CHINA DISPUTE RESOLUTION

NEWS LETTER



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NEWS ALERT

1. **The Supreme People's Court Releases the Annual Report on Judicial Review of Commercial Arbitration (2024)**

   On 28 December 2025, the Supreme People's Court released the *Annual Report on Judicial Review of Commercial Arbitration (2024)*. In 2024, courts nationwide concluded 18,566 cases relating to judicial review of arbitration. Of these, only 2.22% resulted in the setting aside of arbitral awards, while the approval rate for arbitration-related preservation measures was an impressive 98.90%. The Report also highlights that Mainland courts actively supported the recognition and enforcement of both institutional and *ad hoc* arbitral awards from fifteen foreign jurisdictions. Notably, there were no cases in 2024 where courts refused to recognize or enforce foreign arbitral awards. The Report identifies three core principles: a pro-validity interpretation of arbitration agreements; strict limitation of the statutory grounds for setting aside or refusing enforcement of arbitral awards; and, in foreign-related cases, a commitment to good-faith treaty compliance and a pro-enforcement approach. These principles provide a stable judicial foundation for the growth of international commercial arbitration centers.

2. **The Supreme People's Court Issued the Reply on Issues Concerning the Application of Law to Jurisdiction over Certain Civil Cases**

   On 30 December 2025, the Supreme People's Court issued the *Reply on Issues Concerning the Application of Law to Jurisdiction over Certain Civil Cases*, which took effect on the same day. The Reply clarifies that where parties designate a jurisdictional connecting point outside the statutory "five locations," (i.e., the defendant's domicile, the place of performance of the contract, the place of signing the contract, the plaintiff's domicile, and the location of the subject matter) such location must have an actual connection with the dispute; otherwise, the jurisdiction agreement will be invalid. It further confirms that agreement-based jurisdiction may not override exclusive jurisdiction, nor may parties alter the statutory allocation of authority between specialized courts and ordinary people's courts by agreement. In addition, the Reply provides guidance on situations where only a jurisdictional region is specified without identifying a particular court, the validity of "arbitrate-or-litigate" clauses, and jurisdiction over liability insurance disputes, while emphasizing the need to prevent abuse of jurisdiction agreements that may disrupt litigation order.

3. **China Unveils First Regulatory Framework for RWA Tokenization**

   On 6 February 2026, eight Chinese central agencies jointly issued the *Notice on Further Preventing and Addressing Risks Related to Virtual Currencies* while the China Securities Regulatory Commission released the *Regulatory Guidelines for the Offshore Issuance of Asset-Backed Securities Tokens Backed by Domestic Assets*, collectively defining RWA as the use of encryption technology and distributed ledger systems to transform asset ownership into tokens for issuance and trading. The new rules explicitly prohibit conducting RWA activities within China—deeming such activities illegal fundraising or unauthorized securities issuance—and bar offshore

entities from providing RWA services to onshore Chinese entities or individuals, while also restricting internet platforms from offering marketing or technical services and prohibiting company names from containing terms like "RWA" or "virtual currency." However, the Guidelines simultaneously establish the first formal filing regime for Chinese entities seeking to issue asset-backed tokens offshore based on domestic assets, requiring onshore entities controlling underlying assets to file with the CSRC before any offshore issuance with detailed disclosures about the issuer, assets, and token plan. The February 2026 rules replace years of informal guidance and industry warnings with a structured compliance framework, with further detailed filing guidelines expected and targeted RWA pilots on approved financial infrastructures potentially emerging as the regulatory landscape continues to mature.

4. **The State Council Promulgated the Regulation on Commercial Mediation**

The Regulation on Commercial Mediation, promulgated by State Council Decree No. 827 on December 31, 2025, will take effect on May 1, 2026. As China's first administrative regulation specifically governing commercial mediation, it establishes a comprehensive framework based on the core principles of voluntariness, legality, good faith, and confidentiality. The Regulation outlines requirements for the establishment, approval, and supervision of mediation organizations, refines mediator qualifications, and encourages the involvement of overseas professionals. Procedurally, it recognizes the equal legal effect of online mediation, strengthens obligations related to neutrality, recusal, and confidentiality, and permits lawful termination if mediation fails. Mediation agreements under the Regulation are legally binding. Article 2 of the Regulation clearly defines the scope of commercial mediation, listing key areas like trade, investment, finance, and intellectual property, while excluding non-commercial disputes such as family, inheritance, and labor matters. Notably, the Regulation introduces a multi-faceted connection mechanism between mediation and litigation, arbitration, and notarization: parties can seek judicial confirmation of mediation agreements, apply for arbitration based on agreement clauses, or request notarization for enforceable debt documents. This mechanism addresses the challenge of "successful mediation but difficult enforcement." The Regulation marks China's shift from pilot programs to a standardized commercial mediation system, providing a professional dispute resolution path that balances efficiency with the preservation of commercial relationships.

5. **The Supreme People's Court Intellectual Property Tribunal Releases Its 2025 Annual Report**

On 28 January 2026, the Supreme People's Court held a press conference to release the *Annual Report of the Intellectual Property Tribunal of the Supreme People's Court (2025)*, providing detailed information on the Tribunal's adjudication of foreign-related intellectual property cases. According to the Report, since its establishment in 2019, the Tribunal has consistently adhered to the principle of equal protection of the lawful rights and interests of both domestic and foreign rights holders. It has accepted a total of 2,546 foreign-related cases involving parties from Germany, France, Italy, the United States, and other jurisdictions, accounting for 10.3% of all cases handled, with an average annual growth rate of 18.7%. Of these, 2,046 cases have been concluded. In terms of international impact, nearly 80 judgments issued by the Tribunal have been included in the case law databases of international organizations, such as the World Intellectual Property Organization and the International Union for the Protection of New Varieties of Plants.

In addition, through mechanisms such as the integration of mediation and adjudication, the Tribunal provides strong judicial support for high-level opening up.

6. **SAMR Cracks Down on Unfair Online Competition: Eight Typical Cases Signal Heightened Enforcement Risks for Businesses**

China's State Administration for Market Regulation (SAMR) published eight typical cases of unfair online competition on 31 January 2026, underscoring the regulator's intensified focus on digital market order and providing critical insights for businesses navigating e-commerce and platform operations. The cases selected for publication span a range of misconduct, from technical sabotage, platform dispute systems manipulation and data scraping to false advertising, commercial defamation and fake transactions. The regulator is demonstrating its capability and willingness to pursue complex, technical violations across the digital space. For legal and compliance teams, this signals the need for immediate compliance action with the *Anti-Unfair Competition Law* and the newer *Interim Provisions on Unfair Online Competition*.

7. **Supreme People's Court Issues Key Enforcement Guidance: Bankruptcy Priority, Frozen Claims, and Shareholder Liability Clarified**

Released on 5 February 2026, the Supreme People' Court's guidance focuses on enforcement and bankruptcy, freezing of matured claims, equity transfer and capital contribution liability, jurisdiction for preservation review, and third-party liability in enforcement. For example, after a people's court accepts a bankruptcy application, any individual repayments from the debtor's assets (including personal repayments) should cease. The key point is that the suspension of enforcement proceedings is based on the time the bankruptcy application is "accepted," not when the enforcement court actually receives the acceptance ruling. Therefore, even if the enforcement court issued a ruling to settle debts with property—such as a property-for-debt ruling—before receiving the bankruptcy acceptance ruling, the property used for settlement still legally belongs to the debtor and must be included in the bankruptcy proceedings to ensure fair compensation to all creditors. In addition, it clarifies that, in cases of multiple equity transfers within a company, the enforcement procedure can only add original shareholders who have not fulfilled their capital contribution obligations or initiators who should bear joint liability; the transferee's liability should be asserted through separate litigation rather than in the same enforcement procedure. This guidance will help resolve discrepancies in the application of law and promote uniformity in judicial standards.

8. **The Supreme People's Court Issues the Amended Provisions on Causes of Action in Civil Cases**

The Supreme People's Court issued the *Amended Provisions on Causes of Action in Civil Cases*, introducing the third revision to the existing classification system, which will take effect on 1 January 2026. Following the amendment, the framework comprises 12 first-level causes of action, 59 second-level causes, 514 third-level causes, and 470 fourth-level causes, totaling 1,055 categories. Key areas of focus in the revision include the development of new productive forces, the improvement of a law-based business environment, the advancement of foreign-related rule of law, rural revitalization, public welfare protection, and ecological conservation. The amendment also introduces new causes of action related to data and virtual property, while further refining

categories on intellectual property, competition disputes, and maritime and admiralty matters. Additionally, it expands the scope of cases that can be handled by lawyers from Hong Kong, Macao, and Taiwan through more detailed third- and fourth-level classifications, enabling deeper involvement in civil proceedings on the Mainland. These amendments aim to standardize case filing practices, enhance judicial administration, and improve the overall efficiency and quality of civil adjudication.

The legal consequences of backdating paper bills of lading under letters of credit and use of surrendered bills of lading emerge from the China case, Ningbo Nanheng Import and Export Co. Ltd. v. Shinhan Bank Co.

(2021) Zhe Min Zhong No. 156 [PRC][1]

Saibo JIN **

Abstract:

When the beneficiary under the letter of credit presented the original marine paper bill of lading as per the documents required by the letter of credit to the issuing bank, the letter of credit terms also require the cargo carrier to first issue an electronic release bill of lading that records the true date of shipment and release the goods to the consignee designated by the issuing bank in LC. Subsequently, when the beneficiary submits the original paper marine bill of lading with an inaccurate recorded date of shipment to the issuing bank for payment within the validity period of the letter of credit and the latest shipment date, can the issuing bank claim that the beneficiary committed LC fraud based on the inaccurate date of shipment recorded in the paper original marine bill of lading ("forwarded dated bill of lading") and refuse to pay? However, if the beneficiary has already delivered the goods to the designated consignee of the issuing bank according to the instructions of the letter of credit terms through the electronic release bill of lading, and if the beneficiary cannot obtain the payment under the letter of credit due to LC fraud, does the beneficiary have the right to claim the return of the delivered goods from the issuing bank? Or if the issuing bank cannot return the goods, can the beneficiary request the issuing bank to refund the value of the goods, and the interest for the delayed payment?

Cases Summary

Topics: Surrendered Bills of Lading; Bill of Lading Date; Backdating B/L; LC Fraud; Applicable Law; China Law; UCP600 Article 14; UCP600 Article 16; PRC Letter of Credit Provisions Article 8; Contract Law of the PRC, Article 107; Civil Procedure Law of the PRC, Article 170

Type of Lawsuit: Beneficiary sued issuing bank for wrongful dishonor.

Parties:

Plaintiff/Beneficiary/Seller – Ningbo Nanheng Import & Export Co., Ltd.

Defendant/Issuing Bank – Shinhan Bank Corp.

Applicant/Buyer – Jungwoo Interactive Corporation

Freight Forwarder – KNG Shipping Air Co. Ltd.

Underlying Transaction: Sale of crab seafood products.

Instruments: This case involved seven letters of credit with a total amount of USD 2,266,433.82 resulting in seven first-instance judgments[2] and seven second-instance judgments.[3] As the facts and reasoning across the seven cases were similar, this summary is based on one representative judgment.

Procedural History:

First Instance Judgment: The Ningbo Intermediate Court[4] found that Issuing Bank failed to effectively prove Beneficiary committed fraud. It ordered Issuing Bank to pay the LC amount of USD 373,044.80 plus interest and exchange rate losses, but dismissed the claim for legal fees.

Second Instance Judgment: Issuing Bank appealed to the Zhejiang High Court, arguing: (1) Beneficiary submitted a false bill of lading; (2) Invoice date was contradictory; (3) There was no real transaction; and (4) Documents from a Korean prosecutor's investigation show the goods were released from the warehouse without authorization. Beneficiary defended, stating the transaction was genuine, Issuing Bank was aware of the "delivery before payment" transaction model, and that the goods had been delivered to Freight Forwarder.

Decision: The Zhejiang High Court dismissed Issuing Bank's appeal and upheld the original judgment. Issuing Bank was ordered to pay the LC amount of USD 373,044.80 plus interest and exchange rate losses.

Factual Summary:

On 30 August 2019, Ningbo Nanheng Import & Export Co. of China signed a sales contract with Jungwoo Interactive Corporation of South Korea, agreeing to sell crab seafood products to Jungwoo for USD 481,481 backed by payment by sight letter of credit.

On 5 September 2019, Shinhan Bank (Issuing Bank) issued an LC for USD 375,881 subject to UCP600 on behalf of Jungwoo Interactive Corporation (Applicant) in favor of Ningbo Nanheng Import & Export Co. (Beneficiary).

The LC called for: "+ SIGNED COMMERCIAL INVOICE IN TRIPLICATE + PACKING LIST IN TRIPLICATE + FULL SET OF CLEAN ON BOARD OCEAN BILLS OF LADING MADE OUT TO THE ORDER OF SHINHAN BANK SEOUL MARKED FREIGHT PREPAID AND NOTIFY APPLICATION."

Additional Conditions required: "DOCUMENTS MUST BE PRESENTED PRIOR TO CREDIT EXPIRY DATE, DESPITE THE PERIOD FOR PRESENTATION IN DAYS + SHIPPING KOREAN AGENT FOR THE CARRIER MUST BE NOMINATED AS KNG SHIPPING AIR CO. LTD …"

On 6 December 2019, Beneficiary presented documents under the LC, including an ocean bill of lading and commercial invoice, among others. Issuing Bank refused payment on the grounds of a forged bill of lading, claiming that the carrying vessel, "STAR SKIPPER", listed on the B/L was not at Ningbo Port on the stated loading date (20 November 2019) and that the B/L information did not match the carrier's official records. Issuing Bank alleged that Beneficiary committed letter of credit fraud. Beneficiary sued issuing bank for wrongful dishonor.

As mentioned above, this underlying transaction involved seven LCs and was a long-term arrangement. Due to financing difficulties faced by the Korean buyer, the parties agreed to adopt a 'Delivery Before Payment' method. Specifically, the Korean buyer would first obtain and sell the goods through the Issuing Bank via surrendered bills of lading and then use the proceeds from the sale to pay the deposit required by the Issuing Bank as security for payment. Subsequently, the Beneficiary would cooperate by submitting ocean B/Ls to obtain payment under the LCs from the Issuing Bank, based on the Applicant's payment progress. Prior to this, the Chinese seller, Korean buyer, and Korean bank had already completed several transactions and the leader of the Korean bank's branch was fully aware of and understood the facts related to such financing arrangements.

The fundamental cause of the incident in this case was the Applicant's failure to repay the Issuing Bank's advances in a timely manner, resulting in a breach in the funding chain. This raised concerns at Issuing Bank's headquarters. Following an internal investigation, the Issuing Bank filed a report with the Korean police, leading to the arrest of Issuing Bank's branch leader and Applicant's manager. Simultaneously, the Issuing Bank initiated litigation in Korean courts seeking an injunction against payment under the LCs. However, the Korean court ruled that no LC fraud existed in the case and refused to issue an injunction. This was because the goods involved in the case actually existed and the issue arose solely from errors in the financing and payment arrangements between the parties, as all relevant parties under the LCs were actually aware of this specific financing arrangement in advance.

Court's Rulings:

Applicable Law. Should the determination of letter of credit fraud be governed by Chinese law or South Korean law?

Chinese law applied because the place where the alleged fraudulent act occurred -- the place of document issuance -- was in China. Both parties had also agreed to apply Chinese law during the original trial.

Whether Fraud Occurred. Was the bill of lading submitted by Beneficiary forged? Was the underlying transaction genuine? Did Issuing Bank know of, or participate in, the "delivery before payment" arrangement? According to Article 8 of the PRC Letter of Credit Provisions, does a false document necessarily constitute fraud?

Genuineness of Underlying Transaction

The Zhejiang High Court ascertained that the surrendered B/Ls No. 339, No. 340, and No. 341 submitted by Beneficiary during the second trial indicated the shipper as Ningbo Yongzheng International Freight Agency Co., Ltd., the consignee as KNG, and the Date of Laden on Board the Vessel and the Date of Issue as September 15, 2019. Except for the date, these three surrendered B/Ls were consistent with B/L No. 9039 presented by Beneficiary to Issuing Bank in terms of the Ocean Vessel and Voyage No., loading and discharge ports, as well as the description and quantity of the goods.

Although the B/L No. 9039 submitted by Beneficiary contained an incorrect loading date, the surrendered B/Ls, export customs declaration, and Korean import declaration records were consistent with each other and evidenced that Beneficiary had actually shipped and delivered the

goods to Freight Forwarder. Therefore, the underlying transaction was actually performed and Beneficiary lacked the subjective intent to defraud the LC proceeds.

"Delivery Before Payment" Arrangement

A clause in the LC required the carrier's Korean freight agent to be designated as Freight Forwarder. Furthermore, according to the warehouse release application and certificate of contents issued by Issuing Bank, the release of goods to the consignee required Issuing Bank consent. These facts indicated that Issuing Bank exercised actual control over the goods. The Applicant, Issuing Bank, and Beneficiary were involved in multiple consecutive transactions of the same type during the same period. Combined with similar past transaction patterns between the parties, it could be determined that Issuing Bank was clearly aware of this transaction arrangement. Issuing Bank essentially secured the Applicant's payment by controlling the goods under the LC and its interests were not actually harmed by this model.

When Fraud Occurred

The underlying transaction was genuinely performed and Beneficiary lacked the subjective intent to defraud. Fraud did not occur where Beneficiary presented documents, but actually occurred where Applicant paid the issuing bank to retrieve the documents (the Korean prosecutor alleged Freight Forwarder released the goods without authorization), which was unrelated to Beneficiary.

Compensation for Losses. Should exchange rate losses be compensated?

Issuing Bank's unjustified refusal caused Beneficiary to suffer exchange rate losses, for which compensation should be awarded.

Legal Analysis by Jin:

Issuing Bank’s Refusal.

The Chinese court needed to address the question: If the Beneficiary, in addition to delivering a surrendered bill of lading, also submits to the designated person—after a period of time following shipment—an ocean bill of lading with an inaccurate shipment date when claiming payment, may the Issuing Bank refuse payment or apply to the court for an injunction on the grounds of LC?

In this case, the LC required the Beneficiary to submit an ocean B/L. The goods in question do, in fact, exist and had already been collected by the Issuing Bank’s designated person. Additionally, the liner that actually carried the goods also existed. However, the only inconsistency was on the B/L submitted by the Beneficiary; the shipment date recorded was inaccurate—the carrying vessel was not at the port indicated on the B/L on the referenced date and loading records showed that no goods were loaded on that shipment date.

The Beneficiary acted in this manner because the Chinese seller could more easily obtain financing from a Chinese bank, whereas the Korean buyer had more difficulty obtaining financing from a Korean bank. Therefore, the parties agreed that the Korean buyer would first obtain and sell the goods through the Korean Issuing Bank via surrendered B/Ls and then use the proceeds from the sale to pay the deposit required by the Issuing Bank as security for payment. Subsequently, the

Beneficiary would cooperate by presenting ocean B/Ls to obtain payment under the LCs from the Issuing Bank, based on the Applicant's payment progress.

Because the timing of the Applicant's receipt of funds after reselling the goods was uncertain, if the repayment came in later than expected, the Chinese Beneficiary/Seller would have to adjust the shipment date stated on the bill of lading to a slightly later date in order to meet the latest shipment date required under the LC and thereby obtain payment from the Issuing Bank. Moreover, the Chinese Beneficiary/Seller, Korean Applicant/Buyer, and Korean Issuing Bank had already previously completed several similar transactions so the Issuing Bank was fully aware of and familiar with this financing structure and operational arrangement in advance.

As previously stated, the problem in this case arose because the Applicant failed to repay the Issuing Bank's advance in a timely manner, resulting in a break of the funding chain. This triggered an alert at the Issuing Bank's head office. After an internal investigation, the Issuing Bank reported the matter to Korean police, resulting in the arrests of a leading official at the Issuing Bank's branch and a top manager of the Applicant. At the same time, Issuing Bank filed an action in a Korean court seeking an injunction to stop payment under the LC. However, the Korean court held that there was no LC fraud because the goods actually existed. The dispute was over the parties' financing and payment arrangements having gone wrong. The Korean court was satisfied that all parties to the LC had in fact been aware of this special financing arrangement in advance. The court therefore refused to grant an injunction to stop payment under the LC.

Based on the facts of this case, the Korean Issuing Bank refused to pay on the grounds that the documents under the LC contained incorrect information and that the Beneficiary's conduct constituted LC fraud. As a result, the Beneficiary sued the Korean Issuing Bank in China, requesting that the court either: (1) order the Issuing Bank to honor the LC, if LC fraud is not proven; or (2) require the Issuing Bank to return the goods that were released under the surrendered bill of lading; or if the goods cannot be returned, return payment of the goods along with related interest and expenses. The Beneficiary took this action because the process of releasing the goods directly to the person designated by the issuing bank via a surrendered bill of lading, storing them in a cold warehouse, and then releasing them to the final Korean buyer was an operational arrangement expressly set out by the Korean Issuing Bank in the LC provisions.

Legal Consequences of Issuing Paper Bill of Lading and Surrendered Bill of Lading with Inconsistent Shipment Dates

The Zhejiang High Court affirmed that the Beneficiary committed LC fraud by submitting an ocean B/L with an inaccurate shipment date. On the shipment date stated in the B/L, the carrying vessel was not present at the port and the loading records at the port did not evidence that the goods listed on the B/L were shipped. Therefore, the Beneficiary's conduct constituted LC fraud.

However, the Zhejiang High People's Court found that irrespective of the Beneficiary providing false documents, if the Issuing Bank was indeed a victim of the LC fraud, it could seek protection under Article 8 of the *PRC Letters of Credit Provisions*. In this case, however, it has been established that multiple transactions existed among the Applicant, Issuing Bank, and Beneficiary in which the Issuing Bank first received and controlled the goods under the LC and then arranged payment using false documents. The court expressed that under the circumstances where the Issuing Bank had

already received the goods in this case and delivered them to the Applicant, invoking the principle of independence of the LC to refuse payment on the grounds that the documents submitted by the Beneficiary did not correspond to the actual goods would violate the principle of good faith. Therefore, the Issuing Bank should pay the Beneficiary the amount under the LC and the interest accrued thereon.

Comment by Jin:

Implications for the Industry and Surrendered Bills of Lading

The Technical Advisory Team of the ICC Banking Commission drafted an opinion regarding surrendered bills of lading in 2024-2025 based on a query submitted by the ICC Denmark National Committee. The draft opinion sparked considerable debate both within the ICC Banking Commission and among ICC National Committees. At the ICC Banking Commission's February 2025 Meeting in Dubai, I was the Technical Advisor responsible for presenting the Technical Advisory Team's views on the draft opinion. My personal view is that the banking industry should exercise necessary caution regarding such uncommon international shipping practices that may be region-specific—for example, requiring the beneficiary to submit a surrendered bill of lading as a document under a LC. When an LC calls for a surrendered B/L and an original B/L, not only are the LC terms often unclear about what constitutes a surrendered B/L, but in practice, the international transport industry does not have well-defined global rules or operational standards regarding surrendered bills of lading or their relationship to an original bill of lading.

After the Dubai meeting, the Technical Advisory Team sought feedback from three key transport industry organizations about the subject, but received responses that were general. Furthermore, ICC Denmark, which had submitted the query, elected to withdraw their query. Consequently, the Technical Advisory Team decided to pursue addressing this issue in a future Technical Advisory Briefing.

Based on the lessons learned from this case, my conclusion as a lawyer is that issuing banks must exercise necessary caution when dealing with document requirements such as surrendered bills of lading, which are inherently unclear in their specifications. As illustrated in this case, the Korean issuing bank ultimately received support from the Chinese court regarding the matter of the ocean bill of lading because industry rules and practices concerning ocean B/Ls are well-established in both shipping practice and law. However, with surrendered bills of lading, the relevant shipping practices, rules and law are far less clear. Depending on the applicable shipping practice rules and the governing law applied by an adjudicating court, unexpected consequences may arise.

1 Judgment of the High People's Court of Zhejiang Province of the PRC, dated December 10, 2021, Case No. (2021) Zhe Min Zhong No. 156 [PRC], Chief Judge: Mao Qing, Judges: Qiu Jianfeng, Huang Qin.

** Attorney Saibo JIN is an expert in handling Independent Letter of Guarantee disputes, and was invited to participate in drafting and revising the judicial interpretation “Provisions of Supreme People's Court on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantee”. Since August 2023, designated as a member of the Technical Advisory (TA) of the Banking Commission (BC) of the International Chamber of Commerce (ICC). Former member of the Task Force of Demand Guarantee and an expert in DOCDEX Letter of Credit and Independent Letter of Guarantee dispute resolution at the ICC. Vice Director of the East Asia Committee of the Institute of International Banking Law & Practice (IIBLP), member of the Modification Committee of the International Standby Practices (ISP98) of the IIBLP, and member of the Editorial Committee of the electronic publication "Documentary Credit World" (DCW) of the IIBLP. Member of both the Letter of Credit and Independent Letter of Guarantee expert groups of ICC China. Attorney Jin Saibo has handled numerous litigation and arbitration cases related to Letters of Credit and Independent Letter of Guarantee, bulk commodity trading including disputes involving steel, copper oxide, aluminum oxide, palm oil, and ship sales. Twice elected as Vice Director of the Financial and Securities Special Committee of the All China Lawyers Association, arbitrator of the China International Economic and Trade Arbitration Commission, arbitrator of the Beijing International Arbitration Center, and arbitrator of many other arbitration institutions. Previously appointed as an expert of the Expert Committee on Civil and Administrative Supervision Cases of the Supreme People's Procuratorate. Invited to provide opinions and suggestions on the drafting and revision of judicial interpretations of the Guarantee Law part of the Civil Code. Member of the sixth and fifth working groups of the United Nations Commission on International Trade Law (UNCITRAL) for the Model Law on Secured Transactions and the Model Law on Insolvency. Observer of the drafting working group of the Model Law on Factoring (MLF) of the International Institute for the Unification of Private Law (UNIDROIT). Member of the Legal Committee (LC) of the Factors Chain International (FCI). Member of the Academic Committee of the Commercial Factoring Committee of the Service Trade Research Institute of the Ministry of Commerce. The Chinese abbreviation of this case was completed by Lawyer Lin Haosheng, and the English translation was completed by Lawyer Gu Haoran.

2 (2020) Zhe 02 Min Chu No. 279, (2020) Zhe 02 Min Chu No. 280, (2020) Zhe 02 Min Chu No. 281, (2020) Zhe 02 Min Chu No. 282, (2020) Zhe 02 Min Chu No. 283, (2020) Zhe 02 Min Chu No. 284, (2020) Zhe 02 Min Chu No. 285

3 (2021) Zhe Min Zhong No. 153, (2021) Zhe Min Zhong No. 154, (2021) Zhe Min Zhong No. 115, (2021) Zhe Min Zhong No. 155, (2021) Zhe Min Zhong No. 156, (2021) Zhe Min Zhong No. 157, (2021) Zhe Min Zhong No. 158

4 (2020) Zhe 02 Min Chu No. 283 [PRC]

Chinese Judicial Practice on the Validity of "Either Arbitration or Litigation" Clauses

Tianyu (Vera) Zuo, Maoyi (Emily) Yang

The validity of an arbitration agreement directly determines whether arbitral proceedings can be commenced and whether an arbitral award can be recognized and enforced. Under Chinese law, an arbitration agreement that provides for "either arbitration or litigation" is invalid. In practice, however, whether a particular clause actually constitutes an "either arbitration or litigation" arrangement is often disputed. In making that determination, Chinese courts do not apply the statutory language mechanically. Instead, they conduct a holistic assessment in light of the transactional background, the specific contractual context, and the parties' true intentions. By systematically reviewing representative judicial decisions from recent years, this article analyzes the rules applied in Chinese judicial practice when determining the validity of "either arbitration or litigation" clauses, and on that basis summarizes the key points companies should bear in mind when drafting arbitration agreements.

I. Arbitration Agreements Providing for "Either Arbitration or Litigation" Are Invalid

Party autonomy is the cornerstone of arbitration. The core value of an arbitration agreement lies in the parties' clear agreement to exclude the jurisdiction of the courts and, as between arbitration and litigation, to choose arbitration as the means of dispute resolution. If a clause simultaneously gives the parties parallel options to choose between arbitration and litigation, the allocation of jurisdiction becomes uncertain. This may not only undermine the finality of arbitration, but also encourage abusive forum shopping for either courts or arbitral institutions, thereby impairing the efficiency and fairness of dispute resolution.

Accordingly, Chinese law expressly denies the validity of "either arbitration or litigation" clauses. Article 7 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2008 Revision)* (the "*Judicial Interpretation*") provides: "*Where the parties agree that a dispute may be submitted either to an arbitral institution for arbitration or to a people's court for litigation, the arbitration agreement shall be invalid, except where one party applies for arbitration and the other party fails to raise an objection within the period prescribed in Article 20, paragraph 2 of the Arbitration Law.*"

A large number of judicial decisions show that Chinese courts have consistently adhered to this position in adjudicatory practice and have denied the validity of arbitration agreements that provide for "either arbitration or litigation."

For example, in a case heard by the Wuhan Intermediate People's Court[1], the arbitration applicant had purchased construction accident insurance and additional coverage from the respondent. Clause 5.4 of the insurance policy provided: "*The dispute resolution method under this contract shall be selected by the parties from one of the following two methods: 1. Any dispute arising from the performance of this contract shall be resolved by consultation between the parties; if consultation*

fails, the dispute shall be submitted to an arbitral commission jointly selected by both parties for arbitration; 2. Any dispute arising from the performance of this contract shall be resolved by consultation between the parties; if consultation fails, the dispute shall be brought before the people's court in accordance with law." The Wuhan Intermediate People's Court held that "*this clause is a typical 'either arbitration or litigation' clause, and the parties did not reach any further agreement regarding the arbitration clause. Under Article 7 of the Judicial Interpretation, where the parties agree that a dispute may be submitted either to an arbitral institution for arbitration or to a people's court for litigation, the arbitration agreement is invalid.*" The court therefore held that the arbitration agreement contained in the insurance clause at issue was invalid.

Similarly, in its reply to an inquiry submitted by the Beijing Higher People's Court[2]， the Supreme People's Court considered a prospectus for a short-term financing bond issued by the issuer. Article 2(1), Chapter 11, "*Liability for Breach,*" provided: "*If the issuer fails to repay the principal and interest of the current short-term financing bond when due, investors may initiate legal proceedings in accordance with law.*" Article 7, Chapter 11, "*Remedies and Waiver Mechanism,*" provided: "*If the issuer breaches the foregoing provisions, investors shall have the right to submit the dispute to the China International Economic and Trade Arbitration Commission for arbitration in Beijing in accordance with the arbitration rules in effect at the time of the application.*" The bondholders argued that the word "litigation" in Article 2(1) did not specify before what body proceedings should be brought, and that "litigation" could be interpreted to include arbitration. The issuer opposed that interpretation. The Supreme People's Court construed "litigation" as court litigation, and further held that the scope of "the foregoing provisions" referred to in Article 7 was itself unclear and insufficiently specific. It therefore ruled that the arbitration agreement under the prospectus was invalid for violating Article 7 of the Judicial Interpretation.

That said, in judicial practice, not every dispute resolution clause is obviously an "either arbitration or litigation" clause. Many clauses are ambiguous, and not every arbitration agreement that contains both the words "arbitration" and "litigation" will necessarily be deemed invalid on that basis. Courts examine such clauses from multiple perspectives, including the logic of the wording, the parties' true intentions, and the transactional background. Their primary focus is whether the parties clearly agreed to exclude judicial jurisdiction and whether the two dispute resolution methods were arranged as parallel alternatives, so as to avoid unjust outcomes caused by a mechanical application of the law.

The discussion below reviews a number of cases to illustrate the rules and judicial reasoning Chinese courts use in determining whether an arbitration agreement constitutes an "either arbitration or litigation" clause.

II. Arbitration Agreements That Ostensibly Provide for Both but Do Not Substantively Constitute "Either Arbitration or Litigation" Are Valid

1. Dispute Resolution Clauses in Different Contracts or Involving Different Parties Do Not Constitute "Either Arbitration or Litigation"

In complex commercial transactions, especially those involving long-term cooperation or project performance, parties often execute a series of contracts that are sequentially related or linked as principal and ancillary agreements in terms of content and performance. Where these related

contracts provide for different dispute resolution methods, such as arbitration in one and litigation in another, difficult questions arise as to the validity of the relevant clauses. In judicial practice, the core legal principle Chinese courts apply in addressing this issue is the "privity of contract". Under that principle, each contract is an independent legal relationship, and its clauses generally bind only the parties that entered into that contract. Accordingly, review of a dispute resolution clause must return to the specific contract in which it appears and determine the validity of the arbitration agreement based on the true intentions of that contract's signatories and the legal relationship established by that contract. Courts should not mechanically merge different contracts into a single "either arbitration or litigation" arrangement merely because they contain different dispute resolution mechanisms on their face, and then deny the validity of the arbitration agreement on that basis.

For example, in a case included in the Supreme People's Court's 2024 Annual Report on Judicial Review of Commercial Arbitration[3]，Shandong Zhuo Co. and Weifang Bei Co. entered into a Lease Agreement in 2015, which provided: "*For matters not covered herein, the parties shall resolve them through friendly consultation. If consultation fails, litigation may be initiated, and the court at the plaintiff's domicile shall have jurisdiction.*" In 2017, Shandong Zhuo Co., Weifang Bei Co., and Rui Co. entered into an Agreement on the Transfer of Contractual Rights and Obligations, which provided: "*Any dispute arising in the performance of this agreement shall be resolved through consultation among the three parties. If consultation fails, any party may apply to the Yantai Arbitration Commission for arbitration.*" In 2024, Weifang Bei Co. applied to the people's court for a declaration that the arbitration clause was invalid, arguing that the two agreements were in substance part of the same lease relationship and that the dispute resolution clauses conflicted by providing for "either arbitration or litigation." The court held that the Lease Agreement and the Agreement on the Transfer of Contractual Rights and Obligations had different contracting parties and did not belong to the same contractual relationship. In the later tripartite agreement, the three parties had expressly agreed to an arbitration clause, manifested an intention to arbitrate, and designated a specific arbitral institution. The clause should therefore be recognized as valid, and the applicant's claim that the arbitration agreement was invalid could not stand.

The core logic reflected in this case is that, as part of a contract, an arbitration agreement binds only the parties who signed that agreement. Dispute resolution arrangements arising out of different legal relationships should be assessed independently. The fact that an earlier contract provides for litigation while a later contract provides for arbitration does not in itself create an "either arbitration or litigation" problem; rather, it reflects a new expression of intent by the parties in light of a changed legal relationship, and that expression of party autonomy should be respected.

2. Distinguishing Between Authorizing Dispute Resolution Clauses and Basic Dispute Resolution Clauses

Contracts often contain clauses authorizing third parties to exercise rights. In practice, such clauses commonly appear in arrangements involving multiple interested parties or successive transactions, such as beneficiaries under insurance contracts, end users in supply-chain contracts, and subcontractors in construction contracts. If such a clause further authorizes the third party to choose litigation or arbitration in the event of a dispute, courts may analyze it separately from the contract's basic dispute resolution clause. Because the third party is not itself a party to the underlying contractual relationship, the nature of such an "either arbitration or litigation" clause is that of an

authorizing dispute resolution clause, which cannot bind the two contracting parties themselves.

For example, in a case heard by the Guangzhou Intermediate People's Court[4], the debtor and a certain branch of Bank of China entered into a Fixed Asset Loan Contract (the principal contract at issue), which contained an arbitration agreement. Article 17 of the Pledge Contract entered into by the guarantor, Feng Co., and the bank branch provided that "*the same dispute resolution method as agreed in the principal contract shall apply.*" However, Article 19 further provided that "*if, due to business needs, the bank branch entrusts another Bank of China institution to perform the rights and obligations under this contract, Feng Co. acknowledges and accepts the same. Such authorized Bank of China institution shall have the right to exercise all rights under this contract and shall have the right to bring litigation before a court or submit the dispute to an arbitral institution for adjudication with respect to disputes under this contract.*" After the bank branch initiated arbitration, Feng Co. requested the court to confirm that the Pledge Contract did not contain a valid arbitration clause. The court adopted a three-step analysis. First, the Pledge Contract had already provided that the same dispute resolution method as in the principal contract would apply, and the principal contract had clearly chosen arbitration before the Shenzhen Court of International Arbitration; subsequent supplemental agreements did not make any new arrangement regarding dispute resolution. Accordingly, the Pledge Contract satisfied the requirements for an arbitration agreement under the *Arbitration Law of the People's Republic of China* (the "*Arbitration Law*"). Second, Article 19 of the Pledge Contract was, in substance, a provision authorizing other Bank of China institutions to exercise contractual rights and to enjoy the corresponding right to bring suit or request arbitration. It addressed the legal basis on which such institutions could exercise contractual rights, rather than the dispute resolution method governing disputes under the contract. As between the contracting parties, disputes under the contract remained governed by Article 17 of the Pledge Contract. Third, even if Article 19 were viewed as involving a dispute resolution method, it would apply only where an authorized third-party institution asserts rights against Feng Co.; in the present case, however, the bank branch itself was asserting rights directly, so Article 19 was inapplicable. The court ultimately dismissed Feng Co.'s application.

This case drew a clear line between authorizing dispute resolution clauses and basic dispute resolution clauses. It made clear that the function of an authorizing clause is to address who may exercise contractual rights, not to alter the parties' previously agreed dispute resolution mechanism. The focus of judicial review therefore remains whether the specific parties to the dispute have agreed to an "either arbitration or litigation" arrangement.

3. "Arbitration First, Litigation Later" Clauses Do Not Constitute "Either Arbitration or Litigation"

In practice, some contracts provide for "arbitration first, litigation later." The key distinction between such clauses and "either arbitration or litigation" clauses is that the former establishes a sequential, rather than parallel, arrangement between the two dispute resolution methods. In such circumstances, courts may adopt a severability approach, holding the arbitration portion valid while treating the litigation portion as invalid for violating the principle of finality in arbitration. The invalidity of the litigation portion does not affect the validity of the arbitration portion.

For example, in a case heard by the Shenzhen Intermediate People's Court of Guangdong Province[5],

a company entered into a Loan Contract with Liu Co. and Hong. Article 5 of the contract provided: "*If any dispute arises under this contract, the parties shall resolve it through consultation. If consultation fails, the dispute shall be submitted to the Shenzhen Arbitration Commission, at the place where the contract was signed, for arbitration, with the final determination to be made by the Shenzhen courts.*" After the company applied for arbitration under this clause, Liu Co. and Hong applied to have the arbitration agreement declared invalid on the ground that the clause constituted "either arbitration or litigation." The court held that the clause contained a clear intention to arbitrate, identified the matters to be arbitrated, and designated a specific arbitral institution, thereby satisfying the requirements of the *Arbitration Law* and thus being valid. The phrase "*with the final determination to be made by the Shenzhen courts*" was not an "either arbitration or litigation" arrangement, but rather reflected the parties' intention to provide for "arbitration first, litigation later." Accordingly, Liu Co. and Hong lacked a legal basis for claiming that the arbitration agreement was invalid.

This case treated the validity of an "arbitration first, litigation later" clause on a severed basis, thereby both respecting the parties' prior choice of arbitration and preserving the core institutional value of arbitration finality.

4. Unilateral Option Arbitration Clauses Do Not Constitute "Either Arbitration or Litigation"

A unilateral option arbitration clause, also known as an asymmetric arbitration clause, is a clause that grants one party to the contract, typically the creditor, pledgee, or another rights holder, the unilateral right to choose either litigation or arbitration. Because of their flexibility, such clauses have become common in international financing transactions in recent years. The key distinction between such clauses and "either arbitration or litigation" clauses lies in the exclusivity and certainty of the choice. Once the rights holder exercises its option, the dispute resolution method becomes fixed.

In a case heard by the Beijing Financial Court[6], the parties entered into a Pledge Agreement. Article 23.1 provided that all disputes arising out of the agreement should be submitted to the certain arbitral commission in Beijing for arbitration, and that the arbitration would be final. Article 23.2 further provided that, notwithstanding Article 23.1, if the pledgee (a certain bank) so elected, the parties would submit to the non-exclusive jurisdiction of the courts of Country J. After the bank applied to the arbitral commission for arbitration in relation to a dispute over the performance of the agreement, the certain Telecom Co. applied to the court to declare the arbitration clause invalid, arguing that the clause gave the bank the unilateral option to choose arbitration or litigation and therefore constituted an "either arbitration or litigation" arrangement. The court held that the standard for identifying an "either arbitration or litigation" agreement under Article 7 of the *Judicial Interpretation* is whether arbitration and litigation are provided as parallel or alternative methods such that a jurisdictional conflict arises. In this case, however, the clause at issue was a unilateral option dispute resolution clause, the nature of which depended on the bank's choice. The clause resulted from mutual agreement between the parties, there was no legal prohibition against such an arrangement, and it was not sufficient to render the parties' rights and obligations manifestly unfair. The parties' autonomy should therefore be respected. Since the bank had already applied for arbitration and had expressly waived its right to bring suit in court, the dispute resolution clause had crystallized into a definite and exclusive agreement to arbitrate. It did not constitute an "either arbitration or litigation"

clause and should be held lawful and valid.

This case, following the earlier decision of the Shanghai First Intermediate People's Court in *Xiamen C&D Chemical Co., Ltd. v. Switzerland Albert Trading Co., Ltd.*[7], marked another clear affirmation by Chinese courts of the validity of unilateral option arbitration clauses. Because it also involved a Belt and Road project, it is of particular significance. The case clearly delineates the boundary between unilateral option arbitration clauses and "either arbitration or litigation" clauses, and recognizes the legality and validity of such clauses in commercial transactions. This approach both respects party autonomy and responds to the practical needs of complex commercial arrangements.

III. Conclusion and Implications

The representative cases discussed above show that, in determining the validity of "either arbitration or litigation" clauses, Chinese courts favor a substantive review approach designed to avoid a mechanical application of the law. Their core judicial reasoning may be summarized as follows: First, they focus on examining the true intent of the parties, making a comprehensive determination of whether a clear arbitration agreement exists by considering factors such as the wording of the clauses, the sequence of agreements between the parties, and the context of the transaction. Second, they distinguish between different contracts and different clauses within the same contract, so as to accurately identify the dispute resolution clause that is genuinely applicable to the opposing parties with rights and obligations. Third, they respect the independence of the arbitral proceeding and do their utmost to uphold the validity of the arbitration agreement.

To minimize the risk of an arbitration agreement being invalidated during judicial review and to enhance predictability in dispute resolution, parties should focus on at least two key points. First, the chosen method of dispute resolution should be stated as clearly as possible, with careful drafting to avoid presenting arbitration and litigation as parallel options in the same clause. Second, the arbitral institution should be explicitly designated and the scope of arbitrable matters clearly defined, so as to fully satisfy the essential validity requirements of an arbitration agreement in China. Looking ahead, as commercial transaction structures continue to diversify and new forms of arbitration agreements continue to emerge, Chinese courts' rules for identifying "either arbitration or litigation" clauses are likely to become more nuanced and more fully developed in practice. Whatever new forms such clauses may take, party autonomy will remain the central criterion for determining the validity of an arbitration agreement. This judicial tendency provides parties with a relatively stable expectations, while also offering necessary support for the continued development of arbitration.

1 Application by a Hubei-based Construction Labor Service Company to Confirm the Validity of an Arbitration Agreement, *Case No. (2025) E 01 Min Te No. 61*, Wuhan Intermediate People's Court, Hubei Province

2 Reply in the Matter of Beijing Huaye Capital Holdings Co., Ltd.'s Application for Confirmation of Validity of Arbitration Agreement, *Case No. (2019) Zui Gao Fa Min Ta No. 221*, Supreme People's Court

3 Regarding the case between Weifang Bei Co., (applicant) and Rui Co. and Shandong Zhuo Co. (respondents) requested confirmation of the validity of the arbitration agreement, reproduced on page 12 of the Supreme People's Court's 2024 Annual Report on Judicial Review of Commercial Arbitration

4 Guangzhou Feng Co. v. Bank of China Certain Branch, Application for Confirmation of Validity of Arbitration Agreement, *Case No. (2023) Yue 01 Min Te No. 865*, Guangzhou Intermediate People's Court, Guangdong Province

5 The Fourth of Ten Typical Cases of Judicial Review of Arbitration in 2024 Released by the Shenzhen Intermediate People's Court of Guangdong Province: Liu Co. and Hong, Application for Confirmation of Validity of Arbitration Agreement—accurately identification of "either arbitration or litigation" clauses to recognize the validity of an arbitration agreement

6 The Fifth of Ten Typical Cases of Judicial Review of Financial Arbitration: Certain Foreign Telecom Co. (Applicant) and Certain Bank (Respondent), Application for Confirmation of Validity of Arbitration Agreement—a unilateral option arbitration clause is not necessarily "either arbitration or litigation"

7 *Xiamen C&D Chemical Co., Ltd. v. Switzerland Albert Trading Co., Ltd., Case No. (2016) Hu 01 Min Zhong 3337*, Shanghai First Intermediate People's Court

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