[C] Nature

Unlike litigation that is empowered by the state, arbitration derives its power from the party autonomy. Though arbitration is a private procedure, its award is binding and enforceable through legal proceedings and contains public effect. Why does parties' mutual consent produce coercive consequence?

Arbitration is only contractual if law conferred no power on it. Similar to mediation, nowadays, early arbitration depended on parties' willingness: voluntary participation in arbitration and voluntary performance of arbitral award. However, as dispute resolution methods develop, arbitration law and international conventions have spawned. Consequently, arbitration, a previously private procedure, has been regulated and enforced by law, resulting in difficulty in determining its nature.

There are mainly four theories on the nature of arbitration in China and overseas:

(1) Judicial power theory, which holds that states have the power to supervise and administrate arbitration taking place in their jurisdiction. Adjudication is a kind of state sovereignty, exercised only by states. Without mandate from the state of arbitral seat, arbitrators cannot exercise the power normally reserved for judges. It is because that law allows parties to submit their disputes to arbitration that arbitrators have the adjudicating power analogous to that of judges, and arbitral awards are of the same effect as judgments.
(2) Contractual theory, which holds that arbitrators' power is derived from parties' conferral rather than authorization from law of judicial authority, and arbitration, featuring voluntariness, is based on the will of parties.
(3) Mixture theory, which adopts the strengths of both judicial power theory and contractual theory, holds that arbitral awards stand somewhere between judgments and contracts. Both arbitrators' power and the validity of arbitration rest on parties' agreement, and arbitrators do not perform public functions, but arbitration possesses the nature of judicial power in the application of civil procedure law. An arbitration agreement excludes courts' jurisdiction, and arbitrators' authority replaces judges' power.
(4) Autonomy theory, which holds that parties' complete autonomy is demanded by the full development of arbitration, is limited by public policy on the minimum level.[8] Recently, some scholars believe the study focus should be the objective and function of arbitration. The objective of arbitration law is to realize parties' goal, and its function is to develop *lex mercatoria*.

As discussed above, it should be noted that despite the fact that arbitration procedure originates from parties' agreement, arbitration relies on coercive force of states, which is the ultimate basis for arbitrators' appointment, arbitration proceedings, voluntary performance of arbitral awards or compulsory enforcement. An

8. Han Jian, *Theory and Practice of Modern International Commercial Arbitration*, 36 (2nd ed., Law Press 2002); Huang Jin, Song Lianbing, XuQianquan, *Arbitration Law*, 8–13 (China University of Political Science and Law Press 2002).

agreement itself can be breached, but law guarantees that a valid agreement cannot be violated. The development and improvement of arbitration system has indicated shortcomings of the contractual nature of arbitration, which can no longer purport to be the only characteristic of arbitration and can only exist with direct or indirect confirmation of judicial power.

Nonetheless, arbitration, not an innate dispute resolution of states, has its judicial nature limited. Though arbitration originates from parties' conferral, it relies on judicial power from the perspective of enforcement of arbitration agreement and arbitral awards as well as exercise of arbitrators' power. Or in other words, the nature of arbitration is "quasi-judicial power," which may overlap with but not be covered by any of the above theories. This book is inclining to adopt the quasi-judicial power theory.

None of lawyers, arbitrators, arbitration institutions or parties shall conduct arbitration in a way that does not conform to the nature of arbitration. Taking arbitrator as an example, an arbitrator is neither a judge who has inherent authority nor an attorney acting for one party. A party shall be prepared for the possibility of more expenditure in arbitration, and if a party finds an arbitrator or an arbitral institution unsatisfactory, he can vote with his feet.

[D] Category

From different perspectives, modern commercial arbitration can be categorized as follows.

[1] Compulsory Arbitration and Voluntary Arbitration

Judging by whether an arbitration agreement is needed, arbitration can be divided into compulsory arbitration and voluntary arbitration. The former means that an arbitral tribunal's authority derives from provisions of a specific law instead of the parties' consent to arbitrate (arbitration agreement). Under certain circumstances, some commercial transactions may be compelled to arbitrate by virtue of legal provisions. The latter means that by concluding arbitration agreement parties confer authority on an arbitral institution.

[2] Nongovernmental Arbitration and Administrative Arbitration

Measured by status and nature of arbitration organizations, arbitration can be classified as nongovernmental arbitration and administrative arbitration. The former means an arbitral institution that resolves disputes as a nongovernmental organization based on an arbitration agreement concluded consensually by the parties. The latter refers to arbitration conducted by an organization whose authority derives from administrative power, which usually has nothing to do with the parties' willingness.

[3] Domestic and International Arbitration

Depending on whether a dispute to be resolved has foreign-related elements, arbitration can be divided into domestic arbitration and international arbitration. In general, domestic arbitration means that none of the three elements of legal relationship (the parties, subject matter, obligations and rights) involved in a dispute to be resolved by arbitration has foreign factors.[9] In contrast, international arbitration refers to arbitration conducted to resolve a dispute with foreign factors in its legal relationship. Typically, an international arbitration involves at least one foreign party, or where all parties are domestic, the subject matter or contract content is foreign related. International arbitration includes international public law arbitration, but it mainly refers to international commercial arbitration. Accordingly, there are international commercial arbitration and domestic commercial arbitration.

[4] Ad Hoc Arbitration and Institutional Arbitration

Ad hoc arbitration and institutional arbitration represent the most significant categorization of arbitration, which is not commonly prescribed by legislation. Ad hoc arbitration means that parties set up arbitral tribunal to deal with a certain dispute by entering into an arbitration agreement and no permanent arbitration organization is involved. Compared with institutional arbitration, ad hoc arbitration is more flexible in procedure, with high efficiency and lower cost under certain conditions. However, given the fact that parties cannot agree on all the procedures and envision all eventualities, the arbitral proceedings may come to a halt if a certain procedure is problematic.[10]

Institutional arbitration means that parties submit a dispute to a permanent arbitral institution for arbitration according to its rules. A permanent arbitration institution has its own name, constitution, office and generally has its own arbitration rules. Compared with ad hoc arbitration, institutional arbitration is more convenient to both parties and arbitrators.

As arbitration system develops, a mixed arbitration, incorporating characteristics of both ad hoc arbitration and institutional arbitration, may emerge. In such arbitration, though an arbitration institution may accept the case, it is the arbitral tribunal that takes charge of the whole procedure of arbitration, and the institution does little administrative work or even nothing at all. In other words, it would be ad hoc arbitration under the cover of institution arbitration. It should be noted that some arbitral institutions appoint arbitrators according to parties' agreement or law, but this belongs to ad hoc arbitration, which has nothing to do with the institutional arbitration.

9. *See* the discussion of "foreign related" below.
10. The UNCITRAL Model Law on International Commercial Arbitration formulated by the United Nations Commission on International Trade Law in 1976 can be adopted by ad hoc arbitration, and the Model Law is critical to iron out flaws of ad hoc arbitration.

§1.02 "INTERNATIONAL" AND "COMMERCIAL" ARBITRATION IN CHINA

As stated above, arbitration can be divided into international commercial arbitration and domestic commercial arbitration. It is necessary to define "international" and "commercial" because they have a bearing on the category of an arbitration and applicable law. In some countries, different laws apply to different arbitration, such as international arbitration law and domestic arbitration law. In China, the Arbitration Law of the PRC applies only to commercial arbitration, and for arbitration without commercial characteristics, such as labor arbitration, the law is not applicable. Although domestic and foreign related or foreign arbitration are governed by the Arbitration Law of the PRC, they are subject to different standards in judicial review. Therefore, we need to analyze the two characteristics first.

[A] "International" or "Foreign"

Cross-border commercial arbitration is often regarded as international commercial arbitration, distinct from domestic commercial arbitration. For a state, foreign arbitration is often referred to as international commercial arbitration.[11] In the early stage, the purpose of distinguishing between international and domestic commercial arbitration might be to protect domestic commercial transactions and the domestic party. The rationale is that if the state does not give more special protection to disadvantaged groups, which do not have sufficient rights when signing contracts, such groups' rights would be prejudiced. There are still quite a few parties who have not enough power or who have little possibility to exercise their rights in the choice of dispute resolution, resulting in de facto injustice.

However, today, the focus on the distinction between international commercial arbitration and domestic commercial arbitration lies on their different treatment. That is to say, the judicial review standard is relatively looser for international commercial arbitration. For instance, the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), with which a lot of national arbitration legislation parallel, provides for court intervention at a very restricted extent. Taking Chinese dual-track judicial review for foreign-related and domestic arbitration as an example, it shows that applying different review standards yields distinct legal consequences. In *China Equipment Import and Export Tianjin Corporation v. Shandong Xinhua Pharmaceutical Group Corporation*,[12] the award debtor applied for nonenforcement of the award with Zibo Intermediate People's Court, which held that the arbitral ward was a domestic award and ruled to

11. Generally speaking, foreign-related arbitration refers to arbitration with both domestic and international factors, and there is no strict distinction between foreign-related arbitration and international arbitration, both of which involves different countries or legal regions. In China, disputes subject to arbitration between Chinese entities and those from Hong Kong, Macao and Taiwan are also regarded as foreign-related arbitration.
12. (2013) ZhiJianZi No.182.

not enforce the award in accordance with provisions concerning nonenforcement of domestic awards of the 2007 Civil Procedure Law of the PRC. The award creditor applied for reconsideration with Shandong High People's Court, which upheld the decisions made by Zibo Intermediate People's Court and rejected the application. Not until the award creditor instituted an action in the Supreme People's Court did the case outcome changed. The Supreme People's Court held that the award in this case was a foreign one and dismissed the award debtor's nonenforcement application by applying relevant provisions of foreign-related arbitral awards.

Yet, with the development of economic globalization, there is a trend of integration of domestic commercial arbitration and international commercial arbitration. A domestic arbitral award may be enforced in other country, and inconsistent judicial review standards will go beyond a state.

With respect to the concept of "international" "commercial" arbitration, there is no uniform definition, and states have different interpretation. The UNCITRAL Model Law, although not directly applicable in China, sets forth definition of "international" and "commercial" respectively, so do national arbitration legislation. Some disputes, though considered as of international commercial nature, may not be regarded as international commercial differences in other countries. In general, international commercial arbitration refers to a dispute resolution that parties in international commercial transactions voluntarily submit disputes of commercial nature which have arisen or which may arise to arbitrators agreed by them, according to an arbitral clause in a contract or a separate arbitration agreement, for a binding award.

According to traditional private international law, international or foreign-related civil and commercial legal relation means that at least one of the three factors (party, subject matter and contract content) is associated with a foreign state. That is to say, one or all parties in the civil and commercial legal relation is or are foreign national(s), stateless person(s), foreign legal person(s), foreign country or international organization(s), or the subject matter is located in foreign territories, or legal facts that create, change or terminate civil rights and obligations occur in foreign states.

A broad definition of "international arbitration" is provided by Article 1 (3) of the UNCITRAL Model Law,[13] according to which, an arbitration is international if: (1) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; (2) the place of arbitration is situated outside the state in which the parties have their places of business; (3) the place where a substantial part of the obligations of the commercial relationship is to be performed is situated outside the state in which the parties have their places of business; (4) the place with which the subject matter of the dispute is most closely

13. Article 1 (3) of the UNCITRAL Model Law provides that "An arbitration is international if: *(a)* the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or *(b)* one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or *(c)* the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country."

connected is situated outside the state in which the parties have their places of business; or (5) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. This provision has shown the tendency that whether arbitration is international is subject to parties' agreement, expanding the definition of "international" in the traditional international private law and reflecting the trend of expansive interpretation of "international" in the practice of international commercial arbitration. Practices and theories regarding the standard of "international" in China will be discussed.

In China, foreign-related legal relationship is determined according to the relevant provisions. The Supreme People's Court stipulated in its Opinions on General Principles of the Civil Law that if either party or both parties in a civil legal relationship are aliens, stateless persons or foreign legal persons, and the object of the civil legal relationship is within the territory of a foreign country, and the legal facts that produce, alter or annihilate the civil relations of rights and obligations occur in a foreign country, such relationship shall be called foreign-related civil relations. When hearing a foreign civil relationship, the people's court shall apply the substantive law in accordance with the provisions of Chapter VIII of the General Principles of the Civil Law.[14] In its another regulation, it provides that civil cases in which one party or both parties are foreigners, stateless persons, foreign enterprises or organizations or the legal facts for establishment, alteration or termination of a civil legal relationship between the parties concerned take place abroad, or the subject matter of an action is located abroad shall be the civil cases involving foreign elements.[15] Both of the criteria focus on parties in a civil legal relationship, subject matter of an action and legal facts, and if any of the three elements is foreign related, the legal relationship is not domestic. The same is true in commercial arbitration. The party in a legal relationship is not the sole factor in determining whether the relationship is foreign or not.

The Law of the Choice of Law for Foreign-Related Civil Relationships of the PRC[16] does not define "foreign civil legal relationship." In its formulation, the commission of legislative affairs of standing committee of the National People's Congress was suggested to define "foreign civil legal relationship," but the commission deemed that the problem could be solved through the Supreme People's Court's interpretation in practices. The Interpretation of Foreign-Related Civil Relationships by the Supreme People's Court[17] provides in Article 1 that if a civil relationship falls under any of the following circumstances, it is foreign-related civil relationship: (1) either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons; (2) the habitual residence of either party or both parties is located outside the

14. Article 178 of the Notice of the Supreme People's Court on Issuing the Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation) (Partially Invalid), Fa (Ban) Fa [1988] No. 6.
15. Article 304 of the Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China (now invalid), Fa Fa [1992] No. 22.
16. Effective as of Apr. 1, 2011.
17. Interpretations of the Supreme 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), Fa Shi [2012] No. 24. Effective as of January 2013.

territory of the PRC; (3) the subject matter is outside the territory of the PRC; (4) 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.

It should be noted that in this interpretation, in addition to "nationality," "habitual residence" is also an important connection in civil legal relationship. Hence, if "the habitual residence of either party or both parties is located outside the territory of the People's Republic of China," the civil legal relationship is foreign related.

The above standard in determining whether a civil legal relationship is foreign or not also applies to commercial arbitration in China. That is to say, unlike Article 1 (3) of the UNCITRAL Model Law on International Commercial Arbitration, overseas arbitration does not indicate the contract concerned is foreign related, and whether arbitration is foreign related or not cannot be inferred from a party's nationality. Therefore, the nature and legal consequences of the following scenarios can only be analyzed on a case-by-case basis: (1) a contract concluded by a Chinese company and an overseas company; (2) a foreign-related contract entered into by a Chinese company and an overseas company; (3) a domestic contract executed by two Chinese companies; (4) agree to arbitrate abroad by overseas arbitral institution; (5) agree to arbitrate at home by overseas arbitral institution; and (6) agree to arbitrate abroad by domestic arbitral institution.

[B] Cases and Development of Judicial Review of Foreign-Related Arbitration

In judicial review, whether a case is foreign related or not should be determined by a court before it examines whether an agreement to arbitrate abroad is valid or not. In other words, courts need to decide whether a pure domestic dispute without any foreign element can be submitted to arbitration overseas. As far as known, the Supreme People's Court seems to have no express interpretations in this regard, but some lower courts have already provided for this, such as the Jiangsu High People's Court's Opinion on Several Issues Concerning the Judicial Review of Civil and Commercial Arbitration amended in 2010. However, as shown from some recent judgments rendered by the Supreme People's Court and courts at other levels, domestic disputes are not allowed to be submitted to foreign arbitral institutions for arbitration. Once parties enter into such agreement, the arbitral agreement would be held invalid in China (which do not necessarily block the oversea arbitral proceeding), or the award would not be enforced in China (which does not preclude one party from performing the award voluntarily). Even if such awards are not to be enforced in China, chances are these awards may not be enforced in other countries due to flaws in the validity of the arbitration agreements.

In *Jiangsu Aerospace Wanyuan Wind Power Equipment Manufacturing Co., Ltd. ("Jiangsu Company") v. Ailm Wind Blade Products (Tianjin) Co., Ltd. ("Tianjin Company")*, the parties, both domestic entities, entered into a Trade Contract regarding wind turbine blades on December 23, 2005. The dispute resolution clause of the

contract provides that "Disputes may be submitted to the International Chamber of Commerce for arbitration according to its arbitration rules," and "the place of arbitration shall be a site agreed by both parties in PRC Beijing." In 2011, Jiangsu Company applied with Nantong Intermediate People's Court to invalidate the arbitration agreement. Since Nantong Court deemed the arbitration agreement should be held invalid, the case was reported to Jiangsu High People's Court for examination, which agreed with Nantong Court's opinion, and reported to the Supreme People's Court for its examination opinion according to the reporting requirement provided by the Notice of the Supreme People's Court on the Handling of Issues Concerning Foreign-Related Arbitration and Foreign Arbitration by People' Courts.

The Supreme People's Court issued a Reply,[18] providing that, "the parties agreed in the Trade Contract to submit disputes to the International Chamber of Commerce for arbitration in Beijing. Since both parties to the contract are Chinese legal persons, the subject matter is in China, and the contract was concluded and agreed to be performed in China, there is no foreign element in the civil legal relationship and the contract is not foreign related. As arbitration's authority is conferred by law that does not provide that a party may submit nonforeign related disputes to foreign arbitral institution for arbitration or ad hoc arbitration outside China, the parties in this case have no legal grounds to submit disputes to the International Chamber of Commerce for arbitration. We agree with your opinion that the arbitration agreement is invalid."

In *Beijing Chao Lai Sports and Leisure Co., Ltd. ("Sports Company") v. Beijing Suowang Zhixin Investment Advisory Co., Ltd. ("Advisory Company")*, Sports Company and Advisory Company (whose shareholder is Korean) executed a contract on July 20, 2007, which provides that both parties agreed to operate the golf course owned by Sports Company in Beijing in a cooperative manner. In addition to clauses such as equity ratio and investment amount, the contract contains an arbitration clause that any party "may submit disputes to the Korean Commercial Arbitration Board ('KCAB') for arbitration." On April 2, 2012, Advisory Company submitted disputes between the parties to KCAB for arbitration, and Sports Company submitted counterclaims. KCAB accepted the case and rendered an arbitral award applying Chinese law on May 29, 2013. On June 17, 2013, Sports Company applied with Beijing Second Intermediate People's Court for recognition of the award.

On January 20, 2014, Beijing Second Intermediate People's Court rendered a ruling[19] to reject Sports Company's application to recognize the arbitral award made by KCAB. The court held that, pursuant to the Civil Procedure Law of the PRC and the Arbitration Law of the PRC, parties may submit foreign-related economic trade, transportation and maritime disputes to arbitral institutions in China or elsewhere for arbitration according to an arbitral clause in the contract or a submission arbitration agreement, but parties in China are not permitted to refer disputes without foreign elements to arbitration abroad. In this case, Advisory Company and Sports Company are legal persons in China, and the contract concluded by the parties is about operation of a golf course in Chinese territory. The legal facts regarding establishment, alteration

18. [2012] Min Si Ta Zi No. 2, Aug. 31, 2012.
19. (2013) Er Zhong Min Te Zi No. 10670.

and termination of the civil legal relationships between the parties took place in China, the subject matter is also situated in China, and thus the case is not foreign related. Therefore, the arbitration agreement, which violated the Civil Procedure Law of the PRC and the Arbitration Law of the PRC, is invalid. The court is of the opinion that the award should not be recognized according to Article V (1) (a) and (2) (b) of the New York Convention.[20]

Before Beijing Second Intermediate People's Court issued the nonrecognition ruling, it reported the case to the Supreme People's Court for review through Beijing High People's Court according to the reporting requirement.

The Supreme People's Court replied to Beijing High People's Court "the issue at dispute here is whether the arbitral clause in the contract concluded between Advisory Company and Sports Company is valid. According to the facts provided by your court, both parties to the contract are Chinese legal persons, the contract, which is about equity transfer and cooperation regarding a golf course, was executed and performed in China, and the subject matter is also located within Chinese territory. Therefore, since no foreign element existed in the contract, the contract is not foreign related, and the applicable law to the contract as well as the arbitration agreement, whether or not expressly agreed by the parties, shall be Chinese law. Pursuant to Article 271 of the Civil Procedure Law of the PRC and the second paragraph of Article 128 of the Contract Law of the PRC, Chinese law has not authorized parties to submit disputes without foreign elements to foreign arbitral institutions or ad hoc arbitration outside China. Therefore, the arbitration agreement to submit disputes to KCAB for arbitration is invalid. Besides, the substantive validity defects in the arbitration agreement cannot be corrected by failure to raise objection in the arbitral proceeding, and thus the arbitral tribunal has no jurisdiction of this case. Under Article V (1) (a) of the New York Convention, recognition and enforcement of the award may be refused if the party, who furnishes to the competent authority where the recognition and enforcement is sought, proves that the said agreement is not valid under the law to which the parties have subjected it. Thus, the arbitral award should not be recognized. But it is improper to invoke Article V (2) (b) of the New York Convention about public policy in this case, and it should be corrected."

These two influential cases have provoked controversy in China. The second case involves recognition of an award, which is the precondition for the party to apply for enforcement of the award. In addition to domestic parties' agreement to arbitrate abroad, the first case, which deals with determination of the validity of the arbitral agreement, also touches the issue of parties' agreement to submit disputes to a foreign arbitral institution in China for arbitration. But this issue was not dealt with by the Supreme People's Court, because "domestic disputes should not be submitted to foreign arbitral institutions for arbitration" in the first place. Nonetheless, in *Anhui Longdeli Packaging Printing Co., Ltd. v. BP Agnati S.R.L.*, the Supreme People's Court

20. Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, Jun. 10, 1958.

held in the Reply[21] that the arbitration agreement, which provides arbitration in Shanghai by the International Chamber of Commerce, was valid.

With respect to the question of whether a domestic dispute can be arbitrated in China by a foreign arbitral institution, a consensus is yet to be reached. While some hold a negative view, others believe it is a matter of party autonomy and it is not outlawed by legislation. The different views reflect distinct understandings of the nature and source of arbitration power: a judicial power authorized by law or a private right conferred by contract. Neither the Arbitration Law of the PRC nor the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China ("2006 Interpretation on Arbitration Law")[22] clarifies this issue. And the second paragraph of Article 128 of the Contract Law of the PRC only provides "Parties to a foreign-related contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration." The rationale of the second view is that arbitration power is subject to absolute party autonomy; yet, at least under the current legal framework in China, arbitration power should be understood to possess a mixed nature of authorization from both the parties and law. Arbitration power is created by parties' conferral of right, but its existence and exercise is supervised and guaranteed by law. Though the Supreme People's Court has not provided express provisions in this regard, some lower courts have filled the gap in practice. For example, Article 17 of the Jiangsu High People's Court's Opinion on Several Issues Concerning the Judicial Review of Civil and Commercial Arbitration amended in 2010 provides that "an arbitration agreement, which provides to submit civil and commercial disputes with no foreign element to foreign arbitral institution for arbitration or to arbitrate abroad, is invalid."

In recent years, courts at various levels have followed the rationale and position of the Supreme People's Court in the above two cases and have negated the validity of arbitration agreement in which parties agree to arbitrate domestic disputes abroad. Generally, it is not hard to determine whether a dispute is domestic or not; yet for cases with foreign factors, that is exactly the issue that parties disagree on. Under such circumstances, the first step is to determine whether the dispute is domestic or not. As shown by the two cases below, parties and legal relationship are factors in determining whether a case is foreign related or not.

In *Shanghai Kejiang Information Technology Co., Ltd. v. Fan Sun Tang (Shanghai) Cultural Information Consulting Co., Ltd.*,[23] in the Platform Outsource Contract "... the parties agree to submit disputes to HKIAC for arbitration according to its rules." The party applying to invalidate the arbitration agreement argued only foreign-related contract in which party can agree to submit their disputes to foreign arbitral institutions, but no foreign elements exist in this case. The other party defended that because the software platform operates in Hong Kong, the subject matter of this case is not within China and the case is foreign related. The court held the Platform Outsource

21. [2013] Min Si Ta Zi No. 13.
22. Adopted at the 1375th meeting of the Judicial Committee of the Supreme People's Court on Dec. 26, 2005, promulgated on Aug. 23, 2006 and came into force as of Sept. 8, 2006.
23. (2014) Hu Er Zhong Min Ren (Zhong Xie) Zi No. 13.

Contract does not have any foreign-related factors as stipulated by the law of the country. The view that the platform software operates in Hong Kong does not satisfy the "location of the subject matter" requirement prescribed by the Civil Procedure Law of the PRC. Therefore, the arbitration agreement, in which parties agree to submit contractual disputes without Hong Kong factors to Hong Kong International Arbitration Centre (HKIAC) for arbitration, was invalid.

In *Suzhou Xingye Environmental Protection Equipment Co., Ltd., Suzhou Industrial Park Xingye Environmental Protection Equipment Co., Ltd. v. Houlding G Bauer Vin (Suzhou) Electronic Measurement Co., Ltd.*, the dispute resolution clause of the Enterprise Cooperation Contract said "... the parties agree to submit disputes to the International Chamber of Commerce Paris for arbitration. Arbitration shall take place in Beijing." The defendant challenged the jurisdiction of the court on the following grounds: (1) Though the name of the arbitral institution agreed by the parties is not the exact words of "the ICC International Court of Arbitration," it can be clearly inferred from the agreement that the it is the "the ICC International Court of Arbitration" that the parties have selected to arbitrate their disputes. (2) The fourth paragraph of Article 9 of the Enterprise Cooperation Contract provides that "Party A (defendant) shall supply a guarantee letter in the amount of 1.5 million USD by a Germany bank to Party B (plaintiff) within three months." Since the defendant has to perform part of its obligation in Germany, the disputes are foreign related and it is lawful for parties to select a foreign arbitral institution to resolve their disputes. (3) Past judicial practices have proven that the International Chamber of Commerce (ICC) International Court of Arbitration is allowed to arbitrate in China. The plaintiff rebutted that: (1) the arbitral institution selected by the parties does not exist, which means the agreement on the institution is not clear; (2) it is not permitted by Chinese law to submit domestic disputes to foreign arbitral institution for arbitration in China; and (3) this case is not foreign related and thus the parties should not select foreign arbitral institution for arbitration according to Article 128 of the Contract Law of the PRC.

Jiangsu Huqiu People's Court held that the arbitral institution agreed by the parties can be inferred to be the ICC International Court of Arbitration, but all parties are Chinese legal persons, the subject matter is located in Chinese territory, the execution and performance of the contract also occurred in China. Although one clause in the contract provides that a party has the obligation to furnish a guarantee letter issued by a German bank, this case is not a guarantee dispute, and thus the case is not foreign related. Considering arbitrators' power is conferred by law, and Chinese law does not stipulate that parties may submit dispute without foreign elements to foreign arbitral institution for arbitration, the arbitration agreement here is invalid.

Of the two cases, the first one has its platform operating outside Chinese Mainland, and the guaranty relationship is foreign related in the second one. Regarding whether the two cases are foreign related, people may conclude differently. Though foreign and domestic arbitration are largely similar, different provisions apply to them in judicial review. No wonder opposing parties in cases where the distinction between foreign and domestic is blurred would fight. Still, in practice, the line in most cases is clear and below are two more cases.

In *Alcoa Bohai Aluminum Co., Ltd. v. Inner Mongolia X Corp.*,[24] the first question presented to Hebei High People's Court was the validity issue of the arbitration agreement. The court held that the parties were incorporated in China, the subject matter was produced and transported within China, and the contract was also performed in China. Accordingly, since the parties, subject matter and the occurrence of establishment, alteration and termination of legal relationship are in China, the involved contract in this case is not foreign related. Only parties in foreign-related case may submit disputes to foreign-related arbitral institution in China or foreign arbitral institution for arbitration. Therefore, the arbitration agreement, in which domestic parties agreed to submit disputes arising from the contract of no foreign elements to foreign arbitral institution, is invalid. The court has jurisdiction over the case.

In *Ningbo Xinhui International Trade Development Co., Ltd. v. Meikang International Trade Co., Ltd.*,[25] a party applied to set aside the arbitral award made by China International Economic and Trade Arbitration Commission ("CIETAC"). Beijing No. 4 Intermediate People's Court held that Civil cases in which one party or both parties are foreigners, stateless persons, foreign enterprises or organizations or the legal facts for establishment, alteration or termination of a civil legal relationship between the parties concerned take place at abroad, or the subject matter of an action is located at abroad shall be the civil cases involving foreign elements.[26] Beijing Fourth Intermediate People's Court first examined whether the case is foreign related, since domestic and foreign-related awards have different setting aside grounds in China. The parties agreed in the contracts that the goods should be delivered in Shanghai free trade zone. According to provisions concerning customs management system, the goods not cleared in the tariff-free zone have not yet entered Chinese territory. Therefore, the case is foreign related.

As shown from the above, in judicial review of arbitration cases, courts usually first determine whether the involved legal relationship is foreign related according to Article 178 of the Opinions on General Principles of the Civil Law, and then, courts rule to confirm the validity of or to invalidate the arbitration agreement depending on whether the case has foreign elements or not under Article 271 of the Civil Procedure Law of the PRC and Article 128 of the Contract Law of the PRC, which respectively provide that "In the case of a dispute arising from the foreign economic, trade, transport or maritime activities of China, if the parties have had an arbitration clause in the contract concerned or have subsequently reached a written arbitration agreement stipulating the submission of the dispute for arbitration to an arbitral organ in the PRC handling cases involving foreign element, or to any other arbitral body, they may not bring an action in a people's court. If the parties have not had an arbitration clause in the contract concerned or have not subsequently reached a written arbitration agreement, they may bring an action in a people's court" and "Parties to a foreign-related

24. (2015) Ji Li Min Zhong Zi No. 70.
25. (2015) Si Zhong Min (Shang) TeZi No. 00152.
26. According to Art. 304 of the Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China.

contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration."

A recent case has witnessed further development in the determination of foreign-related case. In *Siemens International Trading (Shanghai) Co., Ltd. ("Siemens") v. Shanghai Golden Landmark Co., Ltd. ("Golden Landmark")*,[27] Golden Landmark submitted disputes arising from the contract concluded with Siemens to Singapore International Arbitration Centre ("SIAC") for arbitration. On November 28, 2011, SIAC made an arbitral award in favor of Siemens. Since Golden Landmark only made a partial payment, Siemens applied to Shanghai First Intermediate People's Court for recognition and enforcement of the award. Golden Landmark Company contended that the civil relationship involved in this case had no foreign-related factors, and thus the agreement to submit any dispute to a foreign arbitration institution for arbitration was invalid. If the arbitral award involved here was recognized and enforced, it would violate the public policy of China.

The court held that although there is no typical foreign element in this case, in which both parties are Chinese entities and the agreed delivery place as well as the goods is in China, in view of the actual situations of subjects involved in the contract and the characteristics of fulfillment of the contract, it may be determined that the contractual relationship in dispute was a foreign-related civil legal relationship on the following grounds. First, although both Siemens and Golden Landmark were Chinese legal persons and the place of registration for both of them was China (Shanghai) Pilot Free Trade Zone, both of them were exclusively foreign-owned enterprises in nature, and both of them were closely related to foreign investors. Since foreign investors were their capital providers, ultimate beneficiaries and decision makers, foreign invested companies have more apparent foreign elements compared with domestic companies. Such differences should be taken into consideration, in particular under the circumstances of promoting free trade in pilot tariff-free zone. Second, the characteristics of fulfillment of the contract in this case involved foreign-related factors. The equipment involved was first delivered from a foreign country to the pilot free trade zone for bonded supervision, and then the formalities for customs clearance and tax payment were handled at appropriate time according to the needs of fulfillment of the contract. The equipment involved was circulated from the pilot free trade zone to the outside place. At this point, the formalities for import of the goods have been completed. The circulation of the subject matter of the contract had some characteristics of international sales of goods. Therefore, the contract involved in this case, which is governed by special custom supervision provisions in pilot tariff-free zone, is different from common domestic sales contracts.

In summary, the court held that the contractual legal relationships in this case conforms to "other circumstances under which the civil relationship may be determined as foreign-related civil relationship" set out in item 5 of Article 1 of the Interpretation of Foreign-Related Civil Relationships by the Supreme People's Court,

27. (2013) Hu Yi Zhong Min Ren (WaiZhong) Zi No. 2.

and the arbitration agreement in which party agreed to submit disputes to SIAC for arbitration is valid.

Subsequently, the Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones[28] provides that "Where two wholly foreign-owned enterprises registered in free trade zones agree that any commercial dispute shall be submitted to arbitration out of China, the relevant arbitration agreement shall not be determined to be null and void for the reason that their dispute has no foreign-related factors." Accordingly, the standard of determining foreign elements has been loosened to some extent. Yet, it should be noted that the relaxing criteria only extends to disputes between wholly foreign-owned enterprises registered in pilot free trade zones.

[C] "Commercial"

Under most national legislation and international conventions, only commercial disputes can be subject to arbitration. Pursuant to the Geneva Protocol on Arbitration Clauses of 1923, any contracting state shall recognize the disputes arising from a contract in connection with commercial matters or any other matters can be settled by arbitration are arbitrable, and such obligation is limited to the situation when the contract involved is considered as commercial according to its domestic law. Likewise, Article I (3) of the New York Convention provides that "It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." When acceding to the New York Convention, quite a few states declared "commercial reservation," which means only an arbitral award of a commercial nature made in other contracting states can be recognized and enforced.

China also declared such reservation at the time of accession to the New York Convention. Besides, the Arbitration Law of the PRC expressly excludes noncommercial disputes from arbitration, such as labor disputes.[29] Therefore, whether a dispute is of commercial nature has a bearing on arbitrability of the dispute and enforceability of the award.

Absent uniform international definition, "commercial" is determined by domestic legislation. We can refer to some international provisions for information. Footnote 1 (1) of the UNCITRAL Model Law provides that "the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering;

28. Fa Fa [2016] No. 34, Art. 9.
29. Article 77 of the Arbitration Law of PRC.

licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."[30]

The corresponding phrases in China are "Legal relationships, whether contractual or not, which are considered commercial." In the Notice implementing the New York Convention,[31] the Supreme People's Court pointed out that "'Legal relationships, whether contractual or not, which are considered commercial' means the economic rights and obligations arising from contracts, torts or relevant legal provisions, such as purchase and sale of goods, lease of property, project contracting, processing, technology transfer, equity or contractual joint adventure, exploration and development of natural resources, insurance, credit, labor service, agency, consultation service, marine, civil aviation, railway or road passenger and cargo transportation, product liability, environment pollution, marine accident, and ownership disputes, except disputes between foreign investors and the host government."

Though the definition and execution of "commercial" is ascertained in a country, difficulty may arise when new scenarios emerge, behind which law usually lags. For example, in a country where labor disputes cannot be arbitrated, whether a certain type of hiring or employment contract is arbitrable is arguable.

§1.03 COMMERCIAL ARBITRATION IN CHINA

[A] International Commercial Arbitration in China

In China, international commercial arbitration mainly refers to foreign-related arbitration, which is gradually developed with the reform and opening up of China. Usually, such arbitration cases involve both Chinese and foreign parties, and pure foreign arbitration cases without any Chinese elements are relatively rare. As a matter of fact, to be a frequent arbitral seat of international commercial arbitration, a country has to be qualified in terms of economy, law and cultural background. At present, the room for improvement for China is still quite large.

Chinese international commercial arbitration originated from arbitration practices of CIETAC. On May 6, 1954, the Government Administration Council of the Central People's Government adopted the Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission Within the China Council for the Promotion of International Trade. According to the Decision, the Provisional Rules of Arbitration of China Council for the Promotion of International Trade Foreign Trade Arbitration Commission was adopted in 1956, and the first committee established the Foreign Trade Arbitration Commission. Having changed its name for several times, the current arbitration commission is called CIETAC. Prior to the entry into force of the Arbitration

30. Article 1 (1) of the Model Law provides that the Law applies to "International Commercial Arbitration."
31. 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 promulgated on Apr. 10, 1987.

Law of the PRC, except specific types of disputes,[32] CIETACT only dealt with international commercial arbitration, and such situation had lasted for a while after the Arbitration Law of the PRC was promulgated. Until today, except nonarbitrable cases prescribed by the Arbitration Law of the PRC, CIETAC can handle all types of international disputes.

Since international commercial arbitration has concentrated in Beijing, Shenzhen and Shanghai, CIETAC South China Sub-commission and CIETAC Shanghai Sub-commission was founded in Shenzhen Special Economic Zone in 1983 and in Shanghai in 1988 respectively, both of which could deal with all types of domestic and international[33] disputes with parties all over the world. CIETAC South China Sub-commission pioneered hiring of foreign arbitrators in 1984 in China and set the first precedent for rendering an arbitral award enforced under the New York Convention in 1989.

Prior to 2012, the same set of rules applied to CIETAC headquarters in Beijing, CIETAC South China Sub-commission and CIETAC Shanghai Sub-commission. Subsequent to a split among the three in the spring of 2012, CIETAC South China Sub-commission renamed itself as South China International Economic and Trade Arbitration Commission (also known as the Shenzhen Court of International Arbitration (SCIA)) on October 22, 2012, and CIETAC Shanghai Sub-commission changed its name into Shanghai International Economy and Trade Arbitration Commission (also known as the Shanghai International Arbitration Center) on May 1, 2012. Both arbitral institutions promulgated new arbitration rules and panels of arbitrators. Problems such as the validity of arbitration agreements referring to these institutions, arbitral tribunal's authority and jurisdiction, and enforceability of awards were not resolved until June 23, 2015 when the Supreme People's Court issued the Reply of the Supreme People's Court on the Instruction Request by the Shanghai High People's Court and Others for Issues Concerning the Cases of Judicial Review of the Arbitration Awards Rendered by the CIETAC and Its Former Sub-commissions,[34] according to which:

(1) If, before the CIETAC South China was renamed as the South China International Economic and Trade Arbitration Commission or the Shanghai Arbitration Commission was renamed the Shanghai International Economic and Trade Arbitration Commission, the parties concerned have executed the

32. For example, securities disputes. Article 80 of the Interim Provisions on the Management of the Issuing and Trading of Stocks provides that "Disputes involving the issuing and trading of stocks among securities managing organizations or between a securities managing organization and a stock exchange shall be mediated or arbitrated by arbitration organizations set up with the approval of or designated by the SCSC." On Aug. 26, 1994, the Securities Committee of the State Council (SCSC) issued the Notice of Designating CIETAC as the Arbitration Institution for Resolving Securities Disputes, designating China International Economic and Trade Arbitration Commission (CIETAC) as the arbitration institution to resolve disputes defined in Art. 80 of the Interim Provisions on the Management of the Issuing and Trading of Stocks. On Oct. 11, 1994, China Securities Regulatory Commission also made relevant provisions in the Notice of Problems on Arbitration Agreement related to Securities Disputes.
33. From 2010, the scope of case acceptance extended to domestic disputes.
34. Fa Shi [2015] No. 15.

arbitrators. (2) Failing such determination, the number of arbitrators shall be three." Article 85 of the English Arbitration Act 1996 provides that "(1) The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire. (2) Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal. (3) If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator."

Parties are free to agree on arbitrator's qualification, which usually concerns professional competence in a particular field. Qualification provisions in arbitration agreements help arbitral institutions or other authorities to appoint arbitrator(s) on behalf of the parties should they fail to do so themselves. In jurisdictions where roster system applies, only those within the arbitrator's list can be appointed as arbitrators, even if there is qualification clause in the arbitration agreement. Parties may designate a certain arbitrator in the arbitration agreement, but it should be noted that the arbitrator should not be too close to one of the parties to affect impartiality and independence.

[4] Arbitral Institution

If parties intend to submit their disputes to arbitration, they are free to select the arbitral institution. But parties are advised to select the most appropriate arbitral institution, taking into consideration the dispute nature and expertise of institutions, in particular for intellectual property or maritime issues.

Under the Arbitration Law of the PRC, the agreement on arbitral institution shall be clear; otherwise the arbitration agreement could be argued as invalid. Parties in China generally prefer to select the arbitral institution located where they reside, particularly for foreign-related disputes. Failing such agreement, the parties may choose an arbitral institution in a third place.

It is best to specify the name of the institution in the arbitration agreement. If the parties fail to designate the arbitral institution but manifest their intention to resolve their dispute by arbitration, their agreement to choose the institution in place of either party is valid and enforceable, provided that the institution can be inferred from the agreement (*see* Chapter 4).

Of course, in jurisdictions where ad hoc arbitration is allowed, arbitration agreements do not necessarily contain relevant provisions of arbitral institution.

[5] Language of Arbitration

Parties are free to agree on the language of arbitration. They may agree to use one or several languages in part of the whole arbitral proceedings. The language of arbitration may differ from that of the contract. Relevance to the case shall be taken into consideration when choosing the language.

Absent agreement by parties, institutional rules or arbitral tribunals may dictate the language of arbitration, which could be a fixed language or be ascertained according to the specific circumstances of the case. Given that most cases accepted by Chinese arbitral institutions arise from disputes between or mainly relate to Chinese entities, a prevalent practice in China is to use Chinese as the language of arbitration in the absence of agreement by parties. In another practice, the tribunal or the institutional rules will select the language of arbitration on a case-by-case basis, considering parties to arbitration could be from various countries, in particular in international trade and investment disputes.

[6] Place of Arbitration

The arbitral seat is of paramount importance because it can have profound consequences for enforcement of arbitration agreement and arbitral proceedings. The question of validity of an arbitration agreement is governed by its applicable law. Whether an arbitration agreement is enforceable or not is also subject to the judicial review of the court of the arbitral seat according to its domestic law. An arbitration agreement can be rendered void or an arbitral award be set aside if the dispute is not arbitrable. Traditionally,[7] the law of an arbitral seat governs the arbitral proceedings, and thus an agreement on arbitral seat can ascertain the law applicable to arbitral proceedings as well.

In selecting the arbitral seat, parties may consider the following factors: (1) whether the dispute is arbitrable and enforceable under the law of the intended arbitral seat; (2) whether the arbitration legislation in the intended place of arbitration is pro-arbitration and may provide judicial assistance to arbitral proceedings; (3) whether the country of the intended arbitral seat is a contracting state to international conventions related to enforcement of award, and whether there is agreement or arrangement on mutual enforcement of award between the country of the intended arbitral seat and the state where the award will be relied upon; and (4) whether the intended arbitral seat is convenient to both parties and arbitrators when disputes arise.

Arbitral seat also concerns the court with the jurisdiction to set aside arbitral award. Generally, it is the court of the place of arbitration that has the jurisdiction to deal with application of setting aside arbitral award. However, under the PRC laws, an application of setting aside an award must be submitted to the court of the place where the institution is located, resulting in controversies or parallel jurisdiction if the arbitral seat is different from the institution's location. For example, if the parties agree to submit their differences to a Chinese arbitral institution and specify Paris as the arbitral seat, disputes will inevitably arise with respect to which court has the jurisdiction to accept the application of setting aside an award.

7. Nonlocalization theory is still controversial and only arises in rare cases.

[7] Effects of Arbitral Award

In principle, in China, like in other countries, an arbitral award, once made, is final and binding on the parties and shall not be challenged unless a party applies for setting aside or refusing to enforce the award according to legal procedure. But laws may vary from country to country. Some authorities may allow parties to agree to appeal the award to a second tribunal, such as the Netherlands. However, in China, Article 57 of the Arbitration Law of the PRC provides that "The arbitration award shall be legally effective as of the date on which it is made;" Article 9 provides that "A system of a single and final award shall be practiced for arbitration." Therefore, an arbitral award cannot be effective but not binding. Nonetheless, it may be prudent for parties to stipulate that the award is final and binding.

[C] Anti-suit Effects of Arbitration Agreement

By signing an arbitration agreement, the parties select arbitration as the means of resolving disputes, excluding the jurisdiction of courts. According to law, a valid arbitration agreement has the effect of excluding courts' jurisdiction. Article 5 of the Arbitration Law of the PRC provides that "If the parties have concluded an arbitration agreement and one party institutes an action in a people's court, the people's court shall not accept the case, unless the arbitration agreement is null and void."

The exclusive effects on the jurisdiction of courts include: (1) refraining parties from initiating litigation; and (2) adjourning litigation when a valid arbitration agreement is present[8] or dismissing the action.[9] Certainly, exclusion of courts' jurisdiction on substantive matter does not deprive courts of the power to make decisions on procedural matters. For example, parties may request a court to take temporary measures, to appoint an arbitrator, to preside a witness hearing. Under such circumstances, the jurisdiction of courts is not in conflict with the arbitration agreement. Both Article 1033 of the German Arbitration Law 1998[10] and Chinese arbitration legislation make provisions of courts' jurisdiction on procedural matters. Cases involving the issue are abundant.

In *Beijing Huade Hydraulic Industrial Group Co., Ltd. v. Wuhan X Science and Technology Co., Ltd,*[11] the arbitration agreement provides that "Any disputes arising from this contract shall be settled through negotiation by the parties. In case no consensus can be reached, the disputes shall be resolved by arbitration, which shall take place in Wuhan and administered by a Wuhan arbitration organ." The court held the parties had reached an arbitration agreement in the contract, the court has no

8. For example, Art. 10 of the English Arbitration Act 1996.
9. For example, Art. 26 of the Arbitration Law of the PRC.
10. According to this article, before the commencement of arbitral proceedings or during the course of arbitral proceedings, the court's decision to take interim measures at the request of the party is not in conflict with the arbitral agreement.
11. (2009) Da Min Chu Zi No. 3868.

jurisdiction over the case and therefore dismissed the case, according to Article 5 of the Arbitration Law of the PRC and Article 6 of the Supreme People.

In *Beijing Lipsen Science and Technology Co., Ltd. v. Beijing Sibelius Catering Management Co., Ltd.,*[12] the court held since the parties had agreed an arbitral clause in the Transfer Agreement, disputes arising from the contract should be subject to arbitration, the court had no jurisdiction and thus dismissed the case.

In *Huang v. Beijing Global Education Technology Co., Ltd.*, the plaintiff brought the case with contractual disputes arising from the Cooperation Agreement, which contains a clause saying either party has the right to initiate arbitration to Beijing Arbitration Commission to resolve their differences. The court held the arbitral agreement satisfied the relevant requirement of the Arbitration Law of the PRC, the jurisdictional challenge was well established, the case did not fall into the court's case acceptance scope and thus dismissed the case.

In the cases mentioned above, the parties raised jurisdiction challenges in court proceedings on the grounds of existence of arbitration agreements, and the courts correctly, in my view, applied relevant law and the Supreme People's Interpretations, endeavoring to preserve the parties' intention to arbitrate. Indeed, there are cases in which courts held arbitration agreement void and null and ruled to not to terminate the litigation proceedings (*see* following chapters).

[D] Waiver of Arbitral Agreement

Parties can terminate a valid arbitral agreement, and the right to arbitrate is waived if a party commences litigation of arbitral disputes and the other party fails to raise objection properly. Article 26 of the Arbitration Law of the PRC provides that "If, prior to the first hearing, the other party has not raised an objection to the people's court's acceptance of the case, he shall be deemed to have renounced the arbitration agreement and the people's court shall continue to try the case." Arbitration legislation in other countries such as the UK and Germany has similar provisions.[13] Failure to invoke the arbitration agreement before the first hearing or statement on the substance of the dispute in the national court proceedings has frequently been held to result in waiver of the right to arbitrate. Courts can proceed to exercise their jurisdictions over the cases after parties waive or are considered to waive their right to arbitrate.

In some cases, the intent to waive arbitration agreement is expressly made by both parties. For example, in *Agricultural Bank of China Hunan Dongkou Branch v. Wen and Wang,*[14] when filing the case, the plaintiff did not inform the court of the arbitration agreement, and in the first hearing, the two defendants did not raise jurisdictional objection and replied to waive the right to arbitrate when asked by the judge. In light of this, the court can continue to hear the case.

Some losing parties may seek to overturn the award on the grounds of the existence of arbitration agreements, even if they have expressly waived the right to

12. (2009) Feng Min Chu Zi No. 04471.
13. Article 9 (3) of the English Arbitration Act 1996.
14. (2009) Dong Min Chu Zi No. 794.

arbitrate. In *A v. B*, after a judgment was rendered, B appealed that Article 37.1 of the Construction Contract contained an arbitration agreement, and B had objected to the jurisdiction in the hearing. The second instance Court did find an arbitration agreement between the parties, but also noted that B had agreed to give up arbitration in the hearing. Therefore, the Court of Second Instance held that the procedure of the first instance was not flawed and B's claims were dismissed. There are many other similar cases.[15] Of course, parties' procedural right is involved here, but courts may rule in their favor only if evidence is sufficient.

A valid wavier of arbitration agreement does not require an explicit statement. If a party does not raise jurisdictional challenge before the first hearing in court proceedings, the arbitration agreement will be deemed to be waived. In *Dai v. China X Property Insurance Corp.*,[16] the defendant contended the parties had agreed to submit disputes to Zhengzhou Arbitration Commission for arbitration, the court lacked jurisdiction over this case and the plaintiff should have applied for arbitration. The court did find a valid arbitral clause in the insurance contract, but proceeded to hear the case because the defendant had not raised an objection before the first hearing and rejected the defendant's argument. The defendant appealed against the judgment.[17] The Court of Second Instance held the appellant failed to produce relevant evidence to corroborate its claim that it had orally objected to the jurisdiction of the trial court that deprived it of the right to resolve disputes in the manner as agreed, and maintained the judgment.

The case in the preceding paragraph shows that an objection to jurisdiction needs to be raised in writing before the first hearing, and oral objection shall be corroborated with evidence; otherwise courts would not accept that a valid objection has been made.

Pursuant to the Arbitration Law of the PRC, an objection to jurisdiction should be made before the first hearing, and thus an objection raised in the hearing should not be considered as valid jurisdictional challenge. In *Gao v. X Property Insurance Corp. Zhoukou Branch Office*,[18] the plaintiff did not declare the existence of an arbitration agreement when commencing the litigation, and it was not until in the hearing that the defendant raised a jurisdictional objection. The court invoked Article 26 of the Arbitration Law of the PRC to dismiss the defendant's defense because the objection was not raised before the first hearing.

Just as the right to arbitrate is deemed to be waived if the objection to jurisdiction of court is not raised before the first hearing, the jurisdictional challenge to arbitration is also considered to be given up if a party does not make an objection before the first hearing and continues to participate in the arbitral proceeding. In a Reply[19] with respect to *Hong Kong and China Pharmaceutical Biological Science Co., Ltd. v. X*, the Supreme People's Court reasoned that the second paragraph of Article 20 of the

15. (2009) Min Yi Zhong Zi No. 359.
16. (2009) Nei Min Chu Zi No. 248.
17. (2009) An Min San Zhong Zi No. 239.
18. (2009) Shen Min Chu Zi No. 291.
19. The Reply of the Supreme People's Court on Request for Instructions Re Revocation of Award No. 0044 [2008] of China International Economic & Trade Arbitration Commission, [2009] Min Si Ta Zi No. 1.

Arbitration Law of the PRC provides that "a party's challenge of the validity of the arbitration agreement shall be raised prior to the arbitration tribunal's first hearing," but in the hearing conducted by the arbitral tribunal, instead of presenting jurisdictional challenges, the party's attorney made statement on the substantive issues. Article 8 of the CIETAC Arbitration Rules of 2005 provides that "A party shall be deemed to have waived its right to object where it knows or should have known that any provision of, or requirement under, these Rules has not been complied with and yet participates in or proceeds with the arbitral proceedings without promptly and explicitly submitting its objection in writing to such non-compliance." Therefore, the attorney's party should be deemed to have waived its right to object and the arbitral tribunal have jurisdiction over this case.

[E] Continual Effect of Arbitration Agreement

Is an arbitration agreement still binding after the death of a natural person to the agreement in China? Before turning to China, we may look at some jurisdictions as a comparison. The answer is yes for many countries, such as the UK, Belgium, the Netherlands. Article 8 (1) of the English Arbitration Act 1996 provides that "Whether agreement discharged by death of a party. (1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party."[20] Article 1688 of the Belgian Code of Justice also stipulates that unless otherwise agreed by the parties, an arbitration agreement or the mandate of the arbitral tribunal is not terminated by the death of a party. Article 1032 of the Netherland Arbitration Act provides that "Unless the parties have agreed otherwise, neither the arbitration agreement nor the mandate of the arbitral tribunal shall terminate by reason of the death of one of the parties."[21] Similar provisions can be found in Approved Macao Arbitration System[22] and Hong Kong Arbitration Ordinance.

The same is true for China. According to the Civil Procedure Law of the PRC,[23] such arbitration agreement can be performed by the successor of the deceased, unless the parties or the law have provided otherwise. The second paragraph of Article 8 of the 2006 Interpretation Arbitration Law provides that, if a party concerned died after concluding an agreement for arbitration, the agreement for arbitration shall be binding upon the inheritor who inherits his/her rights and obligations in the matter to be arbitrated. Many domestic arbitration commissions in China have rules prescribing

20. Article 8 (2) of the English Arbitration Act 1996 provides that "Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death."
21. Effective from Dec. 1, 1986.
22. Decree No. 29/96/M.
23. Article 150 (1)-(3) of the Civil Procedure Law of the PRC provides that "Under any of the following circumstances, an action shall be suspended: (1) A party dies and it is necessary to wait for his or her successors to indicate whether they will participate in the action. (2) A party loses his or her litigation competency and his or her legal representative has not been determined. (3) A party that is a legal person or any other organization is terminated and the successors to the rights and obligations of the party have not been determined...."

that a natural person's death does not lead to termination of the arbitration agreement. For example, according to Article 82 of the Karamay Arbitration Commission Provisional Rules, where one party has died or lost capacity, the arbitration shall be suspended, before the successor indicates whether he has the intent to participate in the arbitration or not.

Before terminating its legal personality, a company must go through liquidation, a legal system to clear up company debts and deal with the remaining property of company according to prescribed procedure. Similar to a natural person's death, liquidation of a company does not result in invalidity of an arbitration agreement. Pursuant to the Supreme People's Court's two Replies,[24] a company's business qualification shall be terminated after the revocation of its business license, but its standing to litigate remains exist in the liquidation period which ends at deregistration. Thus, during the liquidation period, the company can still participate in litigation in its own name, and its liquidator may act on its behalf in court proceedings.

Chinese arbitration legislation has no express provisions in this regard. Yet, it should be understood that an arbitration agreement to which a liquidated company is a party does not lose effect, and the liquidator can participate in the arbitration on behalf of the company. Article 11 (8) of the Procedures for Liquidation of Foreign-Funded Enterprises (now invalid) provides that "The liquidation committee exercises the following terms of power during the liquidation period: (8) participation in civil lawsuits on behalf of the enterprise;" Article 21 provides that "If the creditors have objections to the results of the checkups provided by the liquidation committees, they may ask the committees to make re-checks to the credit claims within 15 days beginning from the date of receiving the written notices. If the creditors still have objections to the re-checked results, they may bring a lawsuit before the local people's court within 15 days beginning from the date of receiving the written notices about the results of the re-checks; if the creditors and the FFEs concerned have agreed to settle the matters through an arbitration the matters shall be submitted to arbitrations. During the judicial proceedings or arbitrations, the liquidation committees must not distribute the disputed properties." This provision confirms the validity of arbitration agreement to which a company being liquidated is a party and shows an arbitral procedure can be launched by the arbitration agreement. Many domestic arbitration rules make similar provisions with the same rationale, though only suspension of the arbitral procedure is mentioned.

As a type of contract, arbitration agreement shall abide by the principles of the contract law. Parties may revoke an arbitration agreement in writing or repudiate it in other forms. Unless agreed otherwise, neither party may revoke an arbitration agreement unilaterally. Once an arbitral award is made, the parties cannot initiate another arbitration to solve the same dispute relying on the same arbitration agreement. Article 9 (2) of the Arbitration Law of the PRC provides that "If an arbitration award is set aside or its enforcement is disallowed by the people's court in accordance with the law, a party may apply for arbitration on the basis of a new arbitration agreement reached

24. Fa Jing [2000] No. 23 and Fa Jing [2000] No. 24.

between the parties, or institute an action in the people's court, regarding the same dispute." Accordingly, it is the new arbitration agreement rather than the previous arbitration agreement that is relied on to launch the second arbitration. In contrast, unlike China, some jurisdictions may take the position that parties may apply for another arbitration based on the original arbitration agreement after the award is set aside. For example, according to Article 1059 (5) of the German Arbitration Law 1998, the annulment of arbitral award gives effect to the arbitration agreement once again.

§3.02 SEPARABILITY OF ARBITRATION AGREEMENT

An arbitration agreement, a kind of subordinate agreement with particularity, is independent from its underlying contract. The separability presumption, or the severability or autonomy of arbitration agreement, means that an arbitration agreement is separate from the main contract, insulating from the challenges to the underlying contract.[25] The doctrine of Separability of Arbitration Agreement has become one of the main fundamentals of modern arbitration law.

Does the separability presumption apply to all circumstance? Or in other words, are there any cases when an arbitration agreement cannot be separated from the underlying contract? For these questions, there are generally two views in China. The relative theory argues that under certain conditions, an arbitration agreement shall be held invalid if the underlying contract is invalid or does not exist, for lack of parties' agreement to arbitrate. The absolute theory asserts that in any case an arbitration agreement is presumptively separable from the main contract, and there is no need to distinguish from different circumstances. For example, if A applies for arbitration against B, B may negate his consent to arbitrate, contending that the underlying contract is invalid for A's fraudulent behavior or the main contract does not exist at all. An arbitral tribunal cannot determine whether B's defense is valid without hearing the case. Whatever the applicable theory is, the said dilemma will be encountered.

Most national legislation does not provide for how to deal with the circumstance when the main contract does not exist. Article 19 of the Arbitration Law of the PRC only concerns the "amendment, rescission, termination or invalidity of a contract." Article 10 of the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the PRC provides that "Where a contract does not become effective or is cancelled after being formed, the effectiveness of the agreement for arbitration shall be ascertained under Paragraph 1 of Article 19 of the Arbitration Law. Where the parties concerned reach an agreement for arbitration regarding a dispute when concluding the contract, the effectiveness of the agreement for arbitration shall not be impacted if the contract is not formed." That "contract is not formed" usually only refers to the circumstance when formal validity is not satisfied. This gives rise to a question: does the Article include the scenario when the contract does not exist, for instance, a contract which is conjured up by one party and is of no knowledge

25. Since the autonomy issue usually emerges in the circumstances when the arbitral agreement takes the form of arbitral clause, the chances of occurrence of the issue in separate arbitration agreement is slim.

to the other party? Arbitration institutions are likely to apply the separability presumption to the situation when the contract is not formed. In contrast, depending on their attitudes to arbitration, courts may take the way of early intervention to negate the validity of arbitration agreement or leave the arbitral tribunals or institutions to decide the issue.

In the Reply of the Supreme People's Court to the Request for Instructions on Non-enforcement of the Foreign-Related Arbitral Award between Sri Trang Agro-Industry Plc. and Triangle Tyre Co., Ltd.,[26] the Supreme People's Court held that "even if the contract is presumed to have been formed based on the parties' actual performance of the contract, in accordance with the requirement in China that an arbitration agreement be in writing and the principle that an arbitration agreement be independent of a contract, it cannot be determined, based on performance alone, that the parties reached an arbitration agreement with respect to the means of dispute resolution."

It should be noted that the separability presumption only has the effect to separate an arbitration agreement from the underlying contract in finding their validity, which does not mean the arbitration agreement is valid in any case. Whether an arbitration agreement is valid or not is an issue to be decided by the arbitral tribunal. If an arbitral tribunal finds the arbitration agreement is invalid, it shall cease to hear the case.

Due to the separability presumption, challenges to the main contract do not affect the validity of an arbitration agreement, and an arbitral tribunal deals with the case according to the arbitration agreement. Under those circumstances, an arbitral tribunal decides the jurisdiction issue. In other words, whatever the absolute or relative theory, an arbitral tribunal presumptively possesses the jurisdiction to rule on its jurisdiction, i.e., the competence-competence doctrine. Under the doctrine, a party's objections to the validity of the arbitration agreement do not prevent an arbitral tribunal from determining the validity issue of the arbitration agreement. Generally, an arbitrator has the authority to consider and rule upon the jurisdictional challenge in international arbitration.

Can the competence-competence doctrine be applied to China? The doctrine can be applied with different standards. If the doctrine is applied strictly, arbitrators have the ultimate authority to rule on the jurisdiction issue; if it is applied relative loosely, arbitrators' decision on its jurisdiction remains subject to judicial review. Considering the former, authorizing too much power to an arbitral tribunal, it is the latter that is adopted by the mainstream practice in international commercial arbitration. When prescribing the separability presumption, most national legislation also provides for the competence-competence doctrine,[27] which does not exclude courts' ultimate jurisdiction over such matters.

The situation in China is unique as the arbitral institution decides the jurisdiction issue first. With the arbitration institution's authorization, can the arbitrator or the arbitral tribunal decide on their own jurisdiction? To this extent, China adopts the latter standard, according to which courts have ultimate jurisdiction over the issue. Article 20

26. [2013] Min Si Ta Zi No. 12.
27. The situation in China is unique as the arbitral institution decides the jurisdiction issue.

of the Arbitration Law of the PRC provides that "If a party challenges the validity of the arbitration agreement, he may request the arbitration commission to make a decision or apply to the people's court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the people's court for a ruling, the people's court shall give a ruling."

The separability presumption is reflected in Chinese commercial arbitration practices. For example, in *Beijing Zhi Hua Jia Yi Science and Technology Co., Ltd. v. Beijing Gao Chu Advertising Media Co., Ltd.*,[28] the Beijing Chaoyang People's Court held that an arbitration agreement is autonomous from the underlying contract, and the amendment, rescission, termination or invalidity of the main contract does not affect the validity of the arbitration agreement, according to the Arbitration Law of the PRC. The Termination Contract, concluded by the parties to terminate the Airport Big Screen Media Rental Contract ("Rental Contract"), does not affect the arbitration agreement contained in the Rental Contract. Therefore, this case should be referred to Beijing Arbitration Commission for arbitration according to the arbitration agreement, which provides that "Any dispute arising from or in connection with this contract shall be resolved by Beijing Arbitration Commission according to its arbitration rules."

§3.03 LAW APPLICABLE TO ARBITRATION AGREEMENT

Only valid arbitration agreements can be relied upon as the basis for arbitral procedure and award, and whether an arbitral agreement is valid or not is determined according to the law applicable to the arbitral agreement. As discussed above, it is generally held that, including in China, an arbitration agreement is independent of the main contract, and termination of the contract does not necessarily lead to the invalidity of arbitration agreement. Likewise, the law applicable to the main contract may not necessarily apply to the arbitral clause.

[A] Methods of Determining Law Applicable to Arbitration Agreement

In general, several options exist to determine the law governing arbitration agreement,[29] some of which have been adopted in practice in China while others remain academic discussions.

[1] Law Chosen by Parties

Party autonomy, one of the fundamental principles of the contract law, is considered as the overarching principle of determining the law applicable to arbitration agreements in international commercial arbitration. Nonetheless, it is rare for parties to specifically agree upon the law governing arbitration agreements.

28. (2009) Chao Min Chu Zi No. 21719.
29. Song Lianbing, *Study on Jurisdiction in International Commercial Arbitration*, 82–88 (Law Press 2000).

Article V (1) of the New York Convention provides that "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." Here, "under the law to which the parties have subjected it" refers to the law applicable to the arbitration agreement chosen by parties. Similar to determining the law applicable to a main contract, the first principle of ascertaining the governing law of an arbitration agreement is party autonomy. This provision of the New York Convention also clarifies that in the absence of a choice-of-law clause specifically applicable to the arbitration agreement, the law of the arbitral seat shall apply.

[2] Law of Arbitral Seat

The place of arbitration is generally the place where an award is made.[30] If the parties have not selected a law to govern their arbitration agreement, most authorities adopt a default rule applying the law of the arbitral seat.

As discussed above, with respect to the law governing an arbitral agreement, the law of the arbitral seat is the default applicable law, unless the parties have reached a specific agreement in this regard. In practice, the place of arbitration is also the most commonly used factor in the choice of law. In *Shandong Molong Petroleum Machinery Corp. v. HIGH SEALED AND COUPLED S. A. L*,[31] the Supreme People's Court held that in the Exclusive Sales Contract, the parties had agreed to use the ICC arbitration and Conciliation Rules as the arbitral rules, from which the arbitral institution can be ascertained. The law of arbitral seat in this case is Swiss law, according to which, the arbitration clause agreed by the parties in this case is valid, and thus courts of our country have no jurisdiction over the case. In *Guangdong Sino-foreign Shipping Agency Co., Ltd. v. Lu Qin (HongKong) Co., Ltd.*,[32] the parties agreed that the place of arbitration is Hong Kong and the governing law is British law. Shanghai Higher People's Court held British law shall apply to substantive issues while Hong Kong law shall govern procedural matters. According to both British and the Hong Kong Arbitration Ordinance, the arbitration agreement is valid and enforceable.

30. Yet, the place of arbitration could be separate from the place where an award is made. In an England case decided in 1992 (Hiscox *v. Outhwaite*), though the arbitral proceedings were conducted in London, the award was executed in France and the House of Lords held the award was made in France. According to Art. 100 of the English Arbitration Act 1996, an award should be deemed as being made in the place of arbitration, regardless of the place of execution or delivery of the award. Therefore, the decision made by the House of Lords was overturned.
31. (2010) Min Si Ta Zi No. 40.
32. (2009) Hu Gao Min Si (Hai) Zhong Zi No. 58.

[3] Closest Connection Principle

Like the principle of party autonomy, the closest connection principle is widely adopted to determine the law applicable to commercial contracts, but it is relatively rare to be used to ascertain the governing law of arbitration agreements in practice. Still, in theory, it can be used to determine the applicable law of arbitration agreements. Close connections include the place the contract is concluded, the location of the disputed subject, parties' domicile, nationality, habitual residence, business place.

[4] In Favor of Validity Principle

In ascertaining the validity of a contract, in favor of validity principle, try best to acknowledge the validity of a contract, shall apply. In some jurisdictions, it is held that the principle may also apply to arbitration agreement, as in Switzerland. According to the second paragraph of Article 178 of the Federal International Private Law Act of Switzerland, if an arbitration agreement complies with the law chosen by the parties or the law applicable to the dispute, in particular the choice-of-law of the contract or Swiss law, the arbitration agreement is valid. Accordingly, an arbitration agreement shall be upheld if it is valid under any of those prescribed laws. The law that validates arbitration agreement through choice of law is in favor of arbitration.

In China, pursuant to Article 14 of The Provisions of the Supreme People's Court on Certain Issues Related to the Conduct of Judicial Review of Arbitration Cases,[33] Where, absent the parties' choice of the governing law, a people's court is to ascertain the law governing the validity of a foreign-related arbitration agreement in accordance with Article 18 of the Law of the People's Republic of China on the Law Applicable to Foreign-related Civil Relations, and application of the law of the place of the arbitration institution or the law of the seat of arbitration will bring about different results in respect of the validity of the arbitration agreement, then the people's court shall apply the law that renders the arbitration agreement valid. The principle is also implemented here to support arbitration.

[5] Law Applicable to Underlying Contract

In China, parties usually agree on the law applicable to the contract, but different views exist on whether the applicable law also applies to dispute resolution clause. The general application theory holds that the law applicable to the whole contract shall govern an arbitration clause, which is a part of the contract. In contrast, the separate application theory is of the belief that an arbitration agreement, providing a solution to solve disputes arising from the contract including the governing clause, is of a particular nature and shall be excluded from the scope of the law applicable to the main contract. As discussed above, most authorities including China hold the separability presumption, separating an arbitration agreement from other parts of the contract.

33. Fa Shi [2017] No. 22.

Therefore, in a general rule, in the absence of an express statement, the law applicable to the underlying contract does not automatically apply to the arbitration agreement.

The Model Law of Private International Law of the PRC drafted by Chinese Society of Private International Law provides that "The law chosen by the parties shall govern the validity of an arbitration agreement, except the parties' capacity. 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 and when the place of arbitration or award making is not determined, the *lex causae* of the disputes, notably the law applicable to the main contract or the law of the PRC shall apply."[34] Here, the law applicable to the underlying contract is an alternative.

[6] Other Methods

Absent parties' agreement, the law applicable to an arbitration agreement could also be the law of the forum, the law of concluding the contract and the national law under certain circumstances. For instance, if Sweden is the place or arbitration or at least a party is a Swedish resident at the time of signing the contract, the governing law of the arbitration agreement, if not agreed by the parties, shall be Swedish law.

For national courts, the most convenient practice is to apply the law of the forum. Pursuant to the Supreme People's Court, the most convenient practice is if the parties neither agreed upon the applicable laws nor agreed upon the place of arbitration or if the place of arbitration is not clearly agreed upon, the laws at the locality of the court shall apply to examine the effectiveness of the arbitration agreement. In *Vietnam Haifang Wanhua International Travel Company v. Hainan Island Custom International Travel Agency Co., Ltd.*,[35] the arbitration agreement says "In the case of force majeure and political factors, the parties shall solve problems through amicable negotiation, failing which, the parties agree to submit disputes to the local arbitration body for resolution and the parties are bound by the arbitration body's decision." In the reply to Hainan Higher People's Court, the Supreme People's Court held that "the arbitration clause does not contain the law applicable to itself nor provide the place of arbitration. Therefore, the law of the PRC, the law of the forum in this case, shall be applied to the arbitration clause. According to Article 16 of the Arbitration Law of the PRC, a valid arbitral clause shall contain the designated arbitral institution. Yet, in this case, the arbitral clause only says the problems shall be resolved by the arbitration body in the place where disputes take place, which is not a defined concept in procedural law. The disputes arose from the defendant's default in payment to the plaintiff, but the contract does not specify the place where such payment shall be made. Thus, the place where disputes occur cannot be ascertained, which in turn makes it impossible to determine

34. China Society of Private International Law, *The Model Law of Private International Law of the PRC*, 33 (Law Press 2000).
35. Reply of the Supreme People's Court to the Instruction Request on the Validity of the Arbitration Clause Involved in the Dispute over the Travel Service Contract (*Hai Phong Wai Hua International Travel Company v. Hannan Redao Fengqing International Travel Agency Co., Ltd.*), [2003] Min Si Ta Zi No. 36.

the arbitral institution referred to in the arbitral clause. Considering the plaintiff has brought the case before Haikou Intermediate People's Court, the parties had not made a supplementary arbitral agreement. Therefore, according to Article 18 of the Arbitration Law of the PRC, the arbitral clause in this case is invalid and Haikou Intermediate People's Court has jurisdiction over this case." In this case, the Supreme People's Court has illustrated how the law of the forum is applied.

[7] No Applicable Law

The nonlocalization theory or denationalization theory is of the view that international commercial arbitration procedure shall be above the procedural law of any country, in particular the arbitral seat, and arbitration is not subject to the law of the place of arbitration, or even law of any country. Accordingly, arbitration agreements shall be governed by international law such as general legal principles and international commercial practices. That is not the practice in China.

[B] Methods of Determining Law Applicable to Arbitration Agreement in China

As parties usually do not agree upon the law applicable to their arbitration agreement, how should the law applicable to the arbitration agreement in China be determined? In general, rules applicable to the underlying contract also apply to arbitration agreement which itself is a contract. In international private law, there are two main modes to determine the choice-of-law: divisive or holistic systems. This is nearly the same in China. Some advocate that holistic system shall be adopted in ascertaining the law applicable to the arbitration agreement. That is to say, except capacity of the parties, all aspects of an arbitration agreement shall be regarded as indivisible whole governed by the same law. In contrast, others believe it is better to select the divisive system, which is to apply different laws with respect to the capacity of the parties, formation, formal validity, substantive validity and interpretation. The former is more convenient in practice, more supportive to arbitration and more effective to solve disputes.

However, in the application of the holistic system, the following factors should be considered: (1) the national law of the party's domicile or place of incorporation shall govern the capacity of parties (including whether a party has the capacity or whether the party is effectively represented). Some national laws expressly exclude the law applicable to the arbitration agreement (such as the law of the arbitral seat) to the questions of capacity, for example, Sweden.[36] (2) In determining whether a dispute is arbitrable, the law of the arbitral seat and the enforcement forum should be taken into consideration. Even if deemed valid by its applicable law, an arbitration agreement cannot be enforced if it is considered as nonarbitrable under the law of said two states.

36. The second half of the Article 48 of the Swedish Arbitration Act 1999 provides "The first paragraph shall not apply to the issue of whether a party was authorized to enter into an arbitration agreement or was duly represented."

In general, since parties usually state the arbitral seat, the law of the place of arbitration is the most common law applicable to an arbitration agreement, followed by the law of the forum, parties less frequently make an express agreement concerning the governing law of the arbitration agreement, so arbitral tribunals rarely are able to apply the governing law chosen by the parties. For a time, Chinese courts had a tendency to apply the law of the forum to arbitration agreements, that is, to simply apply the Chinese law to foreign-related cases.[37] In recent years, changes have taken place, in particular, in the judicial review of arbitration.

In China, in determining the law applicable to international arbitration agreements, the mode of application of the law chosen by parties, the law of the arbitral seat and the law of forum is established. Article 16 of the 2006 Interpretation on Arbitration Law[38] provides that "The examination of the effectiveness of an agreement for arbitration which involves foreign interests shall be governed by the laws agreed upon between the parties concerned; if the parties concerned did not agree upon the applicable laws but have agreed upon the place of arbitration, the laws at the place of arbitration shall apply; if they neither agreed upon the applicable laws nor agreed upon the place of arbitration or the place of arbitration is not clearly agreed upon, the laws at the locality of the court shall apply." Article 58 of the Second National Judicial Conference on Foreign-Related Commercial and Maritime Affairs published by the Supreme People's court[39] provides that "The law applicable to the contractual disputes agreed by the parties cannot be used to determine the validity of the foreign-related arbitration agreement. The law agreed by the parties shall govern the arbitration agreement; if the parties did not agree upon the applicable law to the arbitration agreement but have agreed upon the place of arbitration, the laws at the place of arbitration shall apply." Article 14 of the Interpretation of Foreign-Related Civil Relationships by the Supreme People's Court provides that, if the parties make no choice of law applicable to the foreign-related arbitration agreement, nor agree on the arbitration institute or place of arbitration, or they make no explicit agreement thereon, the laws of the PRC may be applied to determine the validity of such arbitration agreement.

In recent judicial practices, the Supreme People's Court and other levels of courts determine the law applicable to an arbitration agreement with the following order: (1) the law chosen by the parties; (2) the law of the arbitral seat; and (3) the law of the forum. Below are examples.

In the Reply of the Supreme People's Court regarding the Validity of the Arbitration Agreement in the Sales Contract between Romania SC SCORIA SRL and

37. According to the sample survey by the Supreme People's Court on the application of law in fifty foreign-related commercial cases handled by the court at all levels in China in 2001and 2002, 90% of the cases applied the law of the PRC, among which the judgments of 56% cases stated no reason why the PRC law was applied in the particular case. Among all the cases, 23% applied the law agreed by the parties (with express or tacit consent or by presumption), 6% applied the law determined by the conflict rules, and 15% applied the law according to the doctrine of the most significant relationship.
38. Fa Shi [2006] No. 7.
39. [2005] No. 26.

Shandong Tainxing Railway Engineering Co., Ltd.,[40] the parties agreed to "submit disputes to Chinese arbitral institution for arbitration according to arbitration rule." The parties agreed to arbitrate in China but did not stipulate the law applicable to the arbitration agreement. Pursuant to Article 16 of the 2006 Interpretation, the law of China, the arbitral seat agreed by the parties, shall govern the validity of the arbitration agreement. According to the Arbitration Law of the PRC, since the arbitration agreement did not specify the name of the arbitral institution and the parties did not reach a supplement agreement regarding the institution, the arbitration agreement is invalid.

In the Supreme People' Reply regarding the Validity of the Arbitration Clause in the *Meijin Coal Gasification Corp. v. Japan Minhe industrial Corp. and Tokyo Gas and Energy Corp.*,[41] the parties agreed that "Any disputes, which arise from the interpretation and performance of this contract and cannot be settled by negotiation, shall be subject to a third country for arbitration." Neither the law applicable to the arbitration agreement nor the arbitral seat was agreed by the parties. According to Article 16 of the 2006 Interpretation, the law of China, the forum, shall govern the validity of the arbitration agreement.

In the Reply of Supreme People's Court regarding the Validity of the arbitration agreement regarding the Zhongshe International Business Transport Agency Co., Ltd., the parties agreed to "arbitrate in Beijing applying Chinese law." Since the arbitration agreement only stated arbitration in Beijing but did not specify the name of the arbitral institution and the parties did not reach a supplement agreement regarding the institution, the arbitration agreement is invalid.

In *COFCO Wines & Spirits Co., Ltd. v. GLORIAVINO*,[42] Article 13 of the Sales Contract provided that "A) Any disputes arising from or in connection with this contract shall be resolved through amicable negotiation, failing which, the dispute shall be submitted to arbitration. B) Arbitration shall take place in Switzerland. C) The arbitral award shall be final and binding on the parties. D) The cost of arbitration shall be borne by the losing party." COFCO Wines & Spirits Co., Ltd. petitioned Beijing Third Intermediate People's Court to invalidate the arbitral clause on the grounds that the parties only agreed to arbitrate but had not specified the name of the arbitral institution.

However, the court held the arbitral clause was valid. Article 18 of the Law of the Choice of Law for Foreign-Related Civil Relationships of the PRC provides that "The parties concerned may choose the laws applicable to arbitral agreement by agreement. If the parties do not choose, the laws at the locality of the arbitral authority or of the arbitration shall apply." Though the parties did not agree on the law applicable to the arbitral clause, the law of Switzerland, which was designated as the arbitral seat in the Sales Contract, should be applied to determine the validity of the arbitral agreement. According to Chapter 12 of the Swiss Private International Law Act, an "international arbitration" shall satisfy two requirements: (1) the place of arbitration shall be in Switzerland, and (2) at least a party's domicile, habitual residence or business

40. [2009] Min Si Ta Zi No. 41.
41. [2009] Min Si Ta Zi No. 34.
42. (2014) San Zhong Min Te Zi No. 07946.

arbitration institutions, arbitration rules and arbitral tribunals to exercise their discretion. In fact, the basic principles and framework of the arbitration legislations and arbitration rules in various jurisdictions, including China, are virtually similar. The differences lie in the details and how to apply those details into practice.

When the Chinese courts conduct the judicial review of the arbitral procedures, the courts in fact also review other relevant procedures so as to determine whether or not they are in compliance with the arbitration laws and arbitration rules. Their standard for doing so is Article 20 of the 2006 Interpretation on Arbitration Law and Article 58 of the Arbitration Law, according to which "violation of statutory procedures" refers to circumstances where the arbitration procedures under the Arbitration Law have been violated and where the arbitration rules selected by the parties are likely to affect the accurate ruling of the case. This section will explain how arbitral procedures work under Chinese law, followed by an introduction to commercial arbitral procedures in combination with some specific cases and examples under the Arbitration Law of the PRC and in commercial arbitration practice.

[A] Request for Arbitration and Acceptance

Under Chinese law, a request for arbitration means an application submitted by any of natural persons, legal persons and other organizations to the agreed arbitration institution to resolve their contractual disputes and other disputes over rights and interests in property, pursuant to their arbitration agreement either concluded preceded or subsequent to the occurrence of the disputes. It is provided that the filling of a request for arbitration shall satisfy the following requirements:[1]

(1) An arbitration agreement is submitted. A valid arbitration agreement is the basis for a request for arbitration. In absence of the arbitration agreement, arbitration institutions will have no jurisdiction over the case, and thus the parties are unable to resolve their disputes by filing an arbitration application.[2]
(2) There is specific statement of claim and the facts and grounds on which the claim is based. The statement of claim should be concrete and explicit, and should be supported by the facts and grounds, all of which should be submitted to the arbitral institution (or tribunal) together.
(3) The statement of claim should fall within the arbitrable scope of arbitration institutions. The claims raised by the parties for arbitration should be the contractual disputes or other disputes regarding properties between citizens, legal persons and other organizations as equal civil subjects,[3] other than the disputes arising out of marriage, adoption, guardianship, support and inheritance as well as the administrative disputes that shall be handled by administrative organs as prescribed by law.[4]
(4) The request for arbitration should be submitted to the agreed arbitration institution. The parties should apply to the arbitration institution selected in their arbitration agreement for arbitration.
(5) Both the originals and the duplicates of the request for arbitration should be submitted. In accordance with Article 23 of the Arbitration Law, a request for arbitration shall generally contain the items as follows: (a) each party (natural person)'s name, gender, age, occupation, employer and domicile, or each party (legal person or other organization)'s name, domicile and its legal representative's name and position; (b) the statement of claim and the facts and grounds on which they are based; (c) the evidence, the source of the evidence and the names and domiciles of witnesses.[5] The parties can amend to or withdraw their request for arbitration after being filed.

Although a party has filed a request for arbitration, the arbitration procedure does not really begin until the arbitration institution agrees to accept the request. After the arbitration institution receives the request for arbitration, it decides whether or not to accept the arbitration. Article 24 of the Arbitration Law of the PRC stipulates that within five days upon receipt of the application for arbitration, the arbitration institution shall, if it finds that the arbitration institution meets the conditions of acceptance, notify the parties and, if it does not satisfy the conditions of acceptance, notify the parties of the nonacceptance and explain the reasons. The arbitration institution is required to review the party's arbitration application based on the above five requirements. If the application for arbitration meets those requirements, the party must be notified in writing or verbally (usually in written form); if it is not accepted, the party shall be notified within five days, but the notice of nonacceptance shall be in writing. The notice of nonacceptance shall contain the reasons why the arbitration institution does not accept the case. In the event that the arbitration institution accepts the application for arbitration, it shall, within the time limit prescribed in the arbitration rules, serve upon the claimant with arbitration rules and panel of arbitrators, and serve upon the respondent with duplicates of arbitration application, arbitration rules and panel of arbitrators.[6] Article 9 of the Arbitration Law prevents an arbitration institution or the people's court from accepting a case filed by either party again with regard to the same dispute which has been adjudicated by the arbitral tribunal with the arbitral award rendered.

1. Articles 21 and 22 of the Arbitration Law of the PRC.
2. In practice, under certain circumstances, the arbitration commissions in China may try to accept the request for arbitration even if no arbitration agreement is presented, and afterwards issue inquiry letter to the respondent. If the respondent agreed and sign written arbitration agreement, the arbitration proceeding will be initiated and proceed forward. If the respondent disagrees to sign arbitration agreement or makes no response, the arbitration procedure cannot proceed any further.
3. Article 2 of the Arbitration Law of the PRC.
4. Article 3 of the Arbitration Law of the PRC.
5. The detailed application procedures may refer to the official websites of individual arbitration commissions.
6. Article 25 (1) of the Arbitration Law of the PRC.

[B] Defense and Counterclaim

Defense is a significant right for the respondent. The respondent can respond to the claimant's application and make his position clear by means of defense. In this way, it is helpful to find out the facts of the case and resolve disputes between the parties. If the respondent fails to defend himself for the reasons not attributable to himself, it will affect the efficiency of arbitration and the enforcement of the award. If the respondent does not defend or fully defend himself for his own reasons, only his own interests will be affected. The respondent should submit a statement of defense within the time limit prescribed by the arbitration rules of the arbitration institution. However, if the respondent does not submit his defense within the time limit, it will not affect the arbitration proceedings. After the arbitration institution receives the statement of defense from the respondent, it shall serve a duplicated copy of the statement of defense upon the claimant within the time limit prescribed in the arbitration rules. If the respondent fails to submit the statement of defense, the arbitration proceedings will not be affected.

In addition to the right of defense, the respondent may also file a counterclaim. Article 27 of the Arbitration Law provides that a claimant can waive or change his statement of claim, and the respondent may recognize or refute the statement of claim and have the right to file a counterclaim. The Arbitration Law sets conditions for filing a counterclaim. Counterclaims are closely related to the statement of claim, but they are relatively independent.

First, the counterclaims are made against the original claims for arbitration, both of which are based on the same arbitration agreement.

Second, the counterclaims are independent claims, which are not required to make before the same tribunal. The arbitral tribunal's acceptance of both the counterclaims and the original claims in the same case in fact amounts to the consolidation of two arbitration procedures. The advantages for both counterclaims and original claims to be accepted by the same arbitral tribunal are: (1) improving efficiency; (2) reducing the risk of conflicting arbitral awards being rendered by different tribunals.

Third, unless the parties agree otherwise, withdrawing the original statement of claim does not affect the continuation of the arbitration proceedings for counterclaims, and the arbitral tribunal still has to adjudicate the counterclaims. In addition, even if a party fails to file a counterclaim prior to the deadline, it has not lost the right to file a separate claim in another arbitration or litigation.

[C] Composition of the Arbitral Tribunal and Challenge of Arbitrators

Chinese laws require that an arbitration tribunal be composed of three arbitrators or one arbitrator. The appointment of arbitrators, the composition of arbitral tribunals, and the challenge and replacement of arbitrators are all significant processes in arbitration proceedings, and even to some extent, they are the most significant. In case of consisting of three arbitrators, the presiding arbitrator shall be appointed. If the parties agree on the arbitral tribunal of three arbitrators, each shall appoint or entrust

the president of the arbitration institution to appoint one arbitrator respectively. The third arbitrator shall be jointly appointed by the parties or by the president of the arbitration institution jointly entrusted by the parties. The third arbitrator is the presiding arbitrator. If the parties agree that the arbitral tribunal is composed of a sole arbitrator, the parties shall jointly appoint or jointly entrust the president of the arbitration institution to appoint the sole arbitrator. If the parties fail to agree on the composition of the arbitral tribunal or the selection of the arbitrators within the time limit prescribed in the arbitration rules, the arbitrators shall be appointed by the president of the arbitration institution. After the arbitral tribunal is formed, the arbitration institution shall notify the parties of the composition of the arbitral tribunal in writing.[7]

[D] Oral Hearings and Hearings on the Basis of Documents

In China, the oral hearing is the main form for trying an arbitration case. The arbitration institution shall, within the time limit prescribed in the arbitration rules, notify the parties of the date of the oral hearing. If the parties have justified reasons, they may request an extension of the oral hearing within the time limit prescribed in the arbitration rules. It is subject to the decision of the arbitral tribunal whether or not to approve the extension. If the claimant fails to appear at an oral hearing without showing sufficient cause for such failure or withdraws from an ongoing oral hearing without the permission of the arbitral tribunal, the claimant shall be deemed to have withdrawn its request for arbitration. If the respondent fails to appear at an oral hearing without showing sufficient cause for such failure or withdraws from an ongoing oral hearing without the permission of the arbitral tribunal, the arbitral tribunal shall make a default hearing, and proceed with the arbitration.[8]

During the proceeding of the oral hearing, the parties may present evidence, examine evidence and debate. At the conclusion of the debate, the presiding arbitrator or the sole arbitrator shall consult the parties if they have any closing statements. In the arbitration in China, the arbitral tribunal shall record the oral hearing in the transcripts. Where the parties and other participants deem that there is any omission or error in the transcript containing their statements, they are entitled to apply for correction. If a party applies not to correct, his application should be recorded. The transcripts are affixed with signatures or seals by the arbitrators, the stenographers, the parties and any other participants in the arbitration.[9] The arbitral tribunal for foreign-related arbitration may make a verbatim transcript of the oral hearing or make a transcript of the key points in the oral hearing which may be affixed with signatures or seals by the parties and other arbitration participants.[10]

With regard to the modes of oral hearings, they include adversarial proceedings, inquisitorial proceedings and the others. The adversarial regime under the common

7. Articles 31–33 of the Arbitration Law of the PRC.
8. Articles 39–42 of the Arbitration Law of the PRC.
9. Articles 47–48 of the Arbitration Law of the PRC.
10. Article 69 of the Arbitration Law of the PRC.

law system and the inquisitorial regime under the civil law system are distinctive from each in terms of the mode of hearing. In fact, these various modes of hearing appears in China arbitration practice since the cases may involve various parties and arbitrators form various nations. When deciding to adopt which mode of hearing, the arbitrators from different law systems tend to be substantially influenced by the law system where they come from. Such influence is particularly obvious in international (or foreign-related) arbitration cases conducted by China's arbitration institutions. The common mode of hearing adopted in the modern commercial arbitration in China, like in some other main jurisdictions, is neither the pure adversarial regime nor the pure inquisitorial regime, but a mix regime of the adversarial regime and inquisitorial regime.

Article 39 of the Arbitration Law of the PRC favors oral hears but also permits arbitration without one. If the parties agree to arbitration without oral hearings, the arbitration tribunal may render an arbitration award on the basis of the written application for arbitration, the written defense and other documents. If the case is heard on the basis of documents, the approval must be obtained from both of parties; if the arbitral tribunal deems it is appropriate to hear the case on the basis of documents, it should notify the parties and consult the parties that they have no objection to the hearing on the basis of the documents.

[E] Default Proceedings

There are two understandings in China regarding a party's failure to appear at hearing: (1) In the narrow sense, it refers to a party's failure to appear at the oral hearing only; (2) In the broad sense, it refers to a party's failure to appear in the entire arbitration proceedings, including the oral hearing and other proceedings. If a party is default in arbitration, how the arbitral tribunal proceeds with the arbitration? The Arbitration Law of the PRC provides that, if the claimant fails to appear before the arbitration tribunal without justified reasons, he may be deemed to have withdrawn his application for arbitration, and if the respondent fails to appear before the arbitration tribunal without justified reasons, a default award may be made.[11] Generally, the applicable arbitration rules of a Chinese arbitration institution that govern the arbitration proceedings will also make relevant provisions.

In general, in China arbitration practice, one party's failure to appear at the hearing will not affect the arbitration proceedings to go forward. The arbitral tribunal can proceed with the arbitration without the defaulting party's presence in accordance with applicable arbitration rules. However, the arbitral tribunal will inevitably face the problem of how to examine and accept, without prejudice of procedural justice, the ex parte evidentiary materials presented and the statements made by a party.

The practice in Chinese commercial arbitration is that even if a party fails to respond or appear, the arbitral tribunal can consider the merits of the case and decide the substantive and procedural issues. The party that participates in the arbitration proceedings still has to satisfy the arbitral tribunal with sufficient evidence and

11. Article 42 of the Arbitration Law of the PRC.

grounds. The arbitral tribunal does not substitute itself for the defaulting party. However, the arbitral tribunal is obliged to assess and examine factually and legally the evidence and statements presented by the nondefaulting party, in order to find out whether they are well founded or not, and thereafter make a reasoned award, setting out the facts and basis for its decision.

[F] Deliberation and Award

After the hearing, the arbitral tribunal shall arrange the time for the deliberation, put forward the opinion of the arbitral tribunal and render a timely award, as often expressly required by Chinese arbitration commission's rules. According to the Arbitration Law of the PRC, the award should be made in accordance with the opinions of the majority of arbitrators, and the dissenting opinions of the minority of the arbitrators may be recorded in the transcript. Where the arbitral tribunal cannot form a majority opinion, the arbitral award shall be rendered in accordance with the presiding arbitrator's opinion. The award shall contain the request for arbitration, the facts at dispute, the grounds for the award, the result of the award, the burden of the arbitration fees and the date of the award. The parties may agree not to put down the facts at dispute and the grounds for the decision in the award. The award shall be affixed with signatures of the arbitrators and the seal of the arbitration institution. The arbitrators who hold dissenting opinions have the option to sign the arbitral award or not.[12] Generally in China practice, the dissenting opinions are not to be included in the text of the arbitration award.

In arbitration proceedings, if a part of the facts involved has already become clear, the arbitration tribunal may first make a partial award in respect of such part of the facts. If there are literal or calculation errors in the arbitration award, or if the matters which have been decided by the arbitration tribunal are omitted in the arbitration award, the arbitration tribunal shall make correction or supplementation in due course. The parties may, within thirty days from the date of receipt of the award, request the arbitration tribunal to make such correction or supplementation.[13] As to this, different Chinese arbitration institutions may have slightly different provisions in their rules.

[G] Rearbitration

Rearbitration is a special mechanism in the arbitration system. Although China's modern commercial arbitration system only has a history of fifty years,[14] the rearbitration was not actually adopted until the implementation of the Arbitration Law of the

12. Articles 53–54 of the Arbitration Law of the PRC.
13. Articles 55–56 of the Arbitration Law of the PRC.
14. In 1954, the Government Administration Council of the Central People's Government decided to set up a Foreign Trade Arbitration Committee within the China Council for the Promotion of International Trade, which should be regarded as the outset in the strict sense of China's modern commercial arbitration system.

PRC in 1995. Therefore, it is a relatively new mechanism.[15] The provisions regarding rearbitration in the Arbitration law are roughly drafted.[16]

Some courts that encounter this issue regularly have issued their guidance in this respect. For example, Shanghai High People's Court issued the Guidelines regarding "Relevant Matters on Re-arbitration by Notice of People's Courts,"[17] which provides for the grounds[18] and procedures[19] for rearbitration and some other matters.

The 2006 Interpretation on Arbitration Law only provides for the grounds for the rearbitration of domestic arbitration cases, and the grounds provided thereof only include the forgery of evidence and the concealment of evidence.[20] However, from the description of Article 21, it should not be considered that it denies the court's discretion on the matter of rearbitration. In other words, the court can notify the arbitral tribunal to rearbitrate the case on other grounds than the two grounds prescribed in Article 21.

The direct consequence of the court's notice of rearbitration is the suspension of the proceedings of setting aside arbitral award. In accordance with Article 61 of the Arbitration Law of the PRC, the court suspends the proceedings of setting aside arbitral award in the form of a ruling. Suspension of the proceeding of setting aside arbitral award refers to such a circumstance that, after accepting an application for setting aside

15. The re-arbitration prescribed in Art. 261 of the Civil Procedure Law of the PRC on Apr. 9, 1991, refers to that after the arbitral award was rendered by the people's court, the parties re-apply for arbitration according to a written arbitration agreement reached between the parties. The re-arbitration stipulated in this Article shall refer to the arbitration conducted pursuant to an arbitration agreement newly reached, that is, this type of re-arbitration specified in Art. 9 (2) of the Arbitration Law of the PRC which came into force on Sept. 1, 1995. This kind of re-arbitration is not the subject of this chapter.
16. Article 61 of Ch. 5 (Application to Set Aside Arbitral Award) of the Arbitration Law stipulates that "If, after accepting an application for setting aside an arbitration award, the people's court considers that the case may be re-arbitrated by the arbitration tribunal, it shall notify the tribunal that it shall re-arbitrate the case within a certain time limit and shall rule to stay the setting-aside procedure. If the arbitration tribunal refuses to re-arbitrate the case, the people's court shall rule to resume the setting-aside procedure."
17. *See* Shanghai High People's Court's Opinions on Several Issues in Implementation of the Arbitration Law of the People's Republic of China, which came into force on Feb. 1, 2001.
18. If any of the following requirements is satisfied, the people's court may inform the arbitration tribunal of the re-arbitration: (a) the arbitration procedure violates the mandatory procedural law; (b) the evidence on reliance of which the award is rendered is forged (only applicable to the domestic arbitral awards); (c) the counterparty conceals the evidence that is sufficient to affect the fairness of the award (only applicable to domestic arbitral awards); (d) the arbitral award deals with the matters outside the scope of submission to arbitration, or the arbitral award omits the disposition of matters presented to the tribunal in the arbitration.
19. If the case satisfies the requirements for re-arbitration, the people's court shall, after having heard the opinion of the arbitral tribunal, rule the case to be re-arbitrated by the arbitral tribunal and suspend the proceeding of setting aside arbitral award. The arbitral tribunal shall initiate the arbitration proceedings within one month upon the ruling made by the people's court and render an award within six months. In the event that the arbitral tribunal refuses to re-arbitrate the case, the people's court shall resume the proceeding of setting aside arbitral award immediately.
20. Article 21 of the 2006 Interpretation on Arbitration Law provides that "The people's court may notify the relevant arbitral tribunal to start to re-arbitrate a case within a certain time limit pursuant to Article 61 of the Arbitration Law if the case concerning a party's application to vacate a domestic arbitration award involves either of the following circumstances: (1) The award is made according to fabricated evidence; (2) The other party has concealed evidence that is sufficient to affect the impartiality of the award. The people's court shall describe in its notice the specific reason for the request to re-arbitrate the case."

an arbitral award, if the people's court considers that the dispute between the parties may be rearbitrated by the arbitration tribunal, it should notify the arbitral tribunal to rearbitrate the dispute within prescribed period of time and thereby lead to suspension of the proceeding of setting aside arbitral award.

Whether the notice of rearbitration can directly initiate the rearbitration proceedings? In accordance with the last paragraph of Article 61 of the Arbitration Law, it is subject to the arbitral tribunal to decide whether to grant rearbitration, and whether to accept and observe the court's notice of rearbitration. In other words, the arbitral tribunal has the right to rearbitrate or refuse to rearbitrate the case. Regardless of whatever reasons the arbitral tribunal refuses to rearbitrate the case, the court should rule to resume the proceeding of setting aside arbitral award, and proceed with the judicial review of the arbitral award. The suspension of the proceeding of setting aside arbitral award is temporary. The court should resume the proceeding of setting aside arbitral award if the arbitral tribunal refuses to rearbitrate or if the party convinces the court with supportive evidence into admitting the grounds for setting aside arbitral award even after rearbitration.

With respect to the award rendered after rearbitration, it is the same as a regular award, and also subject to judicial review. Pursuant to Article 23 of the 2006 Interpretation on Arbitration Law, a party concerned who refuses to accept an award made after the case is rearbitrated may, within six months of the date when the award is served, apply to a people's court to have the award vacated in accordance with Article 58 of the Arbitration Law.

§7.02 IRREGULARITY IN SELECTION OF ARBITRATORS AND COMPOSITION OF ARBITRAL TRIBUNAL

In China, the parties have the autonomy to appoint their arbitrators or agree on the composition of the arbitral tribunal. The arbitral tribunal shall be independent and impartial. However, the procedural irregularities in the selection of arbitrators or composition of the tribunal may impair the independence and impartiality of the tribunal.

In accordance with the New York Convention, an arbitral award may be set aside by the court, if the party against whom the award is invoked was not given proper notice of appointment of an arbitrator, or the composition of the arbitral tribunal was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the applicable law.[21] The Arbitration Law of the PRC has the similar provisions. Chapter 6 has already touched upon this topic when discussing the arbitral tribunal and arbitrators, and this section will further discuss this topic.

21. *See* Article V (1) (b) and (d) of the New York Convention.

[A] Not Given Proper Notice of Appointment of an Arbitrator

If the arbitral tribunal (or institution) fails to appropriately notify the parties to appoint an arbitrator or fails to notify the parties of the composition of the tribunal, it can be deemed constituting the circumstance of not given proper notice of appointment of an arbitrator. The validity of the arbitral award will be affected if the parties cannot exercise the important right to select an arbitrator.

A typical case in which an arbitration respondent challenged an arbitral award for lack of proper notice is *Xinsheng Company v. Xinkun Company*.[22] The court affirmed that the arbitration commission had already served the notice of appointment of arbitrator upon Xinsheng Company, and the president of the arbitration commission's appointment of an arbitrator for Xinsheng Company was not in violation of the applicable arbitration rules. One of the grounds for Xincheng Company's application to set aside the arbitral award is that it was not notified to appoint an arbitrator. The mailing address of Xincheng Company stated in the arbitral award was provided by the respondent Xinkun Company, and it was not the correct address of Xincheng Company. Because of the wrong address, Xinsheng Company was unable to receive the arbitration notices and other relevant materials promptly within the prescribed time limit. After Xinsheng Company submitted its appointment of arbitrator later, its appointment was not accepted because it was late. The arbitral tribunal had, on its initiative, appointed an arbitrator for Xinsheng Company, and thereby Xincheng Company lost its right to appoint an arbitrator. Xinkun Company asserted that Xinsheng Company should had received the notice of appointment of an arbitrator. Prior to filing the arbitration, Xinkun Company had already referred to the company registration materials and confirmed the address was correct before providing to the tribunal. The notice of arbitration was delivered by courier, which was in compliance with Article 77 of the arbitration rules.

The court found that, the arbitration commission in fact delivered the arbitration materials to Xinsheng Company via the registered address by courier, instead of the mailing address stated in the arbitral award. According to the applicable arbitration rules,[23] the notice shall be deemed to have been properly served on the party.

In some other situations, the parties are unaware of the composition of the arbitral tribunal, for example, not notified of the name of arbitrators, and therefore the parties are in fact deprived of the right to challenge the composition of the arbitral

22. (2000) Shen Zhong Fa Jing Er Chu Zi No. 106.
23. In accordance with the applicable arbitration rules of CIETAC at that time, Art. 76 provided that "All documents, notices and written materials in relation to the arbitration may be delivered in person or sent by registered mail or courier, fax, or by any other means considered proper by the arbitration commission or the arbitral tribunal," and Art. 77 provided that "Any written correspondence to a party or its representative(s) shall be deemed to have been properly served on the party if delivered to the addressee or sent to the addressee's place of business, habitual residence or mailing address, or where none of the aforesaid addresses can be found after reasonable inquires, the written correspondence is sent to the addressee's last known place of business, habitual residence or mailing address by registered mail or by any other means that can provide a record of the attempt at delivery."

tribunal, the right to request replacement of arbitrators and the like, all of which will make the arbitration not transparent from the outset.

[B] The Composition of Arbitral Tribunal Not in Accordance with the Agreement of the Parties

Arbitration is based on the parties' agreement to arbitrate, unless otherwise provided by mandatory law. The parties form the arbitral tribunal based on the principle of party autonomy. An arbitral award can be challenged if the award was rendered by the arbitral tribunal not in accordance of the parties' agreement. For the award to be recognized or enforced in China, according to the New York Convention, the forth ground for rejecting the recognition and enforcement of the award is that "(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[24] In other words, the agreement of the parties takes priority, and the laws of the arbitral seat will not be taken into consideration unless an arbitral agreement between the parties is lacking.

Although party autonomy is the cornerstone of the arbitration system, it does not mean that the agreement of the parties can violate the requirement of due process. If the parties' agreement stipulates those provisions such as that only one party has the right to appoint an arbitrator or one party is not given the right to defend himself or the like, the court will set aside the enforcement of the arbitral award which are rendered pursuant to those agreements on the ground of violation of due process or public policy.[25]

In the case *Noble Resources International Pte. Ltd. v. Shanghai Good Credit International Trade Co., Ltd.*,[26] Noble Resources International Pte. Ltd. (hereinafter "Noble") sought for recognition and enforcement of the arbitral award. The court held that SIAC violated the Article V 1 (d) of the New York Convention (i.e., "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.").

In another typical case, *Yabaili Company Shenzhen Overseas Chinese Tutorial School (hereinafter "the Applicant") v. X*,[27] the Applicant applied to set aside the award on the basis that the arbitrator appointed by the Applicant was not accepted by the Arbitration Commission and the intervening conduct of the arbitration commission in its appointment of arbitrator had violated Article 260 (3) of the Civil Procedure Law. The Respondent defended by challenging the composition of the arbitration tribunal. The Applicant had nominated Ms. A, an American licensed lawyer who practiced in Hong Kong, as its arbitrator among the CIETAC's panel of arbitration, but she was not

24. Article 5 (1) (d) of the New York Convention.
25. P. Sanders, *The New York Convention*, II Intl. Com. Arb. 293, 317 (1960).
26. *See* Shanghai First Intermediate People's Court, *Non-recognition and Non-enforcement of One Foreign Arbitral Award*, People's Court Daily (August 25, 2017).
27. (2000) Shen Zhong Fa Jing Er Chu Zi No. 108.

accepted by the arbitration commission because Ms. A was not a domestic arbitrator. The Applicant was asked to appoint an arbitrator again. The Applicant had no choice but to appoint another arbitrator. The court found out that, the Applicant appointed Mr. B as its arbitrator, and the Respondent appointed Mr. C as its arbitrator. Since the parties failed to jointly appoint and jointly entrust the president of CIETAC to appoint the presiding arbitrator, the president of CIETAC took the initiative to appoint Mr. D as the presiding arbitrator. The above three arbitrators form the arbitral tribunal and heard the case. The court held that the composition of the arbitral tribunal complied with Articles 31 and 32 of the Arbitration Law and Article 24 of CIETAC arbitration rules.

The parties may challenge the composition of the arbitral tribunal as not conforming to the arbitration commission rules, which are regarded as being incorporated into the arbitration agreement of the parties. In *Guangzhou Economic Technology Development Zone Asia-Pacific Aluminum Co., Ltd. (hereinafter "Guangzhou Asia-Pacific Company") v. X Company*,[28] Guangzhou Asia-Pacific Company alleged that the composition of the arbitral tribunal was not in accordance with the applicable arbitration rules. Shenzhen Intermediate People's Court dismissed the allegation of Guangzhou Asia-Pacific Company. In this case, X company filed the application for arbitration against both Guangzhou Asia-Pacific Company and Hong Kong Asia-Pacific Company, who selected their arbitrator after negotiation. However, at the first hearing, X company withdrew its arbitration request against Hong Kong Asia-Pacific Company. The arbitration commission dismissed Guangzhou Asia-Pacific Company's request for reappoint its arbitrator. Guangzhou Asia-Pacific Company alleged that its right to appoint its arbitrator had been deprived of by the arbitration commission. Shenzhen Intermediate People's Court held that, the composition of the arbitral tribunal was in accordance with Articles 31, 32 of the Arbitration Law and the applicable arbitration rules. Although the arbitral tribunal failed to notify the parties to reappoint the arbitrators after the withdrawal, Guangzhou Asia-Pacific Company did not raise any objection to it. Instead, it still instructed its arbitrator to attend the arbitration hearings and presented its case at the hearings, all of which showed the true intention of Guangzhou Asia-Pacific Company.

§7.03 UNABLE TO PRESENT

The transparency and impartiality of arbitral proceedings are the foundation for the protection of the rights of parties in arbitration proceedings. If the arbitral proceedings are not transparent or unfair, then such proceedings are flawed, which will result in the award rendered thereunder being set aside. In China practice, if either party can prove that his inability to present in the arbitration proceedings is not attributable to himself, indicating the proceedings are not transparent and unfair, the arbitral award rendered thereunder may be set aside by the court.

28. (2001) Shen Zhong Fa Er Chu Zi No. 83.

If the party resisting enforcement of an award has successfully prove that he did not receive proper notice of arbitration proceedings and thereby was unable to present his case, the award rendered thereof will face the fatal consequence: being set aside or not being recognized or enforced. In practice, this ground may rank among the top in a great number of cases in respect of resisting enforcement in China. There are many causes for being unable to present the case, including but not limited to: the failure or inappropriateness of the arbitral institution (or tribunal) in serving the notices of arbitration proceedings upon the parties, not giving a fair opportunity to a party to present his case or depriving a party of any other opportunity to fully present the case. This section only illustrates some principal circumstances and the corresponding consequences.

[A] Notice and Service

In the enforcement procedure, the party resisting enforcement may allege that he was not properly notified of the arbitral proceedings. This is one of the main grounds for resisting enforcement of an award in China, whether in accordance with the Arbitration Law of the PRC or the New York Convention. Although the notice is a formal requirement, it is in fact plays a significant role in arbitration. Not given proper notice mainly means that the arbitral tribunal or institution fails to issue the notice. In practice, the issue of notice may involve the following situations and should be treated differently.

Prior to further illustration of the specific situations, it is necessary to discuss the issue concerned with the service of arbitration instruments because the service issue is closely connected to the notice issue. Regarding how to determine whether arbitration instruments have been successfully served upon the parties, the relevant provisions of the arbitration rules shall be applied. In general, if the arbitral tribunal or institution has exercised its duty of prudence by delivering the arbitration instruments in strict accordance with the arbitration rules to the addresses of the parties without any fault or negligence in itself, it shall be considered that the service complies with the arbitration rules and the arbitration law. If a party does not receive the arbitration documents for the cause attributable to his own fault or negligence,[29] he should bear the corresponding consequences by himself.[30]

[1] Notice Not Issued

"Notice not issued" means the arbitral tribunal (or institution) negligently or intentionally failed to serve the notices of arbitral proceedings upon a party. The reason for

29. For example, the addressee intentionally refuses to be served, or fails to notify the other party or arbitration institution or arbitral tribunal when his address is changed, or fails to proceed to administration of industry and commerce to handle alteration formalities regarding the change of address, or no one works or lives in his business address or domicile.
30. Han Jian, *Determination Standards for Valid Service of Arbitration Documents*, Foreign-Related Arb. Judicial Rev. 290–291 (2006).

such failure lies in the arbitral tribunal (or institution) itself. Several cases raise these issues.

In *Shenzhen Ruifeng Industry Co., Ltd (hereinafter "Ruifeng Company") v. X*,[31] the defense raised by the party resisting enforcement is one of the typical examples. Ruifeng Company filed with Shenzhen Intermediate People's Court to set aside the award on the ground that the arbitral tribunal did not give Ruifeng Company the chance to present its opinion. The Court found that: the arbitral tribunal had held an oral hearing, and the agents *ad litem* of the parties had attended the oral hearing and presented their cases, and submitted the supplemental materials. Consequently, Ruifeng Company failed to satisfy the Court to set aside the award.

In some other case, like *Shenzhen Huafeng Industry Co., Ltd. v. X*[32] and *Guangzhou Economic and Technology Development Zone Asia-Pacific Co., Ltd. v. X*,[33] the party sought to set aside the arbitral awards, arguing that they were unable to present its case for the reason of not receiving the relevant arbitration documents. However, if the procedures were complete and sufficient for each party to present their case, the courts would not support the challenging party's opinion, so did the courts in these two cases.

[2] Notice Being Delivered, but Failure to Be Received or Received in the Timely Basis Due to Wrong Address

In that case, the losing party can seek to set aside or nonenforcement of the award which was rendered thereunder.

The *Guangli Development Company v. Xinxuguang Company*[34] illustrates the circumstance of failure to serve the arbitration instruments because of wrong address, thereby preventing the party from presenting or fully present his case. Guangli Company alleged it did not receive any notice or document for arbitration commission and thereby was unable to present its case, because the arbitration commission mistook the address of Guangli Company. The respondent Xinxuguang Company defended that the notices of arbitration had been properly delivered by the arbitration commission within the prescribed period. The Court found there existed slight difference between the disputed addresses. However, the court held that, there were delivery receipts of Hong Kong Post proving that the mail had been successfully delivered even though the mailing address was wrong. Guangli Company had no evidence to deny evidential effect of the delivery receipt of Hong Kong Post. The other facts were that agents of Guangli Company had attended the hearing and submitted the statement of defense. Therefore, it should be affirmed that the arbitration documents had been served upon Guangli Company. In addition, Guangli Company failed to show sufficient cause for unable to present its case at the arbitral proceedings. Consequently, the Court dismissed Guangli Company's application to set aside the award.

31. (1997) Shen Zhong Fa Jing Er Chu Zi No. 19.
32. (2000) Shen Zhong Fa Jing Er Chu Zi No. 19.
33. (2001) Shen Zhong Fa Jing Er Chu Zi No. 83.
34. (1999) Shen Zhong Fa Jing Er Chu Zi No. 223.

Under Chinese arbitration rules, generally, the address to which the arbitration documents are served should be provided by the parties and the arbitration institution is not obliged to take the initiative to enquire about the service address. The arbitration institution may require the claimant to provide the new address if the arbitration instruments are returned. However, the arbitration institution must exercise the duty of due diligence (e.g., to require the party which provides the address to provide the corresponding evidence to prove the validity of the address provided). If the arbitration institution does not do so, the arbitral award rendered later may be set aside. In Reply of the Supreme People's Court to the Request of Heilongjiang Hongchang International Freight Forwarding Co., Ltd. for the Revocation of an Arbitral Award of the China Maritime Arbitration Commission,[35] the Supreme People's Court found and held that, after the arbitration documents served by courier were returned, the arbitration commission still entrusted the courier service company to serve the documents according to the original address and did not make an inquiry with the local administrative department for industry and commerce, which was the most common and reasonable way. Therefore, the service process for the arbitration documents in this case shall not be deemed to have been properly completed, and the arbitral award rendered thereunder should be set aside.

[3] Notices Being Delivered to the Right Address, but Failure to be Received for Other Reasons

In certain circumstances, the mailing address is right, but the party concerned still do not receive the arbitration instruments being served upon him for various reasons, such as the party left the mailing address for a long time, or the party ceased to operate as a company, or the mailing address is the registered address in legal sense but no one is actually working there, or it is attributed to the fault of the tribunal in delay of the service.

In the practice of arbitration, it is common that the arbitration instruments being delivered may be returned, and the arbitration instruments were unable to be delivered during the entire arbitration proceedings. In that case, the arbitration instruments may be considered as being served in accordance with relevant arbitration rule. The following two circumstances are common in practice: (1) no parties raise objection to the default award after being rendered; (2) the losing party appears to raise objection to the default award after being rendered.

For example, in a case,[36] the Hong Kong address of the respondent was right, but the arbitration instruments delivered to him were all returned because he had not been resident in Hong Kong for a long time. The tribunal ruled that the arbitration instruments had been served upon the respondent according to the applicable rules. However, in the enforcement procedure of the arbitral award, the party seeking enforcement (also the claimant in the arbitration proceeding) applied to enforce the

35. [2003] Min Si Ta Zi No. 32.
36. An undisclosed case of Shenzhen Court of International Arbitration ("SCIA").

properties of the respondent located in the Chinese Mainland. The respondent raised objection by claiming that he never received any notice regarding the arbitration and the claimant concealed his address from the tribunal intentionally. If the respondent could prove such intention, the court would determine that the tribunal was wrong in ruling the arbitration instruments had been served upon the respondent and thereby the award should not be enforced.

[4] Notice Being Received, but the Contents of the Notice Are Inappropriate

In some other circumstances, although the notice has been delivered by the arbitration institution or tribunal and received by the party concerned, the notice may contain the inappropriate contents, such as mistaking the oral hearing for hearing on the basis of documents. In that case, the party has the right to raise objection.

[5] Notice Being Received, and the Contents of the Notice Are Appropriate but Not Being Responded

In default proceedings, the absence of the party (usually the respondent) generally does not affect the arbitration proceedings to go forward. The arbitral tribunal can proceed with the arbitral procedure in accordance with the arbitration rules. However, the arbitral tribunal only hears the case presented by the nondefaulting party, and thus inevitably face the problem of how to examine and accept, without prejudice to procedural justice, the ex parte evidentiary materials presented and the statements made by the nondefaulting party. In general, the common practice is that the arbitral tribunal should only conduct the preliminary examination of the ex parte evidence and materials, i.e., to examine whether the evidence presented by the nondefaulting party can prove its claims and whether there is any conflict between the evidence.

In an arbitration conducted by a Chinese arbitration institution, the respondent did not appear although being noticed appropriately. After receiving the arbitral award, the respondent challenged the award to the Singapore court, alleging that its absence in the arbitration proceeding should not necessarily mean that all the requests for arbitration of the claimant should be automatically satisfied. The court found and held that, from the descriptions and contents of the arbitral award, it can be presumed that the arbitrators had already taken into consideration the facts of the case. The court later supplemented the arbitrators should only need to examine and confirm whether the evidence presented by the nondefaulting party can establish its case, and each piece of evidence is authentic on the surface and does not contradict with each other.[37] In China judicial review practice, it is nearly the same.

37. *Hainan Machinery Import and Export Corporation (PR China) v. Donald & McArthy Pte Ltd (Singapore)*, High Court, Sept. 29, 1995, No. 1056 of 1994. *See* [1996] 1 *Singapore Law Reports*, 34–46. *Also see ICCA Yearbook*, Vol, XXII, 1997, 771–779.

[B] Unable to Present

One grounds for a party to challenge the arbitral proceedings is not being given opportunity to fully present his case, but a concrete standard for how to determine "fully" or not is lacking and is illustrated by the case in which *Sinotrans Shandong Company v. X & Y*.[38] The applicant Sinotrans Shandong Company filed with Shenzhen Intermediate People's Court with application to set aside the arbitral award on January 2000, on the ground that the two respondents were unable to present their cases during the arbitral proceeding for the cause attributed to the applicant. The Shenzhen Intermediate People's Court found and held that, the applicant had participated in the oral hearing, presented its case, made the defense, as well as submitted its written statements of defense for twice to the tribunal and the tribunal had circulated its statements of defense to the respondents. Therefore, it can be seen that the tribunal had already given full opportunity to the applicant to present its case at the arbitration proceeding, and the court finally dismissed the applicant's request to set aside the award.

A similar issue was illustrated in *Guangdong Dongjian Industry Corporation v. X*.[39] The applicant applied to Shenzhen Intermediate People's Court to set aside the award rendered in terms of the dispute over the cooperative operation contract, on the ground that: the applicant was not given an opportunity to fully present its case, because the arbitral tribunal did not accept the applicant's request for oral hearing and rejected the crucial materials submitted by the applicant at the last time. The tribunal held three oral hearings in total. Prior to the end of the second oral hearing, the tribunal enquired the parties regarding whether to hold the third oral hearing, and the parties both responded with negative answers and urged the tribunal the render the award as soon as possible. However, later the respondent requested the tribunal to the third oral hearing.

The tribunal accepted the request of the respondent and held the third oral hearing. The applicant further alleged that the respondent deprived the applicant of the right to operate and manage the joint venture company and concealed the construction process and sales of the cooperative projects from the applicant and the tribunal. Therefore, the applicant applied to the tribunal for conducting on-site investigation, supplemented its requests for arbitration, and requested for another oral hearing, all of which were rejected by the tribunal. Based on the above, the applicant asserted that the tribunal was in prejudice of the due process by only giving the opportunity to the respondent to present its case, but not giving the equal opportunity to the applicant. When the tribunal was aware that the respondent concealed the facts and evidence, it still rejected the evidence presented by the applicant, resulting in major errors in finding the facts.

38. (2000) Shen Zhong Fa Jing Er Chu Zi No. 37. *China Transportation Shandong Company (Plaintiff; the respondent of arbitration) v. Shanxi Shengbao Group Co., Ltd. Hong Kong Hesheng Development Co., Ltd. (Defendant; the claimant of arbitration)*.
39. (2000) Shen Zhong Fa Jing Er Chu Zi No. 45.