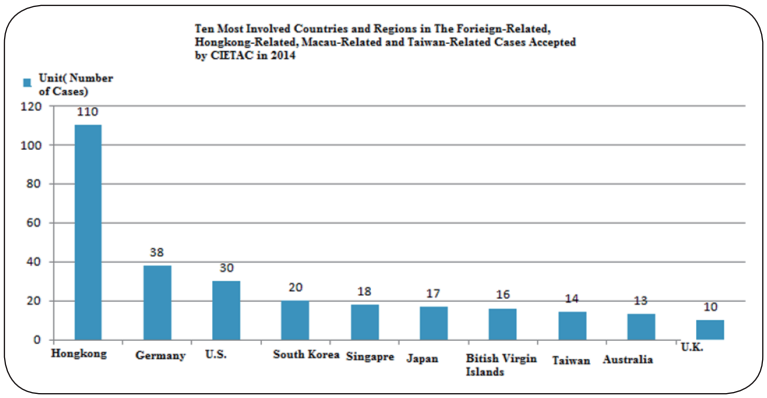

Figure 3.1 Countries and regions involved in the foreign-related and HMT-related cases accepted by CIETAC in 2014

as one or two parties, but such cases are not treated as foreign-related and HMT-related ones if there is no foreign-related elements as stated in judicial interpretations since joint ventures are regarded as Chinese enterprises under Chinese laws.

CIETAC's foreign-related and HMT-related caseload accounted for 21.68% of the national total (1,785 cases). CIETAC accepted the largest foreign-related caseload, which accounted 39.25% of the national total (665 cases). CIETAC ranked the top among all Chinese arbitration commissions in terms of the amount in dispute for the foreign-related and HMT-related cases,[2] with parties from the widest range of countries and regions.

In 2014, the amount in dispute for the foreign-related and HMT-related cases accepted by CIETAC was RMB 9.35097 billion, accounting for 24.73% of the total amount of dispute of RMB 37.8 billion for all cases accepted by CIETAC. There were 22 cases with an amount of dispute above RMB 100 million, and the average amount of dispute per case was about RMB 25 million.

② CMAC

In 2014, CMAC accepted 46 foreign-related and HMT-related cases with a decrease of 2 cases, accounting for 38.66% of its total caseload. Among such cases, 39 were subject to the summary procedure, accounting for 84.78% of the foreign-related and HMT-related cases. Amongst the foreign-related and HMT-related cases accepted, 27 were foreign-related ones, accounting for 58.70%, and

2 Though there is no separate statistics on the amount of dispute for foreign-related cases accepted by Chinese arbitration commissions in the 2014 Chinese Arbitration Work Report by the State Council Legislative Affairs Office, it may be found from the statistics of amount in dispute for foreign-related cases accepted by CIETAC, Guangzhou Arbitration Commission, Shenzhen Arbitration Commission, Shanghai Arbitration Commission and CMAC whose caseload of foreign-related cases accounts for 74.85 of the national figure that the amount of dispute for foreign-related cases accepted by CIETAC accounted for 66.63% of the amount for the five arbitration commissions. The dispute amount of such cases accepted by CIETAC should have ranked No. 1.

19 were HMT-related ones, accounting for 41.30%.

The parties of the foreign-related and HMT-related cases were from 11 countries and regions, which in the order of the number of cases involved were (excluding the mainland China) Hong Kong, Panama, Singapore, U.S., U.K., Taiwan, the British Virgin Islands, Germany, Guinea and Liberia.

In 2014, the total amount of dispute for the foreign-related and HMT-related cases accepted by CMAC was RMB 226.2 million, accounting for 12.52% of the amount of dispute of RMB 1.806 billion for all cases accepted by CMAC. There were 5 cases with an amount of dispute above RMB 50 million.

2. Dispute Types

① CIETAC

The foreign-related and HMT-related cases accepted by CIETAC in 2014 mainly involved disputes over sales of goods, machinery and electromechanical equipment, joint ventures, share transfer, industrial raw materials, financial transactions, house selling or leasing, construction and decoration, contract projects, real estate construction and development, franchising and licensing, intellectual property licensing, etc., among which disputes over sales of goods took the highest proportion as of 30.13% while disputes over machinery and electromechanical equipment ranked No. 2 with the proportion of 17.72%.

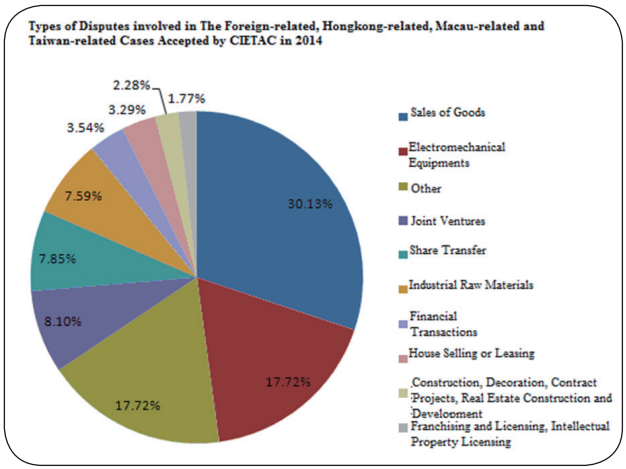

Figure 3.2 Types of disputes involved in the foreign-related and HMT-related cases cccepted by CIETAC in 2014

The cases handled by CIETAC have become more and more diversified in terms of dispute types. New-type disputes are on the rise, such as service contract disputes, capital increase or investment agreement disputes, cooperation agreement disputes, etc., in comparison to the traditional disputes such as sales of goods disputes, machinery and electromechanical equipment disputes, joint venture disputes, share transfer disputes, etc. This new trend is compatible with China's economic development and transformation. For example, disputes on contracts involving valuation adjustment mechanism (VAM, commonly known as "side bet agreements") are a new type of disputes with this new kind of contracts emerging from the commercial development. It is highly controversial whether such agreements shall be deemed as completely or partially valid, on which courts have made different judgments. In CIETAC's awards, the validity

of such agreements is basically confirmed, through which the parties' consensus is respected while the demand in the development of commercial practice is satisfied. Such awards have significantly impacted the financial investment industry and attracted social attention.

② CMAC

In 2014, the foreign-related and HMT-related cases accepted by CMAC mainly involved disputes over salvage, freight forwarders, transport contracts, collisions, voyage charters, etc., among which the disputes over salvage ranked the first, accounting for 19.57%.

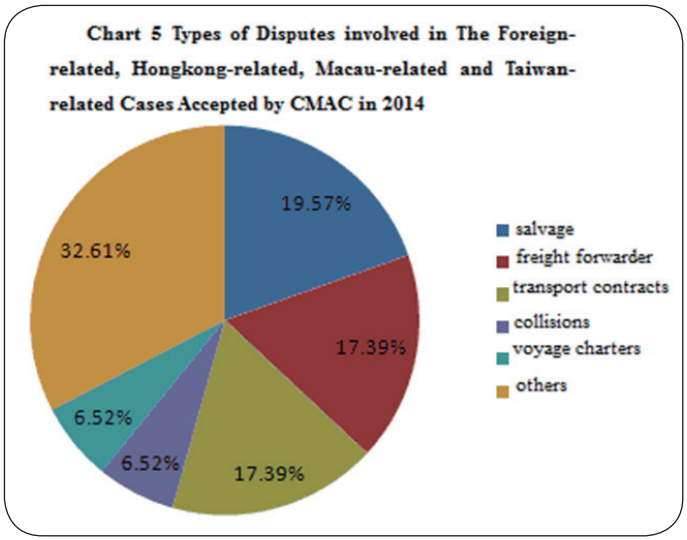

Figure 3.3 Types of disputes involved in foreign-related and HMT-related cases accepted by CMAC in 2014

3. Special Agreements in Arbitration Clauses

For example, CIETAC administered 65 foreign-related and HMT-related cases in 2014 with special agreements in their arbitration clauses, accounting for 16.80%. Such special agreements concerned the place of arbitration (outside the mainland China), the formation of the arbitral tribunal and the method of appointing arbitrators, the nationalities of arbitrators, the language of arbitration, the applicable arbitration rules and the application of foreign substantive laws, etc.

Special Agreements	Number of Cases	Contents
Place of Arbitration (Outside the Mainland China)	2	Both set Stockholm, Sweden as the place of arbitration.
The Formation of the Arbitral Tribunal and the Method of Appointing Arbitrators	33	Twenty-five agreed on a three-member tribunal under the summary procedure; four agreed on a sole-arbitrator tribunal under the ordinary procedure ; three had special agreements on the method of appointing the presiding arbitrator; and one agreed on the appointment of arbitrators outside the Panel of Arbitrators.

The Nationalities of Arbitrators	3	Three had special agreements on the nationality of the presiding arbitrator.
The Language of Arbitration	12	Seven chose English and five chose both Chinese and English as the languages of arbitration.
The Application of Foreign Arbitration Rules	1	One agreed to apply the ICC Rules.
The Application of Foreign Substantive Laws	3	Two agreed on the application of Hong Kong laws while one on U.K. laws.

Figure 3.4 Special agreements in arbitration clauses involved in foreign-related and HMT-related cases accepted by CIETAC in 2014

Such special agreements of the parties on the place of arbitration, the formation of the arbitral tribunal and the method of appointing arbitrators, the nationalities of arbitrators, the language of arbitration, the application of foreign arbitration rules and the application of foreign substantive laws, are well honored and enforced in CIETAC's arbitration practice.

4. Cases Concluded

① CIETAC

In 2014, CIETAC concluded 384 foreign-related and HMT-related cases with an increase of 27.15% compared to the previous year. Such figure was about the same as that of CIETAC's 2014 new caseload. Among these cases, 301 cases were concluded by way of awards, accounting for 78.39% with an increase of 32.60%, 83 ones were concluded by way of consent awards or dismissal decisions based on parties' withdrawal requests, accounting for 21.61% with an increase of 10.67%.

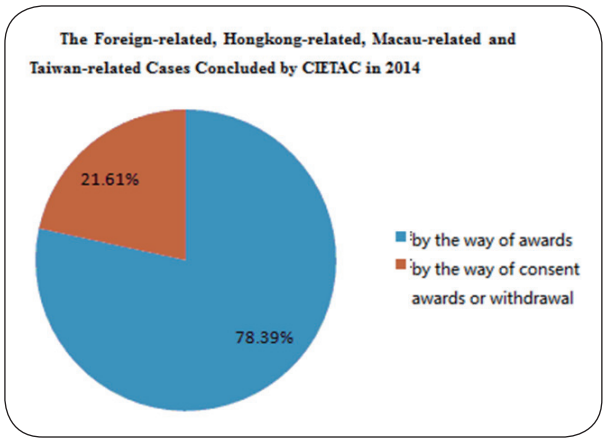

Figure 3.5 The foreign-related and HMT-related cases concluded by CIETAC in 2014

② CMAC

In 2014, CMAC concluded 40 foreign-related, HMT-related cases, almost the same as that of the cases accepted. Of these cases, 12 cases were concluded by way of awards, accounting for 30%; 28 ones were concluded by way of consent awards or withdrawal, accounting for 70%.

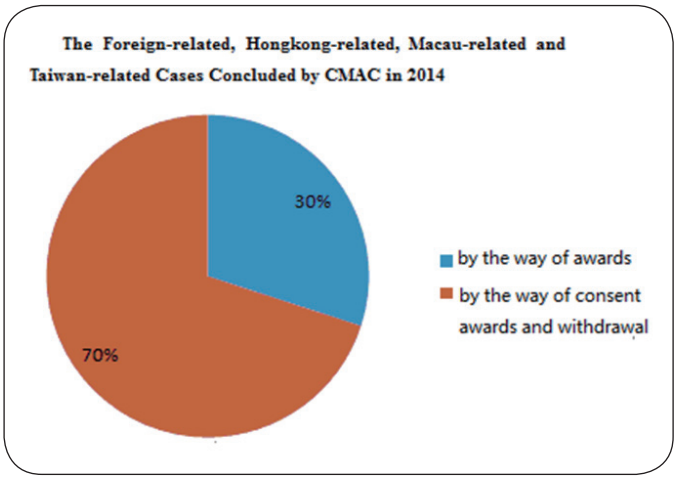

Figure 3.6 The foreign-related and HMT-related cases concluded by CMAC in 2014

5. Feature Analysis

① CIETAC

CIETAC's foreign-related and HMT-related cases in 2014 demonstrated the following characteristics:

Firstly, the caseload continued to increase steadily, with a slightly decreased amount of dispute;

Secondly, the cases involving huge amount of dispute or with great complexity and influence were on the increase, and the average amount of dispute was considerably large;

Thirdly, the cases covered more complicated and diversified types, with more new-type cases appearing;

Fourthly, summary procedure cases accounted for a relatively high proportion;

Fifthly, the parties' agreements in arbitration clauses tend to be more diversified and individualized, and it is more and more common to have special agreements;

Sixthly, the rate of case conclusion surged while the case administration was more efficient. A certain proportion of cases were concluded by way of consent awards or withdrawal. The combination of conciliation with arbitration has continued to achieve satisfactory results.

Furthermore, in recent years, there has been a rising trend for cases where both claimants and respondents are foreign parties,[3] cases with English or both English and Chinese as the arbitration languages, cases where parties agree on places of arbitration outside the mainland China, on the application of foreign substantive laws or on the application of other arbitration rules, which reflects CIETAC's higher internationalization and greater international recognition.

② CMAC

CMAC's foreign-related and HMT-related cases in 2014 demonstrated the following characteristics:

3 The quantities of cases involving foreign parties as both the claimants and the respondents accepted by CIETAC from 2009 to 2014 are 9 in 2009, 14 in 2010, 10 in 2011, 1 in 2012, 19 in 2013, 28 in 2014, which show a rising tendency.

Firstly, the amount in dispute increased steadily while the caseload had a slight drop;

Secondly, the case types were complex and diverse;

Thirdly, most cases were subject to summary procedure;

Fourthly, most cases involved parties from foreign countries or regions;

Fifthly, about 70% cases were concluded by way of consent awards or withdrawal, and the mechanism of combining conciliation with arbitration was running well.

II. Revision of CIETAC and CMAC Arbitration Rules

Both CIETAC and CMAC revised their arbitration rules in 2014. Drawing on the latest development and new experience in international arbitration on the one hand, while summarizing and standardizing their own arbitration practice on the other hand, CIETAC and CMAC endeavored to provide parties with higher quality and more efficient international arbitration service through improving the design of the arbitral proceedings, promoting the efficiency of arbitration, continuing self-innovation and reform, and maintaining the advancement of their arbitration rules and practice.

1. Revision of CIETAC Arbitration Rules

In an effort to adapt to the latest developments in international arbitration practice and to better accommodate the needs of the parties, CIETAC revised its

Arbitration Rules. The new Arbitration Rules, which is the 9th edition, revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on 4 November 2014, has been effective as of 1 January 2015.

Compared with the 2012 edition, the amendments of the new Arbitration Rules are mainly in the following aspects:

a) Setting Up an Arbitration Court to Administer Arbitration Cases

As part of its internal reforms, CIETAC has set up an Arbitration Court to replace the original Secretariat to perform case administration functions under the Arbitration Rules. The Secretariat now instead is responsible for the Commission affairs, focusing on the promotion of public legal services. It should be noted that the set-up of the Arbitration Court only represents a change in division of responsibilities of CIETAC's internal departments. The name of CIETAC as well as its model arbitration clause remains unchanged.

b) Introducing Provisions on Multiple Contracts and Additional Parties

In response to the diversification of business modes and in order to quickly and fairly resolve disputes arising from multiple parties and contracts due to serial transactions, multi-party transaction and/or project series transactions, CIETAC, on the basis of summarizing its own experience, has added provisions on Joinder of Additional Parties and Multiple Contracts and revised the provisions on Consolidation of Arbitrations, which will increase arbitration efficiency and

reduce arbitration costs of the parties at issue.

c) Raising the Threshold of Dispute Amount for the Summary Procedure

In order to reduce procedural complexity and improve efficiency, and in view of the rapid growth of China's economy and the growing value of cases administered by CIETAC, the new Arbitration Rules have raised the threshold of dispute amount for the Summary Procedure from RMB 2 million to RMB 5 million. That is to say, unless otherwise agreed by the parties, the Summary Procedure shall apply to cases where the amount in dispute is below RMB 5 million.

d) Adding a Special Chapter for Hong Kong Arbitration

The revision this time has added a chapter of Special Provisions for Hong Kong Arbitration to highlight the international feature of CIETAC. In September 2012, CIETAC set up the CIETAC Hong Kong Arbitration Centre at the invitation of the Hong Kong SAR Government. As this happened after the previous CIETAC Arbitration Rules took effect in May 2012, the 2012 Arbitration Rules did not include provisions on the CIETAC Hong Kong Center and CIETAC arbitration conducted in Hong Kong. By adding a chapter on Special Provisions for Hong Kong Arbitration, the new CIETAC Arbitration Rules have fully manifested its openness and internationalization.

The Special Provisions for Hong Kong Arbitration in the new Arbitration Rules have incorporated a number of new international arbitration practices. For instance, unless otherwise agreed by the parties, for an arbitration administered

by the CIETAC Hong Kong Arbitration Centre, the place of arbitration shall be Hong Kong, the law applicable to the arbitral proceedings shall be the arbitration law of Hong Kong, and the arbitral award shall be a Hong Kong award; The parties may nominate arbitrators from outside the CIETAC's Panel of Arbitrators; and the administrative fee and the arbitrator's fee shall be charged separately. The revision reflects an even more open attitude of CIETAC and its commitment to embracing Hong Kong international arbitration practices and providing parties at issue with more professional, efficient and international arbitration services.

e) Introducing the Emergency Arbitrator Procedure

The emergency arbitrator procedure is a new mechanism of international arbitration, representing a new development of international arbitration rules. It reflects the importance of emergency relief before the formation of the arbitral tribunal and helps guarantee the fulfillment of lawful rights of the parties.

The introduction of emergency arbitrator procedure under the new CIETAC Arbitration Rules meets the need of the practice of CIETAC Hong Kong Arbitration Centre, where pursuant to the Hong Kong Arbitration Ordinance, any emergency relief granted by an emergency arbitrator is enforceable in the same manner as an order of the court. Also, it adds the possibility of enforcement of the decision of an emergency arbitrator in the enforcing state or region. If allowed by the law applicable to the arbitral proceedings, and the law at the enforcing place also grants legal validity to the decision of an emergency arbitrator, the parties may apply for enforcement in accordance with the decision of the emergency

arbitrator.

Further, the newly added emergency arbitrator procedure can serve as a necessary supplement to interim measures ordered by the court. Emergency relief granted by an emergency arbitrator may be interim measures that cannot be ordered by the court and therefore can serve as a necessary supplement to interim measures ordered by the latter. This may help protect the lawful rights and interests of the parties in a timely manner and reduce losses, with great significance in practice.

f) Other Revisions

Other revisions include the way of service of documents, strengthened power of the presiding arbitrator, engagement of a stenographer, etc.

2. Revision of CMAC Arbitration Rules

CMAC modified its Arbitration Rules at the same pace with CIETAC. The new Rules was modified and approved by China Council for the Promotion of International Trade (CCPIT) / China Chamber of International Commerce on 4 November 2014 and came into effect as from 1 January 2015.

CMAC has greatly reformed the arbitration procedure based on CIETAC and other international arbitration institutions' advanced practice and in conformity with the development trends of international maritime commerce arbitration, making obvious innovation and improvement on the 2004 Rules. For instance, CMAC established the Arbitration Court and the Secretariat with clear division of

work. CMAC also set up its Hong Kong Arbitration Center and added a specific chapter of "Special Provisions for Hong Kong Arbitration" to meet the practical needs of CMAC Hong Kong Arbitration Center in case administration. Moreover, the new Arbitration Rules show more respect for party autonomy, allowing parties to agree on arbitration languages, applicable laws and/or other arbitration rules, and appointment of arbitrators from outside CMAC Panel of Arbitrators. Besides, arbitral tribunals enjoy more power under the new Rules. For example, arbitral tribunals may make jurisdiction decisions under the authorization by CMAC and hear cases in the manner they deem appropriate. Other highlights of the revision include joinder of parties, consolidation of arbitration cases, consolidation of oral hearings, clear distinction between the place of arbitration and the place of oral hearing, and emergency arbitrator procedure, etc.

CMAC, while drawing on the advanced ideas and practice of CIETAC and other international arbitration institutions, also made its own innovation in the new Rules. For example, parties may agree to choose the traditional way of paying a lump-sum arbitration fee based on the disputed amount or the internationally prevailing way of paying the institutional administration fee and the arbitrators' remunerations separately, which is of positive significance for CMAC to motivate arbitrators and keep in line with international practice.

CMAC, when making innovation in the new Rules, still sticks to the unique features of maritime arbitration. For example, CMAC makes no distinction between international and domestic arbitration, with no special provisions on the latter, but only differentiates general and summary procedures and raises the

upper limit of the dispute amount for summary procedure from RMB 1 million to RMB 2 million. CMAC still focuses on its specialty in handling disputes on maritime affairs and maritime commerce as well as logistics disputes. Traditional shipping enterprises have been restructured gradually along with the development of modern logistics industry. From this point of view, CMAC is not limited to accept cases involving traditional disputes on maritime affairs and maritime commerce, but has extended to accept cases involving disputes on sea, land, air transportation and modern logistics. Concerning interim measures, the new Rules keep in line with the Special Maritime Procedure Law, stipulating specifically on property preservation, evidence preservation, maritime injunction and limitation fund for maritime claims, etc.

III. Development and Features of CIETAC and CMAC Arbitration Practice

CIETAC and CMAC, through nearly 60 years of development, has accumulated abundant experience in arbitration practice and institutional administration, developed their own special features, and kept building on such experience and features. This can be illustrated from the following four aspects, including the combination of conciliation with arbitration, the promotion of arbitrators' professional levels to improve the quality of arbitration, the improvement of efficiency in the arbitration process and the consideration of both predictability and flexibility of arbitration fees.

1. Combination of Conciliation with Arbitration

The combination of conciliation with arbitration was first adopted in CIETAC's arbitration practice in 1950's, and has been developed and improved in the nearly 60-year practice of CIETAC and CMAC. Such unique Chinese practice, known as the "oriental experience", has attracted wide attention in the international arbitration circle, followed by some foreign countries in legislation in the past 30 years of arbitration legislation reforms, and adopted by certain foreign arbitration institutions in their arbitration rules.[4]

The combination of conciliation with arbitration innovated by CIETAC mainly refers to Arb-Med under which an arbitral tribunal may conduct mediation during the arbitration process. Such mediation is based on the parties' complete voluntariness and the tribunal' basic understanding of the facts and the right and wrong of the case. The tribunal may help both parties reach a settlement agreement voluntarily by flexible means while the parties may also apply to the tribunal for a consent award based on the content of such agreement. The claimant may also apply for the withdrawal of the case after the performance of such agreement or when the enforcement of such agreement is ensured. Article 47 of the new CIETAC Rules and Article 52 of the new CMAC Rules contain detailed stipulations on the conduct and procedure of the Arb-Med combination.[5]

Such combination of conciliation with arbitration has many advantages, such as reduced time and cost, faster dispute resolution, higher success rate than

4 See Wang Shengchang, 'Theory and Practice of Arb-Med', Law Press (2001).

5 According to CIETAC Rules, where the parties have reached a settlement agreements before the commencement of an arbitration, either party may, based on an arbitration agreement between them that provides for arbitration by CIETAC and the settlement agreement, request CIETAC to constitute an arbitral tribunal to render an arbitral award in accordance with the terms of the settlement agreement.

mediation alone, enforceability of consent awards with high rate of voluntary execution, maintenance of good relationships between the parties, initiatives for the parties to settle their disputes by themselves and high satisfaction of both parties, etc.[6] According to statistics, with the practice of combining conciliation with arbitration, about 20-30% CIETAC cases are concluded every year by way of withdrawal of cases after parties have reached settlement agreements or consent awards by tribunals based on settlement agreements.[7] Take foreign-related cases concluded by CIETAC and CMAC in 2014 for example, 21.61% CIETAC cases were concluded by way of consent awards or withdrawal, and up to 70% CMAC cases are concluded by such way.

The combination of conciliation with arbitration has been proved to be successful practice, which is in line with the development trends and tendency of diversified dispute resolution methods in China and the world. Most parties or their representatives under the influence of oriental culture accept such practice and normally achieve good results, but some parties or arbitration professionals with western culture background are concerned with or even skeptical of the process in which arbitrators act as mediators at the same time. CIETAC and CMAC, considering the differences and conflicts between eastern and western cultures in international commercial arbitration, have inserted a new provision in their revised arbitration rules[8] that CIETAC may, with the consents of both parties, assist the parties to conciliate the dispute in a manner and procedure it considers

6 See Wang Shengchang, 'Theory and Practice of Arb-Med', Law Press (2001), pp. 81-82..

7 See Wang Shengchang, 'Theory and Practice of Arb-Med', Law Press (2001), p 83..

8 See Article 47.8 of the revised CIETAC Arbitration Rules and Article 52.8 of the revised CMAC Arbitration Rules.

appropriate where the parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, so as to satisfy the diversified needs of the parties from different cultural backgrounds.

2. Enhanced Arbitration Quality with Improved Arbitrators

Arbitration is as good as its arbitrators. CIETAC and CMAC, with their advantages in institutional administration, effectively promote the professional levels and ethics of arbitrators from various aspects such as the engagement, training and appointment of arbitrators to ensure the quality of arbitration.

a) Engagement and Training of Arbitrators

CIETAC renewed its Panel of Arbitrators in 2014, and the new Panel of Arbitrators became effective on 1 May 2014. To ensure engagement of excellent arbitrators, CIETAC has adopted the policy of critical selection and cautious replacement, and has set up the mechanism of open selection and pre-engagement training and test since 2011, so as to select outstanding professionals from all over the country as well as from abroad under the principle of fairness, impartiality and openness. In this 2014 renewal, CIETAC has newly engaged 291 arbitrators from the mainland China and 82 arbitrators from Hong Kong, Macau, Taiwan and foreign countries from over 1,000 applicants, after strict preliminary selection, training and test, as well as subsequent reviews of the CIETAC Arbitrators Qualification Examination Committee and the CIETAC Chairmen Meeting.

There are 1,212 arbitrators in the new CIETAC Panel of Arbitrators, including

880 arbitrators from the mainland China, accounting for 72.60%, and 332 arbitrators from Hong Kong, Macau, Taiwan and foreign countries, accounting for the rest 27.40%. Arbitrators from the mainland China are from 51 cities of 28 provinces, cities and districts in China while foreign arbitrators are from 42 countries and regions all over the world. More choices are provided for domestic and foreign parties with appropriate increase in the quantity of arbitrators and wider distribution of the residential places and nationalities of arbitrators.

CMAC also renewed its Panel of Arbitrators in 2014, , which became effective on 1 May 2014. There are 279 arbitrators in the new CMAC Panel, including 214 arbitrators from the mainland China, accounting for 76.7%, and 65 arbitrators from Hong Kong, Macau, Taiwan and foreign countries, accounting for the rest 23.3%. Foreign arbitrators are from 18 countries and regions all over the world. The renewal provides parties with sufficient professional arbitrators to hear various cases involving maritime matters, maritime commerce and logistics disputes through optimizing the profession and age structure of arbitrators, raising the proportion of foreign arbitrators, newly engaging arbitrators from Turkey, France and Germany, and improving the professional levels and internationalization of arbitrators.

CIETAC and CMAC, in addition to their critical selection of new arbitrators, have paid much attention to the improvement of arbitrators' professional levels, arbitration skills and professional ethics. In 2014, CIETAC and CMAC, aiming at securing arbitration quality with highly qualified arbitrators with high level of arbitration skills and internationalization, organized 10 trainings

with 654 participants, covering topics such as construction disputes resolution, forms of VAM and awards thereon, understanding and application of judicial interpretations on finance and leasing as well as practical issues, discussion on the calculation of compensation for damages, effective communication among different legal cultures-- legal privilege mechanism, arbitration skills and ethics, etc., following newly released laws and judicial interpretations, researching on general and typical legal issues in arbitration practice, enhancing arbitrators' understanding of foreign legal systems, and emphasizing professional skills and ethics.

b) Appointment of Arbitrators

In the administration of an arbitration case, the formation of the arbitral tribunal is the most essential in the arbitration procedure and the key to ensure the quality of arbitration. CIETAC, with its resource advantage of numerous first-class domestic and foreign arbitrators and through its careful observation and comprehensive understanding of its arbitrators' specialties, backgrounds, experience, professional skills and impartiality, has been effectively ensuring the quality of arbitration and the fairness of awards through carefully appointing the arbitrators, especially presiding arbitrators and sole arbitrators, thus forming fair and balanced arbitral tribunals with appropriate specialties and reasonable composition based on the procedural type, dispute nature, amount in dispute, degree of complexity, arbitration language, and the circumstances of the parties and their representatives in each case.

In the cases administered by CIETAC in 2014, 631 arbitrators were appointed 3,159 times by the parties or the Chairman of CIETAC, among whom 407 arbitrators were appointed 1,877 times by the Chairman of CIETAC as presiding arbitrators, sole arbitrators or arbitrators appointed on behalf of the parties.

The appointment of foreign arbitrators in 2014 may be divided into the following two categories:

i) Foreign arbitrators appointed by one or both parties, as long as the appointed foreign arbitrator accepted such appointment and the appointing party had prepaid the arbitrator's remuneration as quoted; and

ii) Foreign arbitrators appointed as presiding arbitrators by the Chairman of CIETAC to respect parties' special agreements that the presiding arbitrator shall be of a nationality different from that of both parties.

According to statistics, in 2014, 16 arbitrators from outside the mainland China attended 35 oral hearings of cases administered by CIETAC, among whom 4 were from Hong Kong, 3 from Singapore, 1 from U.S., 1 from Germany,1 from U.K., 1 from France, 1 from New Zealand, 1 from Austria, 1from Australia, 1 from Poland and 1 from Taiwan.

3. Promotion of Efficiency in Arbitration Process

Finality and efficiency are important comparative advantages of arbitration against litigation. However, criticisms over efficiency of arbitration have

increased internationally in recent years. Normally, it takes 1-3 years to conclude an arbitration case or even longer for a complicated one.

According to the CIETAC and CMAC Arbitration Rules, the time period for rendering an arbitral award is 3 months after the formation of the arbitral tribunal for a foreign-relate case where the Summary Procedure is applied and 6 months for a foreign case where the Summary Procedure is not applied. Upon the request of the arbitral tribunal, the President of the Arbitration Court may extend such time period if he/she deems it truly necessary and the reasons for the extension truly justified.[9] In practice, CIETAC and CMAC strictly examine the reasons for the extension of the time periods for rendering awards[10] and strengthen the administration of tracking and supervising so as to avoid undue delay in case hearing and settle disputes as soon as possible. CIETAC and CMAC, making good use of their advantages in institutional administration, actively improve the efficiency of the arbitration process from every step of case administration via a well-developed case administration system. Statistics of the arbitration cases administered by CIETAC in 2014 show that its actual average time for concluding a case was 143 days after the formation of the arbitral tribunal. More specifically, the actual average time for concluding a case where the Summary Procedure was applied was 105 days while that for concluding a case where

9 See Article 48 and Article 62 of the revised CIETAC Arbitration Rules and Article 53 and Article 67 of the revised CMAC Arbitration Rules.

10 The main reasons for extending the time limit of rendering awards in practice include complexity of cases, multiple oral hearings, delay of parties, settlement of parties, application for extension by parties, difficulties in servicing documents, pending or coordination of correlated cases, appraisal, auditing, tribunals' investigation, objections to arbitration agreements and/or jurisdiction, challenge of arbitrators, re-appointment of arbitrators, different opinions among tribunal members, etc.

the Summary Procedure was not applied is 195 days, both being only 15 days longer than the specified time period for rendering an award under the respective procedure in the Arbitration Rules. Despite the facts that CIETAC cases are often quite complicated or involving considerable amount of dispute or of significant importance, as well as its substantial caseload increase[11] CIETAC still achieved a high rate of case conclusion which were 27.15% for foreign-related cases and 37.30% for all cases, with the actual average time for concluding a case roughly equivalent to the specified time period for making an award in the Arbitration Rules. This has sufficiently demonstrated CIETAC's advantages of institutional administration and the efficiency of its arbitration process.

CIETAC and CMAC maintain a system of professional case managers. After CIETAC accepts a case, the Arbitration Court shall designate a case manager to assist with the procedural administration and the coordination among parties, tribunals and the arbitration institution. The case managers of CIETAC and CMAC are highly professional and diligent with strong capabilities, holding master or doctor degrees in law and having good command of foreign languages such as English, French, etc. The system of professional case managers is an important guarantee for CIETAC and CMAC's efficient and professional administration of the arbitration process.

Furthermore, CIETAC, with the purpose of promoting the flexibility and efficiency of its case administration as well as keeping in line with international

11 Though there was only a slight increase in the quantity of foreign-related cases accepted by CIETAC in 2014, the total caseload of 1,610 with 28.18% increase, together with the total dispute amount of RMB37.8 billion, reached a record high.

commercial arbitration practice, and ensuring a fast and efficient arbitration process led by the arbitral tribunals, has set up a working group to research on reforming the conduct of case hearing and propose feasible plans to improve the efficiency of the arbitration process, on the basis of studying and learning from the practice and customs in international commercial arbitration and after taking the actual circumstances of the CIETAC cases into consideration. Up till now, CIETAC has tried approaches such as issuing procedural orders or question lists, producing terms of reference, holding pre-hearing conferences, etc. in nearly 100 cases, which have effectively enhanced the efficiency of the arbitration process in those cases. In the near future, CIETAC will continue its research and summarization of its practice, and make model procedural orders or guidelines on the conduct of case hearing, so as to guide and assist the arbitral tribunals in pushing the arbitration process forward smoothly and thus further improving the efficiency of arbitration.

4. Predictability and Flexibility of Arbitration Costs

Parties are much concerned about the cost of arbitration since the cost of international commercial arbitration is normally high. Currently, major international arbitration institutions adopt the way of collecting institutional administration fees and arbitrators' remuneration separately. This approach lacks predictability for such fees since the fees, especially arbitrators' remuneration, go with the length of procedure.

CIETAC and CMAC have been adopting the way of calculating arbitration fees as

per the amount of disputes which include both institutional administration fees and arbitrators' remuneration, which is different from the above way of collecting fees by other major international arbitration institutions. Furthermore, only reasonable extra actual expenses including special remuneration for foreign arbitrators, travel and accommodation expenses of arbitrators whose place of residence is different from the place of arbitration, engagement fees of stenographers as well as costs and expenses of experts, appraisers or interpreters appointed by tribunals may be collected. The fees and expenses are relatively low and quite predictable.

CIETAC and CMAC, while maintaining the feature of predictable fees and expenses, enhance the flexibility of fee collection in their revised Rules so as to meet diverse need of parties in international commercial arbitration and international standards. Under the revised CIETAC Rules, Hong Kong Arbitration Center of CIETAC adopts the international practice of collecting institutional administration fees and arbitrators' remuneration separately while arbitrators' remuneration and expenses are calculated on the basis of the amount of disputes or hourly rates.[12] CMAC, besides stipulating the same in its revised rules, allows parties choose the way of collecting institutional administration fees and arbitrators' remuneration separately through express agreements.[13]

IV. Latest Trends in China's International Commercial

12 See Article 79 of the revised CIETAC Rules and Fee Schedule III appendixed thereto. According to Article 82.1 of the Rules, the Arbitration Court shall, after hearing from arbitrators and parties concerned, determine arbitrators' special remuneration with reference to the standards of arbitrators' fees and expenses set forth in the Schedule.

13 See Article 76 of the revised CMAC Rules and Fee Schedule II appended thereto. It is stated that the Schedule applies to cases in which 'the parties agree to apply CMAC Fee Schedule II'.

Arbitration Practice

The following relatively obvious latest trends in China's international commercial arbitration may be found through taking foreign cases administered by CIETAC and CMAC as samples and analyzing together with the national data and circumstances of other major Chinese arbitration commissions.

First, the overall caseload has not changed much recently, but the dispute types tend to be complicated and diversified with increase in new-type disputes, which corresponds with the complicating and deepening of economic development.

Secondly, arbitration users are getting more and more experienced, intending to make special agreements in arbitration clauses and customize their arrangements while making better use of the advantage of party autonomy in arbitration.

Thirdly, Chinese arbitration commissions are revising their arbitration rules through actively following and learning latest development and successful practice in international commercial arbitration, which enhances the internationalization of Chinese arbitration rules.

Fourthly, Chinese arbitration commissions have laid emphasis on maintaining and developing advantages, cultivating unique arbitration culture such as Arb-Med, exertion of advantages in institutional administration, consideration to predictability and flexibility of expenses, etc.

Chapter Four. Judicial Support and Supervision of China's International Commercial Arbitration

China, after many years of development, has set up a comprehensive legal system on judicial support and supervision of international commercial arbitration. However, there has been short of steady practical data analysis on this regard. The implementation of the Provisions of Supreme People's Court (SPC) on People's Courts' Publicizing Judgments on Internet as from 1 January 2014 has greatly improved the transparency of China's judicial system.

This Chapter contains a comprehensive study on the judicial support and supervision of China's international commercial arbitration in 2014 based on data from the website of China's Judicial Judgments, as well as the Replies from the 4th Civil Division of the SPC published in the Guidance for Trial of Foreign-Related Commercial and Maritime Cases and other sources on Internet.

I. General Situation

In 2014, Chinese courts concluded 43 cases involving application for confirmation of the validity of foreign-related, Hong Kong-related, Macau-related and Taiwan-related (HMT-related) arbitration clauses,[1] 54 cases involving application for setting aside foreign-related and HMT-related arbitral awards, 141 cases involving

1 The statistics does not cover HMT-related cases involving the confirmation of validity of arbitration agreements in jurisdiction objection.

application for enforcing foreign-related and HMT-related arbitral awards, 30 cases involving application for recognizing and enforcing foreign arbitral awards, 7 cases involving application for recognizing and enforcing arbitral awards made in Hong Kong, Macau and Taiwan.[2] There is no statistics on cases involving preservation measures in foreign-related and HMT-related arbitration cases. Concerning the annulment and non-enforcement of foreign-related and HMT-related awards, no arbitral awards have been set aside, 1 case was remanded to the arbitral tribunal, and only 2 awards were refused of enforcement. Concerning the recognition and enforcement of foreign arbitral awards, 2 awards were denied of recognition and enforcement.[3] No refusal of recognition and enforcement has been made regarding Hong Kong, Macau or Taiwan arbitral awards.[4]

Among the 23 cases involving application for setting aside foreign-related and HMT-related arbitral awards with the judgments publicized on the Internet,[5] 6 were foreign-related awards, 14 Hong Kong-related awards and 3 Taiwan-related

2 Source: judicial statistics from the Research Office of the Supreme People's Court. It should be noted the statistics is from cases reported by courts of various levels under the 'internal reporting system' (the same below) while those cases involving confirmation of validity of arbitration clauses, rejection of application on setting aside arbitral awards or enforcement of arbitral awards which need not to be reported are not taken into account.

3 The grounds for refusal are invalidity of arbitration clause and the tribunal exceeding its authority respectively. Please refer to (2013) Er Zhong Min Te Zi No.10670 Civil Ruling by Beijing Second Intermediate People's Court on 20 January 2014 in the case involving the application for recognition and enforcement of foreign award by Beijing Chao Lai Newborn Sports Leisure Co. Ltd. and (2013) Xi Shang Wai Zhong Shen Zi No.7 Civil Ruling by Wuxi Intermediate People's Court of Jiangsu Province on 20 July 2014 in the case involving the application for recognition and enforcement of foreign award by Just Smith & Suns Cotton Co. Ltd.

4 The statistics is based on the Replies by the 4th Civil Division of the SPC and the website of China's Judicial Judgments. (www.court.gov.cn, last visited on 16 July 2015)

5 All the judgments were made in 2014.

awards.

There were 29 cases involving application for recognition and enforcement of foreign arbitral awards and 5 cases involving application for the enforcement of Hong Kong awards with the judgments publicized on the Internet, among which 2 foreign awards were refused recognition and enforcement while no Hong Kong awards were denied of enforcement. The details are as follows.

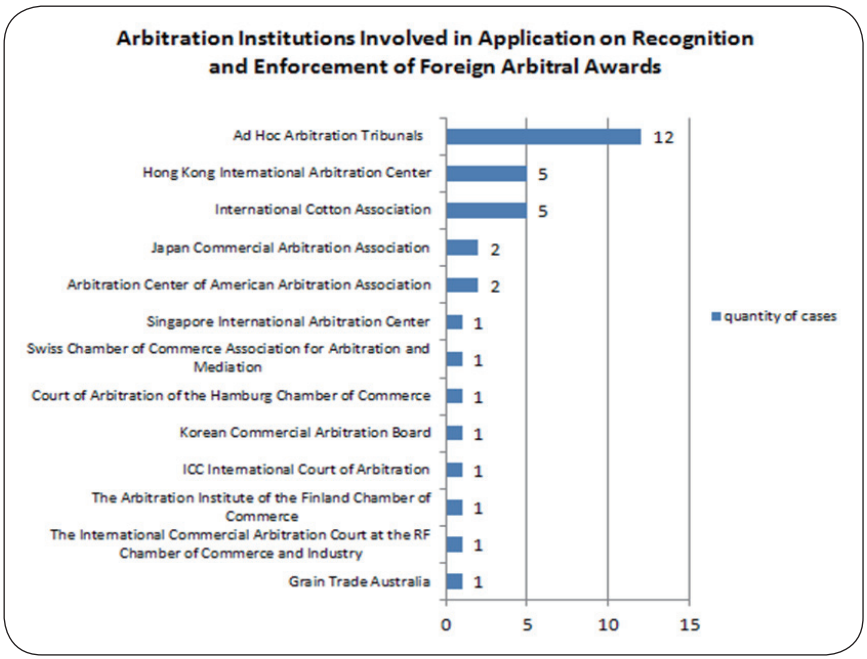

Figure 4.1 Allocation of arbitration institutions involved in foreign arbitral awards whose recognition and enforcement were sought

In general, in the practice of judicial supervision over China's international commercial arbitration in 2014, we see a clearer judicial policy of strictly

limiting the review and supervision to statutory grounds so as to sustain sound development of the arbitration system. Most judgments contained sufficient reasoning and argumentation, and cited international treaties or legal provisions standardly. The internal reporting system of judicial review over international commercial arbitration was thoroughly implemented.

This Chapter, by sorting out important cases involving courts' judicial review over international commercial arbitration in 2014, summarizes the legal issues involved and makes comments and reflections thereon.

II. Property and Evidence Preservation in Arbitration

1. Types of Preservation Measures

Property preservation in arbitration refers to the legal system under which a people's court may, at the request of one party, order to take certain mandatory measures against the subject of dispute or the other party's property, limiting the other party's disposal or transfer of property, if it becomes impossible or difficult to enforce a judgment because of the other party's acts or other reasons. Article 28 of the Arbitration Law stipulates on the system of property preservation in arbitration. The Arbitration Law covers the system of evidence preservation apart from that of property preservation so as to ensure the smooth proceeding of arbitration process and enforcement of arbitral awards. It is stated in Article 46 of the Arbitration Law that "[I]n the event that the evidence might be destroyed or if it would be difficult to obtain the evidence later on, the parties may apply for the evidence to be preserved. If the parties apply for such preservation, the arbitration

commission shall transfer the application to the basic-level people's court at the place where the evidence is located".

The system of conduct preservation was adopted in the 2012 Amendment of the Civil Procedure Law. Article 100.1 stipulates that "[F]or a case where, for the conduct of a party or for other reasons, it may be difficult to enforce a judgment or any other damage may be caused to a party, a people's court may, upon application of the opposing party, issue a ruling on the preservation of the party's property, order certain conduct of the party or prohibit the party from certain conduct; and if no party applies, the people's court may, when necessary, issue a ruling to take a preservative measure". Though the Arbitration Law contains no explicit provision on the system of conduct preservation in arbitration, it may be inferred by analogy from the above provision on new preservation types in the Civil Procedure Law that parties are now entitled to apply for conduct preservation in arbitration.

Furthermore, the system of pre-arbitration preservation was adopted in the 2012 Amendment of the Civil Procedure Law. Article 101 stipulates that "[W]here the lawful rights and interests of an interested party will be irreparably damaged if an application for preservation is not filed immediately under urgent circumstances, the interested party may, before filing an action or applying for arbitration, apply to the people's court at the place where the property to be preserved is located or at the place of domicile of the respondent or to a people's court having jurisdiction over the case for taking preservative measures. The applicant shall provide security and, if the applicant fails to provide security, the people's court shall issue a ruling to dismiss the application".

2. Features of the Preservation System

It may be concluded from the provisions of the Civil Procedure Law and the Arbitration Law that China's legal provisions on the system of preservation in arbitration is rather sophisticated with the following features.

Firstly, courts enjoy exclusive power. Only courts are empowered to take preservation measures, which does not follow the approach of empowering arbitral tribunals to make decisions on preservation measures or interim measures under Article 17 of the UNCITRAL Model Law on International Commercial Arbitration.

Secondly, the courts' jurisdictions over preservation application are different for domestic cases and foreign-related ones. It is stated in Article 68 of the Arbitration Law that "[I]f the parties to a foreign-related arbitration apply for evidence preservation, the foreign-related arbitration commission shall transfer their applications to the intermediate people's court at the place where the evidence is located". However, it is provided in Article 272 of the Civil Procedure Law that "[W]here a party applies for a preservation measure, the foreign-related arbitration institution of the PRC shall transfer the party's application to the intermediate people's court at the place of domicile of the respondent or at the place where the respondent's property is located". It is further clarified in Article 2 of the SPC's Notice on Several Issues Regarding the Implementation of the Arbitration Law of the PRC that "[T]he ruling on an application for property preservation in a domestic case shall be made by the basic-level people's court at the place

of domicile of the respondent or at the place where the respondent's property is located. For a foreign-related case, the court with jurisdiction shall be made by the intermediate people's court at the place of domicile of the respondent or at the place where the respondent's property is located as per Article 258 of the Civil Procedure Law of the PPC (Article 272 after the amendment—editor's note). The people's court shall review property preservation application transferred by the arbitration commission carefully, and make a ruling on property preservation if the application is in conformity with law or dismiss the application if it is not".

Thirdly, if a party applies for preservation measures during arbitration, it must be submitted to the competent court through a Chinese arbitration commission. There is no provision concerning preservation measures for arbitration conducted outside mainland China. Therefore, the mainstream opinion in the judicial practice is that there is no sufficient legal authority for a people's court to accept an application for preservation measures either before or during arbitration for arbitration conducted outside mainland China, with maritime preservation application being an exception.

It is stipulated in Article 14 of the Special Maritime Procedure Law of the PRC that "[M]aritime preservation applications shall not be bound by court jurisdiction agreements or arbitration agreements related to the said maritime claims between the parties". It is stated in Article 21 of the SPC's Interpretation on the Application of the Special Maritime Procedure Law of the PRC that "[T]he application for preservation for maritime claims filed before litigation or arbitration shall be governed by Article 14 of the Special Maritime Procedure

Law. Where a foreign court has already accepted a related maritime case or the relevant dispute has already been submitted for arbitration, but the involved property is within the territory of the PRC, the maritime court at the place where the property is located shall have the jurisdiction to accept the party's maritime preservation application". The SPC, in its Reply to the Request for Instructions on Application for Pre-Arbitration Property Preservation in the case *Pro Liner Shipping Co., Ltd. v. Northern Shipping (Tianjin) Co., Ltd.*, confirms the right of a party to an arbitration conducted outside mainland China to file maritime preservation application in China.

3. Practice of Preservation in Arbitration

In the practice of preservation in foreign-related arbitration, the enforcement record is satisfactory for the preservation measures taken before and during foreign-related arbitration in China. The provision empowering the people's courts to rule whether security shall be provided for application for evidence preservation in foreign-related arbitration was inserted in Article 542 of the SPC's Interpretations Regarding the Application of the Civil Procedure Law of the PRC implemented as of 4 February 2015. It is provided in Article 542.2 that "[I] f a party applies for evidence preservation, it may provide no security when the people's court, after reviewing the application, deems it unnecessary to provide security", which further facilitates the enforcement of evidence preservation measures in foreign-related arbitration.

III. Confirmation of Validity of Arbitration Clauses

Arbitration agreements or arbitration clauses contained in contracts indicate parties' consensus on submitting their disputes to arbitration. They are binding contracts between parties based on party autonomy. The jurisdiction of Arbitral tribunals originates from effective arbitration agreements voluntarily reached by the parties. If an arbitration agreement is false, void, invalid or unenforceable, there will be no jurisdiction for a tribunal. The validity of arbitration agreements is the most important issue in judicial review over arbitration since it is an issue to be settled not only in litigation involving confirmation of validity of arbitration agreements or objection to courts' jurisdiction, but also in annulment or recognition and enforcement of arbitral awards after the conclusion of the arbitral proceedings. There were many remarkable cases in confirmation of validity of arbitration clauses in 2014, among which the following typical cases well reflect the "pro-effective" interpretation approach.

1. Respect and Ascertainment of the Law Applicable to Arbitration Agreements Agreed upon by Parties

In *Beijing CSROAD International Technology Co., Ltd. (CSROAD) v. Supersonic Imagine SA* concerning confirmation of validity of an arbitration agreement,[6] the two parties signed the Exclusive Agent Agreement on 22 October 2009, of which Article 32 states that "[I]f both parties fail to resolve claims or disputes in the above manner while one party wishes to pursue the matter further, such disputes may be finally resolved through arbitration under ICC Rules or other rules agreed by both parties…, the place of arbitration shall be Paris, the language

6 (2013) Er Zhong Min Te Zi No.11200 Civil Ruling by Beijing 2nd Intermediate People's Court on 18 December 2014.

of arbitration shall be English". The parties also agreed that French laws should be applicable to the arbitration agreement. However, CSROAD alleged that the agreement should be nullified since it contained no specific arbitration institution nor did it finalize the applicable arbitration rules.

The court ascertained that it is stated in Article 1504 in Part II, International Arbitration, Volume IV, Arbitration of the Code of Civil Procedure of France that an arbitration involving international trade rights and interests should be considered as an international arbitration. Article 1508 stipulates that the appointment of arbitrators or the method of appointing arbitrators may be determined directly in arbitration agreements or by quoting arbitration rules or procedural rules in arbitration agreements. Article 1509 stipulates that unless it is otherwise agreed in an arbitration agreement, the arbitral tribunal shall determine the rules applied to the arbitral procedure directly or by quoting arbitration rules or procedural rules. The court found that there was no mandatory request on either the form or content of international arbitration agreements under French laws, therefore it was not necessary to review whether the arbitration rules or arbitration institution had been determined in the arbitration agreement when confirming its validity. In the present case, both parties clearly agreed in the Exclusive Agent Agreement to submit disputes to arbitration, and this arbitration agreement shall be valid according to the French law. Therefore, the court rejected CSROAD's application for nullifying the arbitration agreement. The court, through ascertaining and applying the French Laws chosen by the parties, hold that the unclear agreement on arbitration institution or arbitration rules would not lead to the nullification of the arbitration agreement, which effectively realized the parties' intent to arbitrate

as agreed in the written contract.

In *Beijing Jianlong Heavy Industry Group Co. (Jianlong) v. Golden Ocean Fish Ltd. and Golden Zhejiang Co*. concerning confirmation of validity of an arbitration clause, the parties agreed in the Letter of Guarantee that British laws should apply to the Letter, the Letter should be interpreted according to British laws, and all disputes arising out of the Letter should be submitted to arbitrate in London as per the 1996 Arbitration Act of U.K. Jianlong alleged for the Letter to be deemed invalid since it had not been approved by the State Administration of Foreign Exchange in China while the arbitration agreement should be deemed invalid due to the parties' intention of evading the mandatory provisions of the Chinese laws. The SPC replies that the arbitration agreement shall be valid and enforceable as per the 1996 Arbitration Act of U.K., the law of the seat agreed by the parties, and the validity of the independent dispute resolution clause shall not be influenced by that of the Letter of Guarantee.[7]

2. Validity of Arbitration Agreements for Arbitration by a Chinese Arbitration Institution Applying the UNCITRAL Arbitration Rules

In *Zhejiang Yisheng Petrochemical Co., Ltd. (Yisheng) v. Luxembourg INVISTA Technologies S.à.r.l. (INVISTA)* concerning confirmation of validity of an arbitration clause,[8] Yisheng signed two technology licensing agreements with INVISTA on 28 April and 15 June 2003, agreeing that "[T]he arbitration shall take place at China International Economic Trade Arbitration Centre (CIETAC),

7 (2014) Min Si Ta Zi No. 3 Reply.

8 (2012) Zhong Yong Zhong Que Zi No.4 Civil Ruling by Ningbo Intermediate People's Court of Zhengjiang Province on 17 March 2014.

Beijing, P.R.China and shall be settled according to the UNCITRAL Arbitration Rules as at present in force". INVISTA filed its claims with CIETAC on 11 July 2012. Then Yisheng submitted its application to Ningbo Intermediate People's Court for nullification of the arbitration clause on 29 October 2012, alleging that the agreed arbitration was in essence an ad hoc arbitration impermissible under the Arbitration Law of the PRC. Ningbo Intermediate People's Court, after reporting the case level by level to the SPC for review, made the final ruling on 17 March 2014 that though the parties used the expression 'take place at' in the arbitration clause, which is generally understood as reference to location, it could be interpreted an agreement on the arbitration institution by adopting the approach favorable to the realization of the parties' arbitration intent. Though the parties failed to put proper name of the arbitration institution in the arbitration clause, it could be inferred from the abbreviation CIETAC that the arbitration institution chosen by the parties was China International Economic and Trade Arbitration Commission in Beijing. The Court dismissed Yisheng's application for nullification of the arbitration clause since this arbitration clause was not against the Arbitration Law of the PRC.

In this case, the court, under the circumstance that the parties lacked clear agreement on the role of CIETAC in solving disputes, adopted the interpretation approach favorable to the realization of the parties' arbitration intent, i.e., the purposive interpretation, instead of the traditional approach of literal interpretation. By such interpretation, the court confirmed that the arbitration clause was an institutional arbitration one instead of an ad hoc one, so that CIETAC could function as the institution administering the arbitration case.

This case, as a pioneering case allowing a Chinese arbitration institution to administer arbitration cases under the UNCITRAL Arbitration Rules based on parties' agreement, will play a positive role in the internationalization of China's arbitration.

3. Extension of arbitration clauses in Main Agreements to Guarantee Agreements

In the appellate case *Zhang Kaijun etc. v. Lisheng Co. Ltd. (Lisheng)* concerning jurisdiction objection in a guarantee contract dispute,[9] Lisheng signed the Share Transfer Agreement containing an arbitration clause with Pengyi Co. (Pengyi) and the Guarantee Contract containing no arbitration clause with 7 individuals including Zhang Kaijun. Lisheng, after initiating arbitration against Pengyi in Hong Kong, filed a lawsuit in mainland China against the 7 individuals in which the 7 individuals raised the jurisdiction objection, alleging that the arbitration clause in the main contract should be applicable to the Guarantee Contract since disputes arising out of the two contracts are basically the same cause of action. Shandong Higher People's Court dismissed the 7 individuals' jurisdiction objection in the first trial, which was later appealed. The SPC, after hearing the appeal, hold that, in accordance with the principle of party autonomy, the arbitration clause contained in the main contract could not have binding effect on parties other than the signatories or over matters other than the matters outside the scople of the arbitration clause. According to Article 53 of the SPC's Opinion on Several Issues Regarding the Implementation of the Civil Procedure Law of the

9 (2014) Min Si Zhong Zi No. 27 Civil Ruling by the SPC on 4 September 2014.

PRC, there should be only one respondent, *i.e.*, the guarantor, if the creditor only sues against the guarantor. Since the Guarantee Contract may be a separate cause of action, Lisheng was entitled to rely on the Guarantee Contract to sue against the 7 individual guarantors.

4. Interpretation on the Scope of Arbitration Agreements

In the retrial case *Suzhou American Superconductor Co., Ltd.(SASC) v. Sinovel* concerning jurisdiction objection over the computer software copyright infringement,[10] the issue of determining the scope of arbitration arose in the interpretation of "all disputes relating to the performance of this Contract".

The courts of 1st and 2nd instance reasoned that in order to decide whether Sinovel's conducts of modifying, copying and installing software over which SASC enjoyed copyright protection constituted an infringement, the court must first determine whether Sinovel was exercising its right of cure under the Purchase Contract; therefore, SASC's infringement claims were inevitably connected to the Purchase Contract. The courts held that SASC's infringement claims belonged to disputes relating to the performance of the Purchase Contract and should be subject to the arbitration clause.

The SPC in its retrial, found that the conducts of copying and modifying software alleged by SASC should not be classified as disputes relating to contract performance or subject to the arbitration clause, since the Purchase Contract only covered the equipment ownership but not the copyright over the software of the

10 (2013) Min Ti Zi No.54 Civil Ruling by the SPC on 26 January 2014.

equipment,and the repair clause in the Contract only involved the obligation of repair or replacement for the purchased equipment, which was not the same as the amendment in the sense of the copyright law. From the above interpretation, it may be concluded that scope of arbitration agreement, such as "disputes relating to the contract", is quite strictly defined. Infringement disputes could only be classified as 'disputes relating to the contract' when infringement liabilities overlap with liabilities for breach of contract. The copyright infringement dispute in the above case are not subject to the arbitration clause since it is a dispute independent from the contract.

5. Arbitrability of Disputes Arising out of Company Dissolution

In *Fujian Xinsen Carbon Co., Ltd. (Xinsen) v. Fujian Meixin Carbon Co., Ltd.* concerning application for company dissolution with WESTVACO Luxembourg S.à.r.l (WESTVACO) as the third party, Xinsen and WESTVACO had signed the Joint Venture Contract for the establishment of Meixin, agreeing for disputes to be submitted to arbitration administered by Hong Kong International Arbitration Center (HKIAC) under the UNCITRAL Arbitration Rules in Hong Kong. Xinsen litigated for dissolution of Meixin on the ground that WESTVACO breached the Article of Association and trapped Meixin in deadlock. WESTVACO raised the jurisdiction objection based on the existence of arbitration clause. The SPC, in its reply, hold that an arbitration institution had no jurisdiction over company dissolution disputes since such disputes were not arbitrable and could only be settled by courts according to Article 183 of the Company Law of the PRC.[11] In

11 (2014) Min Si Ta Zi No. 15 Reply by the SPC.

this case, Xinsen had applied to HKIAC for mandatory dissolution of Meixin, which was dismissed by HKIAV on similar ground that an arbitration institution has no jurisdiction over company dissolution disputes as per the Company Law of the PRC.

In addition to the above cases, other circumstances under which a foreign-related arbitration clause has been confirmed as invalid or lack of binding force are set out as follows:

(a) The arbitration clause in the charter party can not bind the holder of the bill of lading since the clause has not been incorporated in the bill of lading;[12]

(b) Where the parties has chosen no arbitration institution or two arbitration institutions while the law applicable to the arbitration agreement is the Chinese law;[13]

(c) The arbitration clause signed by and between the consignee and the third party can not bind the consignor of indirect agency when there is no such authorization;[14]

(d) Where the insurer never agreed to arbitrate;[15] and

(e) Where the parties agreed in the dispute resolution clause to submit their disputes to arbitration in London if they could reach an agreement, but failed to

12 (2013) Min Si Ta Zi No. 40, No. 43, No. 50 and No. 61 Replies by the SPC.
13 (2013) Min Si Ta Zi No. 2, No. 4, No. 17, No. 44 and No. 56 Replies by the SPC.
14 (2013) Min Si Ta Zi No. 42 Reply by the SPC.
15 (2014) Min Si Ta Zi No. 54 Reply by the SPC.

reach such further agreement after disputes arose.[16]

IV. Annulment and Non-Enforcement of Foreign-Related Arbitral Awards

The main grounds for application for annulment or non-enforcement of foreign-related and HMT-related awards in 2014 were '*the respondent is not notified to appoint an arbitrator or of the conduct of arbitration procedure or fails to present its case, which is not attributable to the fault of the respondent*' as stipulated in Article 274.1.2 of the Civil Procedure Law, '*the composition of the arbitration tribunal or the arbitration procedure is not in conformity with arbitration rules*' as stipulated in Article 274.1.3 thereof, and '*the enforcement of an arbitration award is contrary to the public interest*' as stipulated in Article 274.2 thereof.

1. Tribunals' Examination and Admission of Evidence

On the issue of failure to exhibit evidence in the oral hearing, most courts, in the reasoning of their judgments, do not consider it as a circumstance for setting aside an award as long as the parties' rights to submit opinions on the examination of evidence are ensured, because they are of the view that Article 45 of the Arbitration Law which stipulates "[A]*ny evidence shall be exhibited at the oral hearing. The parties may challenge the validity of such evidence*" intends to protect the parties' rights to examine evidence. Courts also refuse to set aside awards on the grounds that the arbitral tribunal rejects parties' application for investigation and evidence collection, the admitted evidence is not notarized or

16 (2014) Min Si Ta Zi No. 55 Reply by the SPC.

certified, overdue evidence is accepted, etc., as long as there is no violation of the arbitration rules, since they deem such circumstances fall within the scope of tribunals' investigation of facts and determination of substantive issues.

For instance, Shenzhen Intermediate People's Court found in the (2014) Shen Zhong Fa She Wai Zhong Zi No.248 case that the evidence including the Remittance Certificate may be admitted by the arbitral tribunal as ground for fact finding. Though the evidence was not exhibited during the oral hearing, according to Articles 39.2 and 40.1 of the Arbitration Rules of Shenzhen Arbitration Commission, evidence submitted after the specified period by a party with justified reasons may be admitted as ground for fact finding as long as the evidence has been exchanged to the other party and the latter has reasonable time to submit its examination opinion in writing.[17] The Court also found in the (2014) Shen Zhong Fa She Wai Zhong Zi No. 245 case that the tribunal's admission of overdue evidence could not be taken as ground for annulment of the award since such circumstance fell within the scope of substantive hearing.[18]

2. Forms of Tribunals' Denial of Jurisdiction

Under the arbitration rules of some Chinese arbitration institutions, the arbitral tribunal may make jurisdictional decisions with the authorization of the arbitration commission, either as a separate decision or as part of the award. However, in some awards by certain arbitration commissions where the jurisdictional decision

17 (2014) Shen Zhong Fa She Wai Zhong Zi No. 248 Civil Ruling by Shenzhen Intermediate People's Court on 12 December 2014.

18 (2014) Shen Zhong Fa She Wai Zhong Zi No. 245 Civil Ruling by Shenzhen Intermediate People's Court on 17 October 2014.

denying jurisdiction over certain disputed matters was made therein, the tribunal only briefly mentioned in the reasoning that such matters were beyond the scope of hearing, but failed to make it clear in the award section or distinguish between dismissal of claims and that of arbitration applications, which have caused misunderstanding among parties as to whether they still have the right to litigate their claims over the matters in dispute.

The SPC, in its Reply for Instructions on Application for Setting Aside an Arbitral Award, found that according to the arbitration rules, the arbitration commission or an arbitral tribunal authorized by the commission should make a decision on the dismissal of the case if it decided that it had no jurisdiction over the case. The tribunal violated the arbitration rules by dismissing the claimant's claims after denying any jurisdiction over the case instead of making a dismissal decision. The SPC approved the lower court's opinion to remand the case to the tribunal for re-arbitration within certain period of time since such circumstance was fit for re-arbitration.[19]

The SPC found in another case reported to it that the award in which the tribunal had denied its jurisdiction over the counterclaims and dismissed the counterclaims should not be set aside on the ground that the award was in violation of the arbitration rules since there was no specific provision on the form of jurisdictional decisions over counterclaims, but the lower court may remind the arbitration commission in an appropriate manner that the parties' legitimate litigation rights might be influenced by such award.[20] Above all, arbitration institutions shall

19 (2014) Min Si Ta Zi No.45 Reply by the SPC.

20 (2014) Min Si Ta Zi No.35 Reply by the SPC.

pay attention to the protection of parties' litigation rights when denying the jurisdiction so as to avoid impeding the parties from subsequent relief.

3. Arbitrators' Disclosure of Conflict of Interest

In the (2014) Er Zhong Min Te Zi No.9403 case,[21] it was disputed that whether the failure of the attorney representing one party of the arbitration case in disclosing the fact that he had once worked in the secretariat of the arbitration commission administering the case constituted a violation of the Arbitration Law or the arbitration rules. The court found that such fact did not fall within either the legitimate circumstances for challenging arbitrators under the Arbitration Law or the listed ground for disclosure under the arbitration commission's Code of Conduct for Arbitrators. The attorney left the secretariat years ago, and he does not have a full time position in the arbitration institution though he is listed in its Panel of Arbitrators. He had neither close work contact with the three arbitrators for being employed by the same organization or working for the same social organization nor close personal relationship with the arbitrators as evidenced. Therefore, the court held that the attorney was not under the obligation of disclosure or withdrawing from the case.

The court further opined that according to Article 7.5 of the Measures for Punishing the Illegal Conducts of Lawyers and Law Firms (Measures) (No.122 Order of the Ministry of Justice), serving as an attorney in a case handled by the arbitration institution where he used to or currently work as an arbitrator fell

21 (2014) Er Zhong Min Te Zi No.09403 Civil Ruling by Beijing 2nd Intermediate People's Court on 18 November 2014.

within the circumstances deemed as illegal as per Article 47.3 of the Lawyers Law which stipulates that "representing both parties in a same case, or representing a client in a legal matter that has conflict of interest with himself or his close relative", but such violation on which administrative punishment may be imposed by relevant authorities should not constitute a circumstance for the annulment of awards.

It is fair to say that the court's reasoning is proper to dismiss the annulment application on the ground that there is no close relationship between the attorney and the arbitrators which might influence the arbitrators' impartiality. However, the arbitration circle needs to attach more importance to the issues of the understanding and application of relevant provisions in the Measures in practice as reflected in the above case.

4. Due Notification to the Parties and Protection of their Right of Statement

The SPC, in its reply to a case reported to it on the application for non-enforcement of an arbitral award by Hainan Lion City Tourism Development Limited Company, found that the lower court should make a ruling on non-enforcement of the award according to Article 274.1.2 of the Civil Procedure Law since the respondent, in the arbitration case, had not received arbitration documents including the notice for appointment of arbitrators, the notice of oral hearing, etc., thus could not participate in the arbitration procedure or state its views due to the claimant's wrong provision of the respondent's address at

"Unit 501, Tower C, Yu Hua Cheng, × Road, × City, × Province", for service of arbitration documents to the arbitration commission instead of the respondent's domicile address at "Unit 501, Tower C, Li Hua Cheng, × Road, × City, × Province" which had been used by the claimant to contact the respondent before initiating the arbitration.[22]

It may be seen from the courts' judgments in 2014 that the courts did not apply the criteria for the service of litigation documents to that of arbitration documents, instead, they relied on parties' agreement including the applicable arbitration rules to judge whether the parties had received notices on the appointment of arbitrators or on the arbitration process. For instance, Beijing 2nd Intermediate People's Court, in the (2014) Er Zhong Min Te Zi No. 10632 case involving a party's application for annulment of an award due to its failure of receiving arbitration documents, found the service to the party effective since the arbitration commission had delivered the arbitration documents to the last known address of the party as per the arbitration rules, *i.e.*, its address of registration, and notarized the failure of such service.[23] Shanghai 1st Intermediate People's Court, in the (2013) Fu Zhong Yi Zhong Min Si (Shang) Che Zi No. 16 case, found that the arbitration commission's service of arbitration documents to the post address provided in the contract constituted proper notice since the service was in accordance with the arbitration rules chosen by the parties.[24] As to the protection of parties' right of statement, Shenzhen Intermediate People's Court found in the (2014) Shen

22 (2014) Min Si Ta Zi No.37 Reply by the SPC.

23 (2014) Er Zhong Min Te Zi No.10632 Civil Ruling by Beijing 2nd Intermediate People's Court on 7 December 2014.

24 (2013) Fu Yi zhong Min Si Shang Che Zi No. 16 Civil Ruling by Shanghai 1st Intermediate People's Court on 24 April 2014.

Zhong Fa She Wai Zhong Zi No.173 case that the presiding arbitrator's failure in allowing one attorney to comment after the other attorney had already made his comments was not in violation of the arbitration rules.[25]

5. Violation of Public Interest

There were a number of cases where the parties applied for annulment of awards on the ground of violation of public interest, alleging the company's violation of mandatory provisions in repurchasing shares, involvement of the obligation to pay tax in the award, the tribunal's denial of facts determined by court in a binding ruling, etc., which were all dismissed by the courts. For instance, Beijing 3rd Intermediate People's Court, in the (2014) San Zhong Min Shang Te Zi No.10476 case where one party alleged that the other party had violated public interest through its illegal action of obtaining bank loan with a fake house purchase contract, found that the contract had been nullified based on the finding of the tribunal in the award that the parties had concealed their illegal purpose of fraudulently obtaining credit fund by signing the house purchase contract, which was not in violation of public interest.[26] Beijing 2nd Intermediate People's Court, in the (2014) Er Zhong Min Te Zi No.07648 case where the applicant alleged that the award was in violation of public interest since the tribunal had awarded on non-arbitrable matters related to tax and taxpayers involved in the transaction, thus illegally intervened the state tax administration and might result in the loss of tax revenue, found that the dispute arising out of the parties' performance of

25 (2014) Shen Zhong Fa She Wai Zhong Zi No. 173 Civil Ruling by Shenzhen Intermediate People's Court on 15 October 2014.

26 (2014) San Zhong Min Shang Te Zi No.10476 Civil Ruling by Beijing 3rd Intermediate People's Court on 15 December 2014.

the Share Transfer Contract should be a civil dispute between equal entities with no involvement of public interest which referred to the overall interest of all the members or the majority of the society.[27]

6. Period for Seeking Enforcement of Arbitral Awards

Concerning the period for seeking enforcement of arbitral awards, the SPC, through the No. 37 Guiding Case *Shanghai Jwell Machinery Co., Ltd. v. Retech Aktiengesellschaft, Switzerland*, made it clear that the period for applying for enforcement of an effective foreign-related arbitral award in China started from the day the person or property against which the award was being enforced was found in mainland China, and Chinese courts have the enforcement jurisdiction.

Since the Civil Procedure Law only stipulates that the party applying for recognition and enforcement of a foreign-related arbitral award shall apply directly to a foreign court with jurisdiction, which corresponds to the circumstance where the party against which the enforcement is sought has no domicile or property in mainland China. Parties may dispute over whether the application is beyond the two-year period when it is later found that the party against which the enforcement is sought has domicile or property in mainland China. The above criteria set up in the Guiding Case for the counting of the period for enforcement application reflects the people's courts' attitude of encouraging and supporting the enforcement of foreign-related arbitral awards in mainland China.

27 (2014) Er Zhong Min Te Zi No.07648 Civil Ruling by Beijing 2nd Intermediate People's Court on 18 December 2014.

V. Recognition and Enforcement of Foreign Awards

There were 34 cases concluded in 2014 on recognition and enforcement of foreign arbitral awards and publicized on the Internet. Among them, 28 foreign awards were recognized and enforced, 2 withdrawals of the applications by the parties, 2 dismissals of the applications due to lack of notarization and certification of the award, and only 2 foreign awards were refused of recognition and enforcement, on the grounds of invalidity of the arbitration clause[28] and award beyond the scope of the arbitration agreement respectively.[29] The details are illustrated in the following diagram.

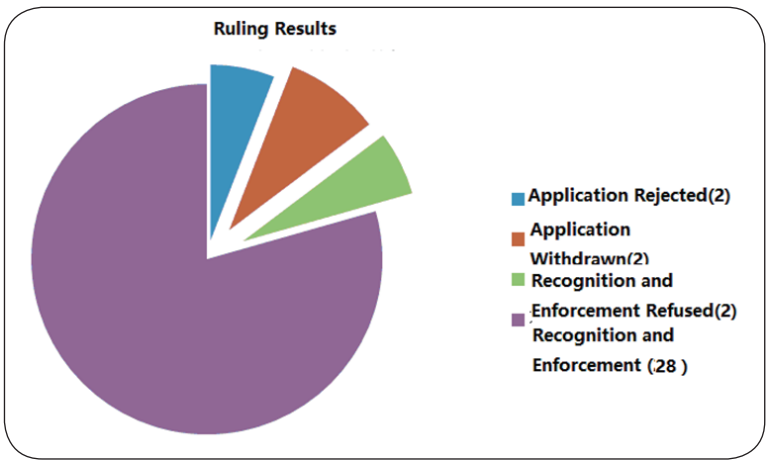

Figure 4.2 Recognition and Enforcement of Foreign Arbitral Awards

28 (2013) Er Zhong Min Te Zi No.10670 Civil Ruling on Application for Recognition and Enforcement of the Award by Foreign Arbitration Institution by Beijing Chao Lai Newborn Sports Leisure Co., Ltd. made by Beijing 2nd Intermediate People's Court on 20 January 2014.

29 (2013)Xi Shang Wai Zhong Shen Zi No.7 Civil Ruling on Application for Recognition and Enforcement of the Award by Foreign Arbitration Insitution by Just Smith & Suns Cotton Co., Ltd. made by Wuxi Intermediate People's Court of Jiangsu Province on 20 July 2014.

1. Formation and Written Form Requirements of Arbitration Clauses

The SPC, in its reply[30] to the case concerning Australia CBH Grain Co., Ltd.'s application for recognition and enforcement of an arbitral award rendered by the Grain and Feed Trade Association, found it inadequate to refuse recognition and enforcement of the award on the ground that the parties had never reached an arbitration agreement. Though Sihai Corporation did not sign the GFR/CIF contract that contained the arbitration clause, both parties had signed the minutes of meeting after negotiation, agreeing on contract modification including quantity, letter of credit and price while not expressly excluding application of other contractual terms including the arbitration clause. Therefore, the GFR/CIF contract and the minutes of meeting constituted the contract basis between the parties, and correspondingly, the arbitration clause contained in the contract constituted a written arbitration agreement between the parties. Accordingly, Shijiazhuang Intermediate People's Court rendered the civil ruling recognizing and enforcing the arbitral award.[31] The court held in this case that the arbitration clause was validly formed and in accordance with the written form requirement under Article 2.2 of the New York Convention through the signing of the minutes of meeting, which is in line with the international trend of more favorable interpretation of the written form requirement for arbitration clauses.

30 (2014) Min Si Ta Zi No. 19 Reply by the SPC.

31 (2013) Shi Min Wu Chu Zi No.525 Civil Ruling by Shijiangzhuang Intermediate People's Court of Hebei Province on 30 December 2014.

2. Recognition and Enforcement of Foreign Awards on Disputes Involving No Foreign Element

The SPC, in its reply to the case concerning the application of Beijing Chao Lai Newborn Sports Leisure Co. Ltd. against Beijing Suo Wang Zhi Xin Investment Advisory Co. for recognition of an arbitral award rendered by the Korean Commercial Arbitration Board, found that since the contract concerned was not a foreign-related one, the Chinese law should be determined as the law applicable to the contract and the arbitration clause contained therein with or without the parties' explicit agreement. According to Article 271 of the Civil Procedure Law and Article 128.2 of the Contract Law, parties are not entitled to submit their disputes involving no foreign elements to arbitration by a foreign arbitration institution or to ad hoc arbitration outside mainland China. Therefore, the arbitration clause in this case where the parties agreed to submit their disputes to arbitration by Korean Arbitration Board was invalid, with such defect failing to be fixed through waiver of jurisdictional objection by the parties in the arbitral proceedings, thus the tribunal should have no jurisdiction over the disputes. According to Article V.1(a) of the New York Convention, recognition and enforcement of an award may be refused when the party against which the award is to be enforced submits evidence to prove that the arbitration clause is not valid under the applicable law. Therefore, the award in this case should not be recognized. Accordingly, Beijing 2nd Intermediate People's Court made the ruling refusing to recognize the award.[32] This is the first case where a people's court

32 (2013) Er Zhong Min Te Zi No.10670 Civil Ruling by Beijing Second Intermediate People's Court on 20 January 2014.

refuses to recognize a foreign arbitral award on disputes involving no foreign elements.

3. Awards Beyond the Scope of Arbitration Agreement and Beyond Jurisdiction

The SPC, in its reply to the case concerning the application of Just Smith & Suns Cotton Co. Ltd.(Just Smith) for recognition and enforcement of an award rendered by the International Cotton Association, approved the lower court's opinion to refuse recognition and enforcement of the award. Just Smith and Wuxi Natural Textile Co., Ltd.(Wuxi Textile) signed the contract of sales and five modifications thereof, among which only the 11 May 2012 modification listed Wuxi Natural Green Fiber Co., Ltd. (Wuxi Fiber) as the buyer but without its signature. Therefore, Wuxi Fiber could not be deemed as joining the contract of sales between Just Smith and Wuxi Textile as a party. Meanwhile, there was no evidence showing Wuxi Fiber and Wuxi Textile were the same entity. Therefore, the award in which Wuxi Fiber was listed as the respondent and liable for breach of contract should be deemed as an award beyond the scope of the arbitration agreement as per Article V.1(c) of the New York Contention,[33] and the award items were not separable. Accordingly, Wuxi Intermediate People's Court made the ruling refusing to recognize and enforce the award.[34]

In this case, the tribunal had no jurisdiction over Wuxi Fiber which was not a party of the arbitration agreement. The Court considered it impossible to separate

33 (2014) Min Si Ta Zi No. 20 Reply by the SPC.

34 (2013) Xi Shang Wai Zhong Shen Zi No.0007 Civil Ruling by Wuxi Intermediate People's Court of Jiangsu Province on 20 July 2014.

the award items beyond the scope of the arbitration agreement from those within the scope since Wuxi Fiber and Wuxi Textile were jointly referred to as the respondents in the award while the tribunal failed to make it clear whether they shared joint or several liability. It is necessary for tribunals to distinguish the legal status and liability of multiple parties and make it clear in the award items since modern arbitration practice always involve complicated transactions and multiple parties.

4. Is Consolidated Arbitration Against Arbitration Rules?

The issue of consolidated arbitration over multi-contract disputes between the parties is involved in *Taikete Telecom Co., Ltd. (Taikete) v. Quanzhou Cardinal Travel Product Co., Ltd. (Cardinal)* concerning recognition and enforcement of a foreign arbitral award.[35] Taikete, Cardinal, Sunproperties, the main agent, and secondary agents signed the License Agreement for Sales in Brazil and the License Agreement for Sales in Mid-East, and both agreements contained an arbitration clause submitting disputes to arbitration by the arbitration institution in Tokyo in accordance with the arbitration rules of Japan Commercial Arbitration Association. Cardinal alleged that the tribunal's decision on the consolidation of arbitration over disputes arising out of the two agreements on the ground that the parties were the same was not in accordance with the arbitration agreement as per Article 44 of the Arbitration Rules of Japan Commercial Arbitration Association which provides that "[I]f the Association or the arbitral tribunal determines that it is necessary to consolidate multiple requests for arbitration that contain claims

35 (2013) Quan Min Ren ZI No.35 Civil Ruling by Quanzhou Intermediate People's Court of Fujian Province on 2 April 2015.

that are essentially and mutually related, the arbitral tribunal, after obtaining the written consent of all the relevant parties, may hear such cases together in the same proceeding. However, if the multiple requests for arbitration arise out of the same arbitration agreement, no consent of the parties is necessary", since the secondary agents in the two agreements were different.

The court held that since the precondition for the application of Article 44 is the existence of multiple requests for arbitration while there was only one request for arbitration in the case, the tribunal's consolidation decision in accordance with Article 26.2 of the Japanese Arbitration Law was reasonable based on the relevance and same nature of the disputes arising out of the two agreements, the respondent also failed to raise any objections in the arbitral proceedings, therefore, there was no inconsistency between the arbitration proceeding and the parties' agreement as stipulated in Article 5.1(d) of the New York Convention.

5. Right of Creditors under Arbitral Awards to Raise Objection to Enforcement of Awards

The issue whether the creditor of an effective foreign arbitral award could rely on its rights under the award to offset its debt under an effective judgment made by a Chinese court was involved in *Cobra Europe S.A.(Cobra) v. Yinhe Depreux Rubber Co., Ltd.*.[36] In this case, the court decided to auction the shares held by Cobra against which the binding judgment should be enforced while Cobra raised objection against the enforcement, alleging such debt to be offset by its credit in due awarded by Hong Kong International Arbitration Center (HKIAC) against the

36 (2013) Zhi Zhi Jian Zi No.202 Civil Ruling by the SPC on 3 March 2014.

party seeking enforcement. The SPC approved the opinion of Shandong Higher People's Court to dismiss the objection, holding that such offset, if allowed, would defeat the purpose of China's system of judicial review over arbitration, which is of great significance in a nation's judicial supremacy,and the interests of the party seeking enforcement of the judgment would also be damaged if the enforcement of an effective judgment had to wait for the conclusion of the judicial review over the arbitral award.

6. Decision Regarding Public Policy

In *Fujian Across Express Information Technology Co., Ltd., Fujian Focus Media Co., Ltd., Cheng Zheng (jointly as Across et al) v. Starr Investments Cayman II Inc*. involving non-enforcement of an award rendered by Hong Kong International Arbitration Center (HKIAC),[37] Across *et al* alleged that the enforcement of the award would severely violate public interest in mainland China since the arrangements under the agreement involved in the case were under the purpose of circumventing the mandatory provision in the Chinese law that foreign investors should establish foreign-invested telecom enterprises and apply for the approval of operating telecom services in order to invest and operate telecom services in mainland China, and the agreement contained Valuation Adjustment Mechnism (VAM) clause. Fuzhou Intermediate People's Court dismissed the application for non-enforcement on the ground that violation of administrative regulations by the arrangements concerned and the VAM clause would not necessarily constitute violation of the public policy of mainland China.

37 (2014) Rong Zhi Jian Zi No.51 Civil Ruling by Fuzhou Intermediate People's Court of Fujian Province on 5 November 2014.

A proviso clause on public policy was stipulated in Article 7 of the Arrangements of the SPC on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR effective as from 1 February 2000, which acts as a safety valve in protecting the fundamental interests of mainland China. In this case, the court focused on whether the enforcement of the arbitral award would violate the fundamental legal system or damage the essential social interest of mainland China, and distinguished between violation of mandatory provisions in administrative regulations and that of public policy, thus followed the consistent judicial practice of defining public policy strictly and prudently.

VI. Issues and Reflections

1. Validity of Arbitration Clauses

In current judicial practice concerning the validity of arbitration clauses, three grounds denying the validity deserve further research and discussion.

The first ground is about whether the arbitration clause is binding on the insurer exercising the right of subrogation. The SPC, in its reply to the case *Beijing Branch of China Continent Property & Casualty Insurance Co., Ltd. v. COSCO Tianjin International Freight Co., Ltd. and Pacific Basin Shipping Ltd.*[38] concerning the jurisdiction objection over disputes arising out of a contract of the carriage of goods by sea, found that the arbitration clause should not bind the insurer who was not a party negotiating and signing the arbitration clause contained in the contract of carriage, and the arbitration clause was not the intent

38 (2014) Min Si Ta Zi No.54 Reply by the SPC.

of the insurer unless the insurer had expressly accepted it. Such point of view is a continuation of the stance in the SPC's reply on 9 October 2005 to the case *Shenzhen Branch of the People's Insurance Company of China Limited v. COSCO Guangzhou Ocean Shipping Co., Ltd.*[39] concerning the confirmation of validity of the arbitration clause in a a contract of the carriage of goods by sea.

However, the 2005 reply was made before the implementation of the SPC's Interpretation concerning Some Issues on Application of the Arbitration Law of the PRC (Judicial Interpretation on the Arbitration Law) in September 2006 when it was still controversial over whether the arbitration clause contained in a contract transfer along with the transfer of the contractual rights and obligations. Article 9 of the Judicial Interpretation on the Arbitration Law stipulates that "[W]here the credits or debts are entirely or partially assigned, the arbitration agreement shall be binding upon the assignee, unless the parties concerned have otherwise agreed, or the assignee explicitly objected to the assignment of the credits or debts or did not know the existence of a separate arbitration agreement at the time of the assignment of the credits or debts." This provision has made it clear that with certain limited exceptions the arbitration clause transfers automatically with the transfer of the contractual rights and obligations, which is based on the theory that the assignee, if not bound by the arbitration clause when obtaining the substantive rights under the contract, would get unreasonable benefit, which should not be supported by law.[40] Further considerations are necessary on the issue whether Article 9 of the Judicial Interpretation of the Arbitration Law is applicable to the

39 (2005) Min Si Ta Zi No. 29 Reply by the SPC.

40 Shen Deyong, Wan Exiang (chief editor), "Understanding and Application of the Supreme People's Court's Interpretation on the Arbitration Law" (2007), published by the People's Court Press, p88.

insurer's subrogation.

The second ground is about whether arbitration clauses are subject to the apparent agency rules. In modern commercial transactions, a large number of contracts are signed by agents who frequently act with no authority or in excess of authority. The apparent agency system was stipulated in Article 49 of the Contract Law of the PRC that "[I]f an actor concludes a contract in the principal's name with no power of agency, in excess of the power of agency, or after the power of agency has expired, and the opposing party has reasons to trust that the actor has the power of agency, the act of agency shall be effective". It is still under debate whether, under apparent agency, the arbitration clause shall bind the principal together with the rights and obligations under the contract.

The third ground is about the validity of an arbitration agreement where two or more arbitration institutions are chosen. Such agreement is called "floating arbitration agreement". The courts used to confirm the validity of such agreement, allowing the parties to reach further agreement on either arbitration institution.[41] However, due to the lack of effective coordination mechanism concerning jurisdiction among Chinese arbitration institutions, it is stipulated in Article 6 of the Judicial Interpretation of the Arbitration Law that the arbitration agreement is invalid if the parties could not reach agreement on choosing one arbitration institution.

Concerning the similar issue of determining the sole court with jurisdiction, the

41 Notice on the Issue Concerning the Validity of an arbitration Clause in Which Two Arbitration Institutions Are Chosen (Fa Han [1996] No176) by the SPC.

SPC has made it clear in Article 30.2 of the Interpretation on the Application of the Civil Procedure Law of the PRC that "[I]f the parties have agreed on jurisdiction by more than two courts located at places with substantial connection with the disputes, the plaintiff can submit the case to any one of them", which overrides Article 24 of the SPC's Opinion on Various Issues Regarding the Application of the Civil Procedure Law of the PRC stating that a jurisdiction agreement is invalid if it is not clear or it has chosen more than one people's court. This is of certain significance for future amendment on Article 6 of the Judicial Interpretation of the Arbitration Law. It would be beneficial for the realization of parties' arbitration intent if a similar system could be established, allowing the parties to choose one arbitration institution and empowering the arbitration institution accepting the parties' arbitration application first with exclusive jurisdiction.

2. Application of the UNCITRAL Arbitration Rules in Mainland China

In the above Yisheng case concerning confirmation of validity of the arbitration clause, the courts of three levels all took positive attitudes toward the mixed arbitration clause under which the dispute would be arbitrated by a permanent arbitration institution under other arbitration rules. However, they had different opinions on whether the arbitration should be deemed as ad hoc arbitration if the parties agreed on the application of the UNCITRAL Arbitration Rules, especially when the parties had not clarified the function of the arbitration institution.

United Nations Commission on International Trade Law (UNCITRAL) recommends three ways of applying the UNCITRAL Arbitration Rules in the Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitration under the UNCITRAL Arbitration Rules (adopted in 1976 and revised in 2010). Firstly, the UNCITRAL Arbitration Rules may serve as a model for arbitration institutions to draft their own arbitration rules. Secondly, arbitration institutions may provide procedural administration or other specific administrative service for arbitration under the UNCITRAL Arbitration Rules. Thirdly, an arbitration institution (or a person) may be requested to act as the appointing authority, as provided for under the UNCITRAL Arbitration Rules. Therefore, though the original goal of drafting the UNCITRAL Arbitration Rules is to provide a procedure reference for ad hoc arbitration, the application of the Rules by permanent arbitration institutions is not excluded.

However, if it is expressly agreed by the parties that a permanent arbitration institution shall only be responsible for the appointment of arbitrators to form the tribunal and shall not administer the arbitration procedure, which means the arbitration institution only functions as the appointing authority, the arbitration shall still be considered as ad hoc arbitration, and such arbitration agreement shall be deemed invalid according to Article 16 of the Arbitration Law of the PRC. Further research is necessary on the different circumstances involving the application of the UNCITRAL Arbitration Rules in mainland China. Chinese permanent arbitration institutions should also explore in practice how to administer arbitration procedure under the UNCITRAL Arbitration Rules and coordinate with the case administration system under their own arbitration rules.

3. Nationality of Arbitral Awards

In international commercial arbitration practice, the nationality of an arbitral award indicates the source of the legal effect of the award. An award can only be legally binding when it has connection with the domestic law of certain nation. The nationality of an award decides which country's court has the power to set aside the award, and is closely related to the recognition and enforcement of the award in other countries under the New York Convention.

There are no clear criteria for deciding the nationality of an award in either the Civil Procedure Law or the Arbitration Law of the PRC. Articles 272, 273, 274 and 283 of the Civil Procedure Law use the wordings of "award rendered by a foreign-related arbitration institution of the PRC" and "award rendered by a foreign arbitration institution" to distinguish between a domestic arbitral award and a foreign arbitral award. Based on the above provisions, there may be controversies over applicable law due to uncertainties in the nationality of two kinds of arbitral awards. One is the awards rendered by Chinese arbitration institutions with the place of arbitration outside mainland China. Another is the awards rendered by foreign arbitration institutions with the seat of arbitration in mainland China.[42] It is urgent to clarify in judicial practice whether the Arbitration Law of the PRC or the New York Convention shall apply to the second kind of awards, especially after the SPC found the parties' agreement on arbitration by

42 Though there is no clear stipulation on the market access for a foreign arbitration institution to provide arbitration service in mainland China while there is no arbitration institution actually organizing arbitration proceedings in mainland China in practice, it is necessary to determine the nationality of an award rendered by a foreign arbitration institution with the place of arbitration within mainland China as per the parties' agreement, such as the ICC China award since the award is deemed as rendered at the place of arbitration.

the International Court of Arbitration of ICC in Shanghai to be valid in its reply in 2013 to the case *Anhui Long Li De Packaging and Printing Co., Ltd. v. BP Agnati S. R. L.*[43] concerning the confirmation of the validity of such arbitration agreement.

It is stipulated in Article 260 of the Civil Procedure Law that "[W]here there is any discrepancy between an international treaty concluded or acceded to by the PPC and this Law, the provisions of the international treaty shall prevail, except clauses on which the PRC has declared reservations". It is stated in Article 5.1(e) of the New York Convention that the court where recognition and enforcement of an award is sought may refuse recognition and enforcement if "[T]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'. Though the above provisions contain no direct definition on the nationality of arbitral awards, they provide the criteria for judging the nationality of awards through clarifying the court which has jurisdiction to exercise judicial review on setting aside or stopping enforcement of an arbitral award, That is to say, only the court in the country where the award is rendered or of which the law is applicable to the arbitration procedure has the jurisdiction to set aside and supervise the award while other courts may only have jurisdiction over the enforcement of the award and review on the limited grounds for refusal of recognition and enforcement set forth in the New York Convention.[44]

43 (2013) Min Si Ta Zi No.13 Reply by the SPC.

44 Yang Fan (translator), "Guide on Interpreting the 1958 New York Convention Produced by the International Chamber of Commerce: Judges' Manual" (2014), published by the Law Press, p86.

Along with the development of the theory and practice in international commercial arbitration laws, the criterion of the place where an arbitral award is rendered, due to its objectivity and clarity, as well as its advantage in avoiding conflict of nationalities, has been recognized as the main criterion for determining the nationality of an arbitral award, which is also adopted by the UNCITRAL Model Law on International Commercial Arbitration. In judicial practice, the SPC issued the Notice on Issues concerning the Enforcement of Hong Kong Arbitral Awards in the Mainland on 30 December 2009,[45] stating that ad hoc arbitral awards made in the Hong Kong SAR and the arbitral awards made by the arbitral tribunals of the Court of International Arbitration of the International Chamber of Commerce and other foreign arbitration institutions in Hong Kong shall be deemed as Hong Kong awards and enforced in the Mainland in accordance with the SPC's Arrangements on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR. The SPC also issued its Interpretation on the Application of the Civil Procedure Law of the PRC on 4 February 2015,[46] stating in Article 545 that "[F]or an arbitral award made by an ad hoc tribunal outside mainland China, the people's court, upon one party's application for recognition and enforcement, shall treat it in accordance with Article 283 of the Civil Procedure Law". The above judicial interpretations have reflected the tendency of determining the nationality of an award according to the place where the award is made. The criterion for determining the nationality of an arbitral award shall be clarified through amendments on the Arbitration Law or judicial interpretations in the near future.

45 Fa [2009] No. 415 Notice.

46 Fa Shi [2015]No. 5.

4. Public Policy Issues in the Recognition and Enforcement of Foreign Awards

There is no clear conclusion on the connotation of social public interest in China's judicial practice, but we can see from the increasing relevant cases that the courts have become more and more prudent in determining violation of public interest. It should be noted that the terms such as "public policy", "social public interest" and "public order" are interchangeable and with fundamentally the same meaning in the publications in China.[47] Therefore, this Report focuses on the analysis of the criteria for determining public interest in China's judicial practice without making distinctions among the terms.

We hereby take two examples, including the SPC's Reply in 1997 to the Request of Beijing No.1 Intermediate People's Court for Instructions on Refusal to Enforce the Arbitral Award of the Case *Performance Company of the United States and Tom Howlette Co. v. China Women Travel Service* Concerning Disputes Arising Out of a Performance Contract[48] (the 1997 Reply) and the Reply of the 4th Civil Division of the SPC to the Request for Instructions on Refusal to Enforce (2003) CIETAC Cai Zi No.0138 Arbitral Award[49] (the 2006 Reply).

The SPC, in the 1997 Reply, found that "during the performance, the American

47 Zhao Xiuwen, "Review of Public Policy as Ground for Refusing Enforcement of Foreign Arbitral Awards by Chinese Courts From the Perspective of Yong Ning Case", the Jurist, Issue 4 (2009), No.99.

48 (No.35[1997], 26 December 1997). Reply of the SPC to the Request of Beijing No.1 Intermediate People's Court for Instructions about Refusal to Enforce the Arbitral Award on the Case of Contract Performance Disputes-Performance Company of the United States and Tom Howlette v. China Women Travel Service.

49 Reply of the 4th Civil Division of the SPC to the Request for Instructions about Refusal to Enforce (2003) CIETAC Cai Zi No.0138 Arbitral Award, (2005) Min Si Ta Zi No.45, 23 January 2006.

performers, instead of putting on performance as ratified by the Ministry of Culture of the PRC, performed heavy metal songs which were unfit for the Chinese situation and breached the contract. This conduct was contrary to the social public interest of China…If the people's court enforces the award, it will impair the social public interest of China." From the current perspective of practice, the SPC adopted quite broad criteria in judging the social public interest in the 1997 Reply.

However, the SPC made it clear in the 2006 Reply that "the social public interest not only safeguards the fairness of arbitration proceedings, but also functions to maintain the fundamental legal order of a nation. In this case, there is no violation of social public interest which would be intolerable to China's legal order. Meanwhile, the enforcement of the award concerned is not the cause for the idleness of the relevant equipment. Thus, it is unfounded to refuse the enforcement of the award for violation of social public interest". That is to say, the determination of violation of social public interest shall be judged according to the enforcement result and the tolerance limit of China's legal order. The 2016 Reply adopted a rather prudent approach compared to the 1997 Reply, and echoed to the criteria adopted in the ruling of the Across case.

It is not hard to find through the above cases that the indefinite and broad concept of public interest is not a static or unaltered one, but changes over time. Take China as an example, the connotation of public interest is different in various stages of legislation or history. The connotation of public interest changes naturally along with political reforms, economic development, cultural progress

and the change of social value while all social environment factors influence the determination of public interest.

Of course there is not yet clear and strict definition or criteria for public interest in the recognition and enforcement of foreign arbitral awards. However, as the practice shows, just like the criteria may become more concrete and definite through the 1997 Reply, the Reply on the Sweden Arbitral Award,[50] the Reply on the ICC Award,[51] the Reply on Tokyo No.07-11 Award,[52] etc. and the ruling of the above Across case, we may attempt to set up a case reference system for the determination of public interest through a series of relevant cases, and find a rather contemporary and complete description for the criteria in the determination of social public interest.

50 Reply of the SPC Regarding the Request of Haikou Intermediate People's Court for Refusal to Recognize and Enforce the Arbitral Award of the Arbitration Institute of Stockholm Chamber of Commerce (2005 Min Si Ta Zi No.12, 13 July 2005).

51 Reply of the SPC Regarding the Request for Refusal to Recognize and Enfoce the Arbitral Award of the Arbitration Court of International Chamber of Commerce (2008 Min Si Ta Zi No.11, 2 June 2008).

52 Reply of the SPC Regarding the Request for Instructions on Refusal to Recognize the Tokyo No. 07-11 Arbitral Award by Japan Commercial Arbitration Association (2010 Min Si Ta Zi No.32, 29 June 2010).

Annual Summary

Almost 60 years have passed since international commercial arbitration first started in China in the 1950s. China's international commercial arbitration has achieved remarkable growth along with China's significant improvement of its comprehensive national strength and international status as well as the comprehensive deepening of its economic and trade exchange with foreign countries.[1] Arbitration has been accepted as one of the primary methods for international commercial dispute resolution. China's international commercial arbitration institution has been recognized internationally, with CIETAC being one of the "world-renowned international arbitration institutions" alongside with the International Court of Arbitration of the International Chamber of Commerce (ICC), the Arbitration Institute of Stockholm Chamber of Commerce (SCC), etc.

In retrospect of the year 2014, the development of China's international commercial arbitration can be summarized from the following four aspects.

Firstly, the overall data analysis shows that, on the one hand, China's international commercial arbitration plays an essential role in resolving international commercial disputes with increasing importance and advantages; on the other hand, the quantity of foreign-related, Hong Kong-related, Macau-related and Taiwan-related cases have increased, while its proportion in the national total caseload has not changed much, and the development of international commercial

1 Cina' s economic aggregate is ranking the second, the foreign trade volume is ranking the first while the inbound and outbound foreign invetsment are in the front ranks.

arbitration is very unbalanced among Chinese arbitration commissions. .

Secondly, China's legal system related to international commercial arbitration is improving. The legal environment is conducive to the development of China's international commercial arbitration with various judicial interpretations on the 1994 Arbitration Law by the Supreme People's Court (SPC), new provisions concerning arbitration in the amendments of other laws, and the internal reporting system of judicial review over arbitration established by the SPC. Breakthrough and progress have been made in recent years in the determination of the law applicable to foreign-related arbitration agreements and the improvement of the relation between foreign-related arbitration and the judiciary.

Thirdly, Chinese international commercial arbitration institutions attach great importance to the dynamic integration of internationalization and localization in their development. Chinese international commercial arbitration institutions represented by CIETAC and CMAC have amended their arbitration rules to follow the latest development and successful practice of international commercial arbitration, accelerated their internationalization, actively merged into the international circle and participated in the rule-making in international arbitration. Meanwhile, they also keep their roots in the Chinese culture, in light of China's actual situation, develop their own features, maintain local advantages such as combination of conciliation with arbitration, institutional administration, foreseeable and flexible arbitration cost, etc., so as to actively grasp the trend and direction of the development of international commercial arbitration and better practice the principle of party autonomy.

Fourthly, the fundamental idea of "pro-arbitration" or "arbitration-friendly" is further reflected in the judicial support and supervision of China's international commercial arbitration. China's international commercial arbitration has been pushed forward by both the improved legal system on arbitration and the more flexible and favorable judicial review environment. The courts review, supervise and support arbitration through strict application of relevant laws, confirm for the first time the validity of the mixed arbitration clause in which the parties agree to arbitrate by a Chinese arbitration institution under the UNCITRAL Arbitration Rules, respect and ascertain the law applicable to arbitration agreements as agreed by the parties, etc., showing the purpose of helping the development of international commercial arbitration.

China is an important player in the construction of the global economy and a major propellant of economic globalization. At the end of 2014, the policy of "improving the arbitration system and promoting the public trust of arbitration" was introduced in the 4th Plenary Session of the 18th Central Committee of the Communist Party of China, which indicated the direction for the development of arbitration in China.

For further development of China's international commercial arbitration, we shall make the following endeavors: continue to develop and improve arbitration-related legislation, strengthen the judicial support and supervision favorable to international commercial arbitration, enhance theoretical research, talent training and the fostering of arbitration culture, actively encourage reform of Chinese arbitration institutions, constantly update arbitration rules and practice, proceed

with a dynamic integration of internationalization and localization, exploit the advantages of institutional administration to the full, enhance the service capabilities and levels, innovate the work style, keep improving the arbitration system and promoting the public trust of arbitration, actively participate in rule-making in international arbitration, enhance the power of influence and have a better say in international community, give full play to the important role of China's international commercial arbitration in international commercial dispute resolution, built China as an international and regional arbitration center, facilitate economic and trade development as well as cooperation among China and other countries in the world, and promote the healthy development of international economic order.

Timeline of Important Events

- On 27 March 2014, Dr. YU Jianlong, Vice Chairman and Secretary General of CIETAC, led a Chinese delegation to the 10th Anniversary Conference of Asia Pacific Regional Arbitration Group (APRAG) in Melbourne, Australia.

- On 6-9 April 2014, Dr. LI Hu, Deputy Secretary-General of CIETAC, led a delegation to the 22nd Conference of International Council for Commercial Arbitration (ICCA) in Miami, USA.

- On 1 May 2014, CIETAC renewed its Panel of Arbitrators though open selection.

- On 1 May 2014, CMAC renewed its Panel of Arbitrators though open selection.

- On 16 June 2014, the China-Laos Symposium on the Arbitration System was held at the CIETAC Southwest Sub-Commission.

- On 19-21 June 2014, Dr. LI Hu, Deputy Secretary-General of CIETAC, attended the 2014 International Arbitration Conference in Malaysia and delivered a speech.

- From 27 July to 2 August 2014, the 5th International ADR Mooting Competition was successfully held at the City University of Hong Kong.

There were 24 delegations coming from 11 countries including China, Australia, India, Malaysia, Pakistan, Singapore and UK, as well as Hong Kong SAR and Taiwan Region.

- On 12-13 September 2014, Mr. LENG Haidong, Deputy Secretary-General of CIETAC, attended the 8th China-Latin America Enterprises Summit in Changsha. Meanwhile, CIETAC signed a cooperation agreement with the Foreign Trade Committee of Mexico.

- On 15-19 September 2014, the 2nd China Arbitration Week was held from in Beijing, during which 10 seminars on international commercial arbitration were held, the winners of the 2nd Zhonglun-Cup Essay Competition on International Commercial Arbitration were awarded, and the 1st Youth Arbitration Salon was organized.

- On 23 September 2014, CIETAC signed in Beijing a cooperation agreement with the Arbitration and Conciliation Center of Bogota, Columbia.

- On 24 September 2014, Shenzhen Arbitration Commission, Hong Kong Mediation Center and Shenzhen Civil and Commercial Mediation Center held a signing ceremony for cooperation between Shenzhen and Hong Kong on arbitration and mediation.

- On 26 September 2014, the 2015 CIETAC Arbitration Rules were passed by the Chairmen's meeting of CIETAC, which were adopted by the

China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC) on 4 November 2014 and came into effect as of 1 January 2015.

- On 26 September 2014, the 2015 CMAC Arbitration Rules were passed by the Chairmen's meeting of CMAC, which were adopted by the China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC) on 4 November 2014 and came into effect as of 1 January 2015.

- On 26 September 2014, CIETAC held an opening ceremony in Beijing for the establishment of its Arbitration Court.

- On 26 September 2014, CMAC held an opening ceremony in Beijing for the establishment of its Arbitration Court.

- On 27 October 2014, Dr. YU Jianlong, Vice Chairman and Secretary General of CIETAC, led a delegation to Sweden, co-hosting a seminar on Chinese and Swedish Arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and delivered a speech. The delegation also visited the Supreme Court of Sweden and the Swedish Arbitration Act Revision Committee of the Ministry of Justice.

- On 14 November 2014, the Annual National Conference on Arbitration was held in Changzhou.

- On 18 November 2014, Mr. LENG Haidong, Deputy Secretary-General of CIETAC, led a delegation to a seminar on CIETAC arbitration in Madrid, Spain. The delegation also visited the Court of Arbitration of Spain Chamber of Commerce, Court of Arbitration of Madrid Chamber of Commerce and the Court of Civil and Commercial Arbitration.

- On 19 November 2014, CIETAC, CMAC and the Department of Justice of the Hong Kong SAR jointly held an inauguration ceremony of the CMAC Hong Kong Arbitration Center in Hong Kong.

- On 19 November 2014, Dr. YU Jianlong, Vice Chairman of CMAC, led a delegation to the Asian Logistics and Maritime Conference co-organized by the government of Hong Kong SAR and Hong Kong Trade Development Council.

- On 20-24 November 2014, the 12th CIETAC Cup International Commercial Arbitration Moot was held in Beijing. This year, over 200 students coming from 33 different universities in China participated in the CIETAC Cup.

- On 4 December 2014, Dr. YU Jianlong, Vice Chairman and Secretary-General of CIETAC, was elected to the Governing Board of International Council for Commercial Arbitration (ICCA). Dr. YU is the only representative of a Chinese arbitration institution in the Governing Board.

- On 9 December 2014, CIETAC and China Construction Industry

Association (CCIA) co-organized the Summit on Chinese Construction Laws and Dispute Resolution in Beijing.

- On 10 December 2014, the UN Convention on Transparency in Treaty-Based Investor-State Arbitration was adopted and would be opened for signature on 17 March 2015 in Mauritius.

- On 18 December 2014, the Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law of the People's Republic of China was adopted by the 1636th Meeting of the Judicial Committee of the Supreme People's Court, which would come into force as from 4 February 2015.

- On 22-26 December 2014, Dr. YU Jianlong, Vice Chairman and Secretary General of CIETAC, led a 30-member Chinese commerce and arbitration delegation to Taiwan. During the visit, CIETAC and Chinese Arbitration Association, Taipei co-organized the 14th Cross-Strait Seminar on Commerce and Arbitration.

- On 31 December 2014, CCPIT/CCOIC announced its Decision on the Reorganization of the CIETAC South China Sub-Commission and the CIETAC Shanghai Sub-Commission. CIETAC released its reorganization announcement on the same day.