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跨境争议解决
Cross-border Dispute Resolution

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编者按：本刊旨在报道与中国有关的跨境争议解决的最新动态与我们的实务经验，但本刊不可替代个案的正式法律意见。您若重复收到本刊或者要订阅、退订或进一步了解本刊的内容，请与大成的有关律师联系。

Editor's note: the purpose of this publication is to report the most recent developments in the field of cross-border dispute resolution in connection with China, as well as our practical experience therein. However, this publication should not be treated as a substitute for a formal legal opinion in individual cases. If you have received this publication more than once, or would like to subscribe or unsubscribe to this publication, or follow up on any issues raised in this publication, please be in contact with the lawyer you usually deal with at Dacheng Law Offices.

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- **北京筹建第三中级人民法院 缓解办案压力（来源：京华时报，2012 年 11 月 19 日）**

  Beijing Prepares for the Establishment of the No. 3 Intermediate People's Court to Ease Case Handling Pressure (Source: www.jinghua.cn, November 19, 2012)

近日获悉，北京增设第三中级人民法院的计划已经获得中央编制办批准，三中院正在筹建之中，预计明年挂牌运行。与之相对应的，北京还将设立北京市人民检察院第三分院。

It is reported recently that the plan on establishing the No. 3 Intermediate People’s Court in Beijing has been approved by the Central Staffing Office. The No. 3 Intermediate People’s Court is under construction, and expected to launch in the next year. Beijing will also set up the corresponding Beijing No. 3 People’s Procuratorate.

确定北京将增设第三中级人民法院后，北京法院的格局将发生重大变化。2012 年 6 月 6 日，北京铁路运输中级法院、北京铁路运输法院正式从铁路局移交至地方管理，使北京市中级法院的数量增至三个。三中院一旦挂牌办案，就意味着北京市将会有四个中级法院，即一中院、二中院、三中院与铁路中级法院。

After the establishment of the Beijing No. 3 Intermediate People’s Court, great change will take place in the layout of Beijing’s courts. On June 6, 2012, the Beijing Railway Transportation Intermediate Court and the Beijing Railway Transportation Court were officially transferred from the railway administration to the local authorities, thereby increasing the number of intermediate courts in Beijing to three. Once the official launch of the No. 3 Intermediate People’s Court, there will be four intermediate people’s courts, namely, the No. 1 Intermediate People’s Court, the No. 2 Intermediate People’s Court, the No. 3 Intermediate People’s Court and the Railway Transportation Intermediate Court.

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- **大连仲裁委员会证券仲裁中心正式挂牌成立（来源：www.csrc.gov.cn，2012 年 11 月 28 日）**

  Securities Arbitration Centre of Dalian Arbitration Commission Established (Source: www.csrc.gov.cn, November 28, 2012)

近日，大连仲裁委员会证券仲裁中心在大连市证券期货业协会正式挂牌成立。该证券仲裁中心是大连仲裁委员会与大连证监局共同研究设立的机构，专门处理大连辖区证券行业纠纷，并将在法律层面为大连证券行业的发展建设提供必要的法律服务与支持。

The Securities Arbitration Centre of the Dalian Arbitration Commission has been officially established with its domicile located in that of the Dalian Securities and Futures Association. The Securities Arbitration Centre is an institution which has been jointly established by the Dalian Arbitration Commission and the Dalian Securities Regulatory Bureau, and shall specialize in resolving disputes of the securities industry in the jurisdiction of Dalian and provide legal services and support for the development and construction of the securities industry of Dalian.

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  China's First Right Protection Case Involving a Famous Trademark "Tong Ren Tang" is Heard (Source: www.legaldaily.com.cn, November 29, 2012)

11 月 15 日，北京同仁堂诉刘某侵犯商标权纠纷一案在四川省成都市中级人民法院开庭审理。原告北京同仁堂诉称，原告发现位于成都市双流县文星镇的某铺面上，设置有显著的红色、蓝色两处“中华同仁堂”招牌。该两处铺面为刘某购买。原告认为，“同仁堂”商标早已是驰名商标，而刘某设置的“中华同仁堂”招牌以“同仁堂”字样为该招牌的主要部分，损害了北京同仁堂作为商标专用权人的合法权益及“同仁堂”驰名商标所代表的商誉。原告代理人梁勤律师请求法院判决被告刘某立即停止一

切侵权行为，消除影响，并向原告支付侵权损害赔偿金人民币 100 万元等。1989 年，“同仁堂”被国家工商行政管理局商标局认定为驰名商标。

On November 15, the lawsuit filed by Beijing Tong Ren Tang against Mr. Liu for infringement upon its trademark right was heard by the Chengdu Intermediate People's Court. Beijing Tong Ren Tang, the plaintiff, claimed that it found two "Zhong Hua Tong Ren Tang" shop signs, one in red and the other in blue, set up at the conspicuous places of two shops located in Wenxing Town, Shuangliu County of Chengdu City which are purchased and owned by Liu, the defendant. The plaintiff held that the "Tong Ren Tang" trademark has been a famous trademark for a long time. The wording "Tong Ren Tang" constitutes the main part of the "Zhong Hua Tong Ren Tang" shop signs set up by Liu, thus, Liu's act has damaged the legitimate rights and interests of the exclusive right of Beijing Tong Ren Tang to use the trademark "Tong Ren Tang" and the goodwill of the "Tong Ren Tang" as a famous trademark. The plaintiff's representing lawyer Liang Qin requested that the court order the defendant to stop all torts immediately, eliminate the impact and compensate the plaintiff for tort damages of CNY 1 million. In 1989, "Tong Ren Tang" was recognized by the State Administration for Industry and Commerce as a famous trademark.

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实务经验
PRACTICAL EXPERIENCE

中国律师的价值

－从外国仲裁裁决在中国的承认及执行看外国当事人在涉华国际商事仲裁中的法律风险控制

The Value of Chinese Lawyers

－Controlling legal risks for foreign parties involved in China-related international commercial arbitration: a discussion in the context of the recognition and enforcement of foreign arbitral awards

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外国仲裁裁决在中国的承认及执行包含“承认”与“执行”两个方面。“承认”是审查仲裁裁决是否存在不予承认的情形。“执行”是执行被申请执行人的财产，实现仲裁裁决的债权。“承认”的工作又存在两个方面，第一个是避免仲裁裁决存在不予承认的情形，这是仲裁过程中的工作；第二个是向中国法院解释仲裁裁决不存在不予承认的情形，这在申请承认及执行过程中的工作。

The recognition and enforcement of foreign arbitral awards in China comprises two aspects: recognition and enforcement. "Recognition" involves examining whether there are any circumstances justifying the non-recognition of the arbitral award. "Enforcement" involves enforcement of the award against the assets of

the respondent in the enforcement proceedings, thereby realizing the creditor's rights under the arbitral award. "Recognition" itself involves a further two aspects. The first is avoiding any circumstances arising in respect of the arbitral award that would justify its non-recognition. This is a function of the arbitration process itself. The second is explaining to the Chinese courts that there are no circumstances in respect of the arbitral award that justify its non-recognition. This is a function of the application for recognition and enforcement.

国际商事仲裁的外国当事人往往在向中国法院申请承认及执行外国仲裁裁决时才会聘请中国律师，也就是只让他们向中国法院解释仲裁裁决不存在不予承认的情形，并执行被申请执行人的财产，实现仲裁裁决的债权。如果仲裁裁决中存在可以不予承认及执行的情形，中国律师也就无能为力了。如果外国当事人在签订仲裁协议时就咨询中国律师的意见，在进行仲裁时也聘请中国律师作为其代理人之一，中国律师就可以提示当事人和仲裁庭那些中国法院认为不予承认及执行的情形，确保外国当事人得到一份可以在中国顺利承认及执行的仲裁裁决。本文即重点介绍中国律师如何帮助外国当事人在涉华国际商事仲裁中进行法律风险控制。

Foreign parties to international commercial arbitration will commonly only engage Chinese legal counsel when it comes time to apply to the Chinese courts for the recognition and enforcement of their foreign arbitral award, i.e., Chinese counsel will only be engaged to explain to the Chinese courts that there are no circumstances in respect of the arbitral award that justify non-recognition, thereby enabling the foreign party to realize its creditor's rights under the arbitral award. If, at this stage in proceedings, there are circumstances in respect of the arbitral award that render it capable of being refused recognition and enforcement, the foreign party's Chinese legal counsel's hands are tied. However, if the foreign parties had consulted Chinese legal counsel when entering into the arbitration agreement, and engaged Chinese lawyers to serve as one of their representatives in the arbitral proceedings, the Chinese legal counsel would have been able to alert the parties and the arbitral tribunal to the circumstances in which courts in China will refuse to recognize and enforce arbitral awards, thereby ensuring that the foreign parties would ultimately obtain an award capable of being recognized and enforced in China. The key focus of this article is to discuss the ways in which Chinese lawyers can control and manage the legal risks arising for foreign parties in China-related international commercial arbitration.

I. 在《纽约公约》缔约国领土内进行仲裁
ARBITRATION CONDUCTED IN THE TERRITORY OF A SIGNATORY TO THE *NEW YORK CONVENTION*

对于向中国法院申请承认及执行的外国仲裁裁决，中国法院应按照 1958 年在纽约通过的《承认及执行外国仲裁裁决公约》（简称“《纽约公约》”）或者按照互惠原则办理 。[1]

Applications to the Chinese courts for the recognition and enforcement of foreign arbitral awards should be handled either in accordance with the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted in New York in 1958 (hereinafter referred to as "the **New York Convention**"), or on the basis of the principle of reciprocity.

对于中国法院来讲，一共有三大类仲裁裁决，即(1)内国裁决、(2)涉外裁决、(3)外国裁决。外国裁决又可以细分为(3-1)《纽约公约》缔约国裁决、(3-2)在一个非《纽约公约》

缔约国但与中国签订其他仲裁条约的国家领土内做出的裁决及(3-3)在一个既非《纽约公约》缔约国亦未与中国签订其他仲裁条约的国家领土内做出的裁决，第(2)和第(3)在我们立法体例中属于国际商事仲裁裁决。第(1)类和第(2)类裁决按照《中华人民共和国民事诉讼法》和《中华人民共和国仲裁法》执行，第(3-1)类按照《纽约公约》和《中华人民共和国民事诉讼法》进行承认及执行，第(3-2)类按照缔结的条约和《中华人民共和国民事诉讼法》进行承认及执行，而第(3-3)类就只能按照互惠原则办理，但《中华人民共和国民事诉讼法》和《中华人民共和国仲裁法》均未规定按照互惠原则办理时中国法院如何进行审查 。因此，尽管《中华人民共和国民事诉讼法》明确规定了中国法院可以“按照互惠原则办理”外国仲裁裁决在中国的承认及执行，但由于在进行审查时中国法院事实上无法可依，中国法院也就很难受理这类案件。

Chinese courts recognize three different categories of arbitral awards: (1) domestic awards, (2) foreign-related awards and (3) foreign awards. Foreign arbitral awards can be further sub-divided into: (3-1) awards made in countries that are signatories to the New York Convention (hereinafter, "**Convention Awards**"), (3-2) awards made within the territory of countries that are not signatories to the New York Convention but have entered into other arbitration treaties with China, and (3-3) awards made within the territory of countries that are neither signatories to the New York Convention nor party to any other arbitration treaties with China. The second and third categories of arbitral award are regarded as international commercial arbitral awards within the Chinese legislative structure. The first and second categories of arbitral award are enforced in accordance with the terms of the *Civil Procedure Law of the People's Republic of China* and the *Arbitration Law of the People's Republic of China*; arbitral awards falling within category (3-1) are enforced in accordance with the terms of the New York Convention and the *Civil Procedure Law* arbitral awards falling within category (3-2) are enforced in accordance with the terms of the relevant bilateral treaty and the *Civil Procedure Law*; and enforcement of awards falling within category (3-3) can only be carried out on the basis of the principle of reciprocity, although neither the *Civil Procedure Law* nor the *Arbitration Law* contain any provisions as to how the Chinese courts should handle examination of enforcement cases brought in accordance with the principle of reciprocity. Therefore, despite the *Civil Procedure Law* expressly providing that Chinese courts can undertake recognition and enforcement of foreign arbitral awards "in accordance with the principle of reciprocity", in practice it is very difficult for the Chinese courts to accept and hear cases of this kind, as there is no legal basis on which Chinese courts can rely in examining such cases.

综上，如果选择在外国进行仲裁，为了仲裁裁决可以顺利被中国法院承认及执行，当事人最好还是选择在《纽约公约》缔约国进行仲裁，不可指望可以按照互惠原则在中国法院申请承认及执行一个外国仲裁裁决。

Therefore, if it is decided to conduct arbitration in a foreign country, the best option is for the parties to select a country that is a signatory to the New York Convention as the place in which to conduct the arbitration (the so-called "seat or arbitration"), in order to ensure the smooth recognition and enforcement of the arbitral award in China. Parties should not expect that they will be able to apply to the Chinese courts for recognition and enforcement of a foreign arbitral award on the basis of the principle of reciprocity.

II. 选择适当的仲裁协议准据法

SELECTING AN APPROPRIATE GOVERNING LAW FOR THE ARBITRATION AGREEMENT

仲裁协议的准据法是指适用于仲裁协议的法律。仲裁协议的准据法与合同的准据法是两个不同的概念，合同的准据法不当然就是仲裁协议的准据法，前者是当事人解决合同争议实体问题的法律，后者是当事人解决合同争议程序问题的法律，二者是可以分开的，在某些情况下也不得不分开[2]。当事人可以根据意思自治原则选择仲裁协议的准据法，如果没有选定，仲裁地的法律即为仲裁协议的准据法[3]。仲裁协议适用当事人意思自治原则的做法已被各国广为接受，并且国际公约也认可仲裁协议首先适用当事人自己选择的法律[4]。

The governing law of the arbitration agreement is the law applied to the arbitration agreement. The governing law of the arbitration agreement and the governing law of the contract are distinct concepts, and the governing law of the contract will not necessarily be the governing law of the arbitration agreement. The former is the law by which the parties resolve the substantive issues in respect of their contractual dispute, whilst the latter is the law by which the parties to the dispute resolve the procedural issues in respect of their contractual dispute; the two can be separated, and in some circumstances there is no choice but to separate them. The parties can select the governing law for their arbitration agreement on the basis of the principle of autonomy of will; where no choice has been made, the law of the place or "seat" of arbitration will be the governing law of the arbitration agreement. The fact that the principle of autonomy of will is applicable to arbitration agreements is widely accepted throughout the world, and international conventions further recognize that the starting point in determining the law applicable to an arbitration agreement is the law chosen by the parties themselves.

在中国法下，合同的准据法与仲裁协议的准据法也是分开的。在张家港星港电子公司与博泽国际公司中外合资经营合同一案[5]中涉外仲裁条款效力问题上，最高人民法院就认为，《中华人民共和国合同法》第一百二十六条第二款[6]的规定，是对解决合同实体争议的准据法作出的规定，并非对认定合同中仲裁条款效力的准据法作出的规定；中国法律并未强制规定在确认中外合资经营合同中仲裁条款效力时必须适用中国的法律作为准据法；本案当事人未明确约定仲裁条款效力的准据法，故而适用当事人约定的仲裁地瑞士的法律对仲裁条款的效力作出认定；根据瑞士的相关法律规定，本案仲裁条款有效，人民法院对该纠纷无管辖权。

Under Chinese law, the governing law of the contract and the governing law of the arbitration agreement are also separate issues. In the dispute between Zhangjiagang Electronics and the international company Brose regarding the parties' joint venture contract, the Supreme People's Court reached the following determinations in respect of the validity of a foreign-related arbitration clause: Article 126(2) of the *Contract Law of the People's Republic of China* relates to the determination of the governing law for the resolution of the substantive issues arising under the contract, and does not relate to the determination of the governing law for the validity of the arbitration agreement contained in the contract; Chinese law does not mandate that PRC law must be used as the governing law in determining the validity of an arbitration agreement contained in a Sino-foreign joint venture contract; as the parties in the case before the Court had not expressly agreed upon

the governing law for the validity of their arbitration clause, the law of the seat of arbitration agreed by the parties, Switzerland, was to be applied in determining the validity of the arbitration clause; and finally that, in accordance with the relevant provisions of Swiss law, the arbitration clause before the Court was valid, and the people's courts in China therefore had no jurisdiction over the dispute.

仲裁协议的效力及仲裁程序的适当性都会涉及到仲裁协议的准据法，依据不同的准据法审查仲裁协议的效力和仲裁程序的适当性可能会得出不同的结论，从而导致仲裁裁决因仲裁协议无效[7]或仲裁程序不当[8]而被拒绝承认及执行。因此，当事人须高度重视仲裁协议准据法的选择，知道自己到底选择的是什么准据法，仲裁协议在准据法下是否有效以及仲裁应遵守什么样的程序。

The validity of the arbitration agreement and the proper conduct of the arbitration proceedings both involve questions of the governing law of the arbitration agreement; different conclusions as to the validity of the arbitration agreement and the proper conduct of the arbitral procedures can be reached depending on which governing law is applied, and this can ultimately lead to the courts refusing to recognize and enforce the arbitral award on account of the invalidity of the arbitration agreement or the improper conduct of the arbitral procedures. Therefore, the parties to a contract must place high importance upon their choice as to the law governing the validity of the arbitration agreement, whether their arbitral agreement is valid under such governing law, as well as the procedures to be observed in the arbitration.

III. 根据仲裁协议准据法选择临时仲裁
SELECTING AD HOC ARBITRATION IN ACCORDANCE WITH THE GOVERNING LAW OF THE ARBITRATION AGREEMENT

《纽约公约》第一条第 2 款明确规定，“仲裁裁决”不仅包括由为每一案件选定的仲裁员所作出的裁决，而且也包括由常设仲裁机构经当事人的提请而作出的裁决，也就是说，《纽约公约》将机构仲裁裁决和临时仲裁裁决都作为可以申请执行的对象，但根据《纽约公约》第五条第 1 款（甲）项的规定，如果仲裁协议无效，被申请承认及执行国就可以依照被申请执行当事人的请求拒绝承认及执行一份外国仲裁裁决[9]。

Article I (2) of the New York Convention provides that the term "arbitral awards" includes not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies by which the parties have submitted; in other words, under the *New York Convention*, both institutional arbitral awards and ad hoc arbitral awards can be the subject of applications for enforcement. However, according to Article V(1)(a) of the New York Convention, if an arbitration agreement is invalid, the country where recognition and enforcement is sought may refuse to recognize and enforce the foreign arbitral award upon application by the party against whom enforcement is sought.

中国法院承认外国临时仲裁机构的临时仲裁裁决[10]，但中国法律没有明确规定承认临时仲裁机构及其作出的裁决。《中华人民共和国民事诉讼法》及《中华人民共和国仲裁法》规定的都是“仲裁机构”[11]，并且，《最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知》规定的也是“仲裁机构”。此外，《中华人民共和国仲裁法》明确规定，当事人必须在仲裁协议中选定仲裁机构，《最高人民法院关于适用<中华人民共和国

仲裁法>若干问题的解释》规定的有关选定仲裁机构的特殊情形也不包括临时仲裁。可以说，中国法尚无临时仲裁裁决存在的法律空间[12]。因此，如果仲裁协议的准据法是中国法，被申请承认及执行的当事人请求被申请及执行的法院拒绝承认及执行外国临时仲裁裁决，则该法院（包括中国法院）就可以拒绝承认及执行该仲裁裁决[13]。有鉴于此，当事人一定要慎重考察仲裁协议的准据法是否承认临时仲裁，如果不承认，那么就不要选择临时仲裁，或者选择承认临时仲裁的准据法。

Chinese courts recognize arbitral awards issued by ad hoc arbitral bodies, but there are no express provisions under PRC law recognizing ad hoc arbitral bodies and awards issued by them. The Civil Procedure Law and the Arbitration Law both regulate "institutional arbitration" only, and the *Notice of the Supreme People's Court on the Handling by the People's Courts of Issues in Foreign-related Arbitration and Foreign Arbitration* also deals only with "institutional arbitration". In addition, the *Arbitration Law* expressly provides that the parties to a contract must select an arbitral institution in their arbitration agreement, and the special circumstances in relation to the selection of an arbitral institution referred to in the provisions of *the Supreme People's Court's Interpretation of Several Issues Relating to the Application of the Arbitration Law of the People's Republic of China* do not include ad hoc arbitration. It is therefore fair to say that there is no room under PRC law for the concept of ad hoc arbitral awards. As a consequence, if the governing law of an arbitration agreement is PRC law, and the respondent in the enforcement proceedings initiated under the arbitration agreement requests that the court refuse to recognize and enforce a foreign ad hoc arbitral award, then the court in which the proceedings are brought (whether a domestic Chinese court or a court in any other jurisdiction) can refuse to recognize and enforce the arbitral award. For this reason, the parties to a contract should carefully consider whether the governing law of their arbitration agreement recognizes ad hoc arbitration; if ad hoc arbitration is not recognized by that governing law, then either ad hoc arbitration should not be chosen by the parties, or the governing law in question should be replaced with one which recognizes ad hoc arbitration.

IV. 选择适当的仲裁地

SELECTING AN APPROPRIATE PLACE OR SEAT OF ARBITRATION

“仲裁地”是国际商事仲裁中的一个法律概念而不是一个地理概念，它是指仲裁是在某个国家的仲裁法律框架内进行。在国际商事仲裁中，仲裁程序往往在多个地点进行，其中包括争议案件的受理地、仲裁材料的提交地、案件的审理开庭地、仲裁庭的合议地、仲裁裁决的签署地、仲裁裁决的发出地等。另外，为了便于程序的进行及节省仲裁成本，仲裁庭经常会在多个国家或地区开庭对案件进行审理或合议甚至签署最后的裁决书。前述这些地点都是地理上的概念，它们只是仲裁活动的地理发生地，而不是仲裁活动的法律发生地。国际商事仲裁中可以有多个地理上的仲裁程序发生地点[14]，而法律上的仲裁地则只能有一个。正如 1985 年《联合国国际商事仲裁示范法》第三十一条第 3 款规定的那样：“裁决应写明日期和按照第二十条(1)的规定所确定的仲裁地点，该裁决应视为是在该地点作出的”。

The "place of arbitration" or "seat of arbitration" in international commercial arbitration is a legal rather than a geographic concept, and means that an arbitration is conducted within a certain country's arbitration law framework. In international commercial arbitration, arbitral proceedings are commonly conducted in various different locations, including the place where the dispute is originally accepted, the place where the materials relating to the arbitration are submitted, the place where the hearing of the case is conducted, the

place where the arbitral tribunal meets to discuss the case, the place where the arbitral award is signed, the place from which the arbitral award is issued, and so on. In addition, for the convenience of the conduct of the proceedings and in order to reduce the costs of the arbitration, arbitral tribunals will commonly conduct hearings or discussions in respect of a case, and sometimes even execute the final award, in multiple countries or regions. The places referred to here are all places in the geographic sense of the word, being merely the places where the various events in the arbitration occur geographically, and not the places where the events of the arbitration occur in a legal sense. In contrast to the physical locations where the events comprising the arbitration take place, there can only be one "place" or "seat" of arbitration in the legal sense. As Article 31(3) of the 1985 UNCITRAL Model Law on International Commercial Arbitration states: "The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place."

当事人可以直接约定仲裁地或通过援引仲裁规则对仲裁地的确定做出安排，很多国家的立法允许当事人自由约定仲裁地[15]。如果当事人没有约定仲裁地或约定仲裁地不明确时，仲裁机构、仲裁庭或法院都有权根据一定的规则来指定仲裁地点[16]。由于仲裁地在确定仲裁协议准据法进而确定仲裁协议的效力的作用以及仲裁地法院有权根据当事人的请求对在其管辖地范围内作出的裁决进行撤销监督，当事人一定要直接约定仲裁地或通过原因仲裁规则对仲裁地的确定做出安排，否则，仲裁地就存在不确定性，仲裁协议的效力也就存在不确定性。

The parties to the contract may either directly agree upon the place/seat of arbitration or else make arrangements for the place/seat of arbitration by citing the provisions of a particular set of arbitral rules regarding the determination of the seat of arbitration. Legislation in many countries permits the parties to a contract to freely choose the seat of arbitration. If the parties to the contract have not agreed upon the seat of arbitration or their agreement on the seat of arbitration is unclear, the arbitral institution, the tribunal or the court is entitled to designate the seat of arbitration in accordance with certain rules. Owing to the role of the seat of arbitration in determining the governing law of the arbitration agreement and thereby the validity of the arbitration agreement, and owing to the fact that courts at the seat of arbitration are entitled to conduct annulment and supervision of arbitral awards issued within the scope of their geographic jurisdiction (upon request by the parties to the arbitration agreement), there is a high degree of uncertainty when it comes to the validity of an arbitration agreement.

V. 选择适当的仲裁地
SELECTING AN APPROPRIATE PLACE OR SEAT OF ARBITRATION

仲裁协议是国际商事仲裁的基石，根据《纽约公约》的规定，仲裁协议是仲裁发生的前提[17]，也是向法院申请承认和执行仲裁裁决的依据[18]。在前述两个场合下，各缔约国法院都需要对是否存在仲裁协议作出评判。当事人之间是否达成仲裁协议，应对当事人的行为能力和仲裁协议的效力两方面进行审查[19]。

Arbitration agreements are the foundation of international commercial arbitration; according to the terms of the New York Convention, arbitration agreements are the precondition to the commencement of arbitration, and are also the basis for any application to the courts for recognition and enforcement of an arbitral award. In each of these contexts, the courts of a signatory state must determine whether an arbitration agreement exists. The determination as to whether the parties have entered into an arbitration agreement should take account of

two aspects: the capacity of the parties to the agreement and the validity of the arbitration agreement.

就当事人的行为能力而言，如果当事人在签订仲裁协议时是处于某种无行为能力的情况之下，则仲裁协议就会归于无效。《纽约公约》没有明确规定在审查当事人是否处于某种无行为能力情况之下应适用何国法律，但根据国际私法的一般原则，当事人的行为能力应适用其属人法，即该当事人国籍所属国或其住所地国的法律。需要特别注意的是，尽管适用于当事人的法律与仲裁协议的准据法可能会是同一个国家的法律，但它们却是两个不同的概念，适用于当事人的法律一般是当事人住所地的法律。在签订仲裁协议时，如果对方当事人是一个自然人，则当事人应根据适用于对方当事人的法律考察其是否具备自然人的完全行为能力；如果对方当事人是一个机构，则当事人应考察对方当事人是否属于一个在其适用法下合法设立并存续的机构，并且还要考察代表对方当事人签署仲裁协议的自然人是否可以代表对方当事人[20]。

Regarding the capacity of the parties to the agreement, if either of the parties are suffering any legal incapacity at the time of entering into the arbitration agreement, then the arbitration agreement will be deemed invalid. The New York Convention does not expressly provide which country's law should be applied in determining whether either of the parties to an arbitration agreement were suffering from legal incapacity of any kind, but based on the general principles of private international law, the legal capacity of the parties to an arbitration agreement should be determined in accordance with their *lex peronalis*, i.e., the laws of their country of nationality or domicile. One point that needs to be borne in mind is that, even though the law applicable to the parties and the governing law of the arbitration agreement will commonly be the laws of the same country, the two concepts are quite distinct, with the law applicable to the parties to the arbitration agreement generally being the law of their place of domicile. When signing the arbitration agreement, if the counter-party to the agreement is a natural person, the party to the arbitration agreement should consider whether the counter-party possesses full legal capacity in accordance with the law applicable to the counter-party; if the counter-party is an institution, then the party to the arbitration agreement should assess whether the counter-party to the agreement constitutes a lawfully established and existing institution in accordance with the law applicable to it, and should also assess whether the natural person executing the arbitration agreement on behalf of the institution is able to represent the counter-party.

就仲裁协议的效力而言，应根据《纽约公约》和仲裁协议准据法的要求对仲裁协议的效力进行考察。《纽约公约》明确规定，仲裁协议的形式应是“书面协议”[21]，并将“书面协议”区分为两大类[22]。第一类是当事人签署的某一合同中包含的仲裁条款或当事人签署的某一单独的仲裁协议；第二类是当事人之间往来的书信、电报中包含的合同之中的仲裁条款或当事人之间往来的书信、电报中包含的单独的仲裁协议。

As regards the validity of the arbitration agreement, an assessment of the validity of the arbitration agreement should be made on the basis of the New York Convention and the requirements of the governing law of the arbitration agreement. The New York Convention expressly states that the arbitration agreements should be "in writing," and divides "written agreements" into two broad categories. The first category consists of an arbitral clause contained in a contract executed by the parties or an independent arbitration agreement executed by the parties; the second category consists of an arbitration clause contained in a contract constituted through an exchange of letters or telegrams between the parties, or a separate arbitration agreement contained in an exchange of letters or telegrams between the parties.

对于第一类“书面协议”，各国的司法实践持比较宽容的态度，并不要求当事人共同在同一份文件上签字，对“文件”的理解也比较宽泛，并不仅指狭义的“合同”或“协议”[23]。对于第二类“书面协议”，当事人必须注意，他们之间的函电往来必须构成要约与承诺，方可在他们之间构成仲裁协议[24]。

The judicial practice in all countries is to adopt a relatively lenient approach in relation to the first category, comprising "written agreements". The parties are generally not required to have signed on the same document, and the interpretation of "document" in this context is relatively broad as well and not limited to “contracts” or “agreements in the narrow sense. With respect to the second category of "written agreements", the parties to an agreement should bear in mind that only where an offer and acceptance is capable of being construed from their exchange of letters or telegrams will they be deemed as having entered into an arbitration agreement.

此外，在实践中还存在一些达成仲裁协议的特殊情形[25]。在这些情况下，当事人一定要根据仲裁协议准据法并结合监督法院及可能的被承认及执行法院的司法实践慎重考察当事人之间是否达成了有效的仲裁协议。例如，中国法在一般情况下不承认“默示”仲裁协议，但在特殊情况下，可以认为当事人之间达成了默示仲裁协议[26]。

Finally, in practice, there a number of special circumstances in which parties will be deemed to have entered into an arbitration agreement. In these circumstances, the parties to the agreement should carefully consider whether they have entered into a valid arbitration agreement, taking into account both the governing law of the arbitration agreement as well as the judicial practice of the supervising court and the court likely to be responsible for recognition and enforcement. For example, "tacit" arbitration agreements are not generally recognized under PRC law, but under certain exceptional circumstances, it is possible for parties to be deemed to have entered into a tacit arbitration agreement.

VI. 在提起仲裁之前按照仲裁协议的约定进行协商
CONDUCTING SETTLEMENT NEGOTIATIONS PRIOR TO THE INITIATION OF ARBITRAL PROCEEDINGS IN ACCORDANCE WITH THE TERMS OF THE ARBITRATION AGREEMENT

当事人通常在仲裁协议中约定应先通过友好协商解决，如果不能通过协商解决，再提交仲裁解决，中国法院也认为当事人应遵守这种约定。在百事（中国）投资有限公司申请承认及执行瑞典斯德哥尔摩商会仲裁院 111/2003 号仲裁裁决案和百事公司申请承认及执行瑞典斯德哥尔摩商会仲裁院 076/2002 号仲裁裁决案中，当事人在仲裁条款中分别约定了争议发生后有 90 日和 45 日的协商期，协商不成的可提交仲裁解决。两案中的申请人在争议发生后没有进行任何协商程序便直接提起了仲裁，并在作出裁决之后向中国法院申请承认及执行仲裁裁决。中国法院认为，“当事人提起仲裁、仲裁庭审查受理案件均属于仲裁程序的一部分……依据当事人在仲裁条款中的约定，如果因合同产生争议，仲裁程序的开始必须具备一定的条件，即在展开协商后四十五天内仍不能依上述方法解决争议，任何一方才可将争议提请仲裁……仲裁庭在当事人未经协商解决争议的情况下即接受百事公司的申请受理仲裁案件，与当事人间的仲裁协议不符，即本案仲裁裁决存在着仲裁程序与仲裁协议不符的情形。依据《纽约公约》第五条第一款第（丁）项的规定，不应得到我国人民法院的承认和执行……”[27]。

The parties to a contract will commonly agree to first attempt an amicable resolution of their dispute, and to only submit their dispute to arbitration in the event that those negotiations are unsuccessful. The Chinese courts also recommend that the parties to a contract follow arrangements of this kind. In a case involving PepsiCo Investment (China) Ltd.'s application for the recognition and enforcement of arbitral award No. 111/2003 issued by the Arbitration Institute of the Stockholm Chamber of Commerce and the case involving PepsiCo's application for the recognition and enforcement of arbitral award No. 076/2002 issued by the Stockholm Chamber of Commerce, the parties to the dispute had agreed in the arbitration clauses of the underlying contracts to a period of negotiations of 90 and 45 days, respectively, with each party entitled to submit the dispute to arbitration in the event that the negotiations proved unsuccessful. The applicant in both cases had submitted the dispute directly to arbitration immediately upon occurrence of the dispute without conducting any negotiations, and had applied to the Chinese courts for the recognition and enforcement of the arbitral award. The Chinese court held: "the initiation of arbitral proceedings by one of the parties and the tribunal's review and acceptance of the case both constitute parts of the arbitral proceedings…The parties had agreed in their arbitration clause that in the event of a dispute arising in respect of the contract, there was a precondition to the commencement of arbitral proceedings, namely that only where the parties had commenced negotiations in respect of the dispute and had been unable to resolve their dispute within a further 45 days was either party permitted to commence arbitral proceedings…The tribunal's acceptance of PepsiCo's arbitration application and initiation of the arbitration proceedings in circumstances where the parties had not attempted to resolve their dispute through negotiations was inconsistent with the arbitral agreement between the parties; in other words, there was an inconsistency in this case between the arbitral proceedings and the terms of the arbitration agreement. In accordance with Article 5(1)(d) of the New York Convention, it should not obtain recognition and enforcement by the Chinese courts".

有鉴于此，当事人在提起仲裁之前，一定要查阅仲裁协议是否存在前置协商的约定，如果存在，就一定要先与对方协商，协商不成，再提起仲裁。在实践中，有的仲裁协议包含前置协商的约定，但该约定非常模糊，如"争议发生后应协商解决，协商不成的可提交仲裁"。类似的约定可能会因为约定不明确而不产生拘束力[28]，但考虑到仲裁裁决被拒绝承认及执行的严重后果，在这种情况下，当事人还是要先向对方发出协商的通知，经过一段合理的时间，如果协商不成，再提起仲裁[29]。

Accordingly, it is important for the parties to an arbitral agreement to first check whether their arbitration agreement provides for pre-arbitration negotiations before initiating arbitral proceedings; if there is such a pre-negotiations provision in place, the parties must first enter into negotiations with the counter-party to the contract, initiating arbitral proceedings only if such negotiations are unsuccessful. In practice, some arbitration agreements contain pre-negotiations provisions that are extremely unclear, such as "any disputes should be resolved through arbitration upon their occurrence; disputes that cannot be resolved through negotiations may be submitted to arbitration." Provisions of this kind can be highly restrictive on the parties owing to their uncertainty, but in light of the serious consequences of refusal of recognition and enforcement, it is recommended that parties in these circumstances issue a formal notice to their contractual counter-party for the commencement of negotiations, and only initiate arbitral proceedings if the negotiations remain unsuccessful following the passage of a reasonable period of time.

VII. 仲裁请求中不得包含中国法律规定的不可仲裁事项
THE REQUEST FOR ARBITRATION MUST NOT CONTAIN MATTERS THAT

ARE NOT ARBITRABLE UNDER CHINESE LAW

根据《纽约公约》第五条第 2 款（甲）项规定[30]，如果争议事项不具有可仲裁性，被申请承认及执行国法院可以拒绝承认及执行仲裁裁决。需要说明的是，被申请承认及执行国法院可以依职权进行审查，而无须被申请执行人请求法院进行审查。另外，在中国“可仲裁性”就属于“公共政策”的一部分，“违反公共政策”的情形实际上就包含了“争议事项不具有可仲裁性”。因此，中国法院将根据中国法律对仲裁裁决是否包含不可仲裁事项进行审查。在中国法下，平等主体的公民、法人和其他组织之间发生的合同纠纷和其他财产权益纠纷，可以仲裁[31]；婚姻、收养、监护、扶养、继承纠纷和依法应当由行政机关处理的行政争议不得仲裁[32]。当事人必须确保仲裁请求中不包含前述事项。

Under Article 5(2) of the New York Convention, recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country. It should be noted here that the courts in the country where recognition and enforcement is sought can undertake a review of these matters based on their own inherent authority, and it is not necessary for the respondent in the enforcement proceedings to make an application to the courts in this respect. In addition, in China “arbitrability” is one aspect of “public policy”, and “violation of public policy” in fact already includes the notion that “the subject matter of the dispute is not capable of arbitration”. Therefore, Chinese courts will always conduct an assessment of whether the arbitral award covers any non-arbitrable issues in accordance with Chinese law. Under Chinese law, contractual disputes and other property disputes arising between citizens, legal persons and other organizations of equal footing are arbitrable; marital disputes and disputes regarding adoption, guardianship, family support and succession, as well administrative disputes that should be handled by administrative authorities in accordance with the law, must not be arbitrated. The parties to a contract must ensure that their arbitral claims do not contain any of the aforesaid matters.

VIII. 仲裁庭不得超裁；申请人应尽可能分项提出仲裁请求并区分各被申请人之间的责任 THE TRIBUNAL MUST NOT EXCEED THE SCOPE OF ITS AUTHORITY; THE APPLICANT SHOULD TO THE EXTENT POSSIBLE ITEMIZE EACH OF ITS ARBITRAL CLAIMS SEPARATELY AND CLEARLY DELINEATE THE LIABILITY OF EACH RESPONDENT

超裁是指仲裁庭超越权限作出裁决，是《纽约公约》明确规定的可以拒绝承认及执行的情形之一[33]。被申请承认及执行国法院应按照《纽约公约》及仲裁协议准据法对仲裁裁决是否存在超裁情形进行审查。按照《纽约公约》的规定，超裁包括超越仲裁协议范围和超越仲裁请求范围两种情形。

The tribunal having issued an arbitral award in excess of the scope of its authority is one of the circumstances listed under the New York Convention justifying refusal to recognize and enforce an arbitral award. The courts in the country where recognition and enforcement is sought should review the award to determine whether the tribunal has exceeded its authority in accordance with the terms of the New York Convention. The provisions of the New York Convention prescribe two ways in which a tribunal can exceed the scope of its authority: by exceeding the scope of the arbitration agreement and by exceeding the scope of the claimant's arbitral claims.

需要说明的是，仲裁协议只约束仲裁协议的当事人，仲裁协议当事人之外的第三方不能仲裁程序的当事人，仲裁裁决也就不能对涉及第三方的事项作出裁决。在美国 GMI 公司申请承认及执行英国伦敦金融交易所仲裁裁决一案[34]中，仲裁协议的当事双方为美国 GMI 公司和芜湖冶炼厂，但美国 GMI 公司将芜湖恒鑫铜业集团有限公司也列为仲裁被申请人。仲裁庭据此对所谓的美国 GMI 公司与芜湖冶炼厂及芜湖恒鑫铜业集团有限公司三方之间的纠纷作出了裁决。最终，中国法院对仲裁裁决中涉及芜湖恒鑫铜业集团有限公司的部分拒绝承认及执行。

In this context, it is important to note that the arbitration agreement is only binding on the immediate parties to the arbitration agreement, and third parties other than the parties to the arbitration agreement cannot become parties to the arbitral proceedings. The arbitral tribunal must not issue rulings in respect of matters involving such third parties. In a case involving the US company GMI's application for the recognition and enforcement of an arbitral award of the London Stock Exchange, the parties to the arbitration agreement were GMI and the Wuhu Smelting Plant, but the US company GMI also included Wuhu Hengxin Copper Industry Group Co., Ltd. as a respondent to the arbitration. On this basis, the arbitral tribunal purported to issue an award in respect of the three-party arbitration between GMI, the Wuhu Smelting Plant and Wuhu Hengxin Copper Industry Group Co., Ltd.. In the end, the Chinese court refused to recognise and enforce that part of the arbitral award that concerned Wuhu Hengxin Copper Industry Group Co., Ltd.

在 Hemofarm DD、MAG 国际贸易公司和苏拉么媒体有限公司申请承认及执行国际商会仲裁院第 13464/MS/JB/JEM 号仲裁裁决一案[35]中，当事人之间的仲裁条款仅约束合资合同当事人就合资事项发生的争议，不能约束被申请人与合资公司之间的租赁合同纠纷。仲裁庭对被申请人与合资公司之间的租赁合同纠纷作出了裁决，超出了合资合同约定的仲裁协议的范围。最终，中国法院拒绝承认及执行该仲裁裁决。

In a case for the recognition and enforcement of arbitral award No.13464/MS/JB/JEM issued by the Court of Arbitration of the International Chamber of Commerce involving Hemofarm DD, MAG International Trading Co. and Sulame Media Co., Ltd., the arbitration clause executed by the parties was only applicable to disputes between the joint venture partners relating to the joint venture, and was not binding in relation to disputes in respect of the lease contract between the respondent and the joint venture company. The tribunal issued a ruling in relation to the lease contract dispute between the respondent and the joint venture company, exceeding the scope of the arbitration clause contained in the joint venture contract. The Chinese courts ultimately refused to recognize and enforce the arbitral award.

如果仲裁庭超裁，被申请承认及执行国法院将审查超裁部分是否可以与未超裁部分区分，如果可以区分，法院就会承认及执行未超裁部分，反之，法院就会拒绝承认及执行整份仲裁裁决。为了避免超裁部分与未超裁部分不可区分而导致仲裁裁决整体被拒绝承认及执行，申请人在提起仲裁时，应尽可能申请人分项提出仲裁请求，在有两个或两个以上被申请人的情况下，应尽可能区分各被申请人之间的责任。仲裁裁决的表述时，也尽可能对各被申请人分开表述，避免统称为被申请人[36]。

Where the tribunal has exceeded the scope of its authority, the courts in the country where recognition and enforcement is sought will consider whether the part of the award exceeding the tribunal's authority can be separated from those parts of the award not exceeding the scope of the tribunal's authority, and if the two parts can be separated, the courts will recognize and enforce the part falling within the scope of the tribunal's authority and refuse to recognize and enforce the part of the

award exceeding the tribunal's authority. In order to avoid the situation where the part of the award exceeding the tribunal's authority becomes inseparable from the remainder of the award, the claimant should when initiating arbitral proceedings ensure that each of its claims is individually itemized to the greatest possible extent and, where there are two or more respondents, should delineate the respective liability of each respondent to the greatest extent possible. The final award should also be addressed to each respondent separately, and avoid addressing all respondents collectively as "the respondents".

IX. 严格遵守正当程序
STRICT OBSERVANCE OF DUE PROCESS

违反正当程序是被申请承认及执行国可以拒绝承认及执行仲裁裁决的事由。仲裁所适用的正当程序源于仲裁协议及其准据法和仲裁程序准据法三个方面。为了避免仲裁裁决被监督法院撤销或者被申请承认及执行国法院拒绝承认及执行，当事人和仲裁庭必须仔细研究仲裁协议及其准据法和仲裁程序准据法，严格遵守它们的程序性规定。

Violation of due process is one of the grounds upon which the country in which recognition and enforcement is sought can refuse to recognize and enforce an arbitral award. The due process applicable to an arbitration originates from three sources: the arbitration agreement itself, the governing law of the arbitration agreement and the governing procedural law of the arbitral proceedings. In order to avoid their arbitral award being annulled by the supervising court or refused recognition and enforcement in the courts where recognition and enforcement is sought, the parties to an arbitral agreement and the tribunal must closely study the arbitral agreement, its governing law and the procedural law governing the arbitration, and strictly observe any procedural requirements.

（一） 仲裁庭或当事人必须就指定仲裁员或仲裁程序给予对方当事人适当的通知，并且对此举证证明。

THE TRIBUNAL OR THE PARTY TO THE ARBITRAL PROCEEDINGS MUST GIVE THE OTHER PARTY TO THE PROCEEDINGS PROPER NOTICE OF THE APPOINTMENT OF ITS ARBITRATOR AND THE EXISTENCE OF THE ARBITRAL PROCEEDINGS, AND MUST ADDUCE EVIDENCE TO PROVE THAT IT HAS DONE SO

《纽约公约》第五条第 1 款（乙）项规定，"受裁决援用之一造未接获关于指派仲裁员或仲裁程序之适当通知，或因他故，致未能申辩者"。据此，仲裁庭和当事人必须就指定仲裁员或仲裁程序给予对方当事人适当的通知，否则，被申请承认及执行国法院就可以拒绝承认及执行仲裁裁决。如果被申请人主张其没有被给予指定仲裁员或者进行仲裁程序的适当通知，那么，申请人就有义务举证证明其或仲裁庭已经给予被申请人该等通知。如果申请人无法举证证明这一点，被申请承认及执行国就可以拒绝承认及执行仲裁裁决。因此，仲裁庭或当事人必须就指定仲裁员或仲裁程序给予对方当事人适当的通知。而所谓适当通知，则是指通知的方式必须符合仲裁程序准据法的规定。

Article 5(1) (b) of the New York Convention provides the following as one of the grounds for refusing to recognize and enforce an arbitral award: "The party against whom the award is invoked was

not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." Based on this provision, the arbitral tribunal or the parties to the proceedings must give the other party to the proceedings proper notice of the appointment of the arbitrator and of the arbitration proceedings; otherwise, the courts in the country where recognition and enforcement is sought may refuse to recognize and enforce the arbitral award. If the respondent in the recognition and enforcement proceedings claims that it has not been given proper notice of the appointment of the arbitrator or the arbitration proceedings, then the claimant in the recognition and enforcement proceedings will have a duty to adduce evidence proving that such notice was provided to the respondent, either by the claimant itself or by the tribunal. If the claimant is unable to adduce evidence proving this fact, the country in which recognition and enforcement is sought can refuse to recognize and enforce the arbitral award. Therefore, either the tribunal or one of the parties to the proceedings must give the other party to the proceedings proper notice of the appointment of the arbitrator and the arbitration proceedings themselves. As for the notion of "proper notice", this means that the form of the notice must comply with the governing procedural law of the arbitration proceedings.

在日本信越化学工业株式会社申请承认及执行日本商事仲裁协会东京 04-05 号仲裁裁决一案[37]中，仲裁程序适用《日本商事仲裁协会商事仲裁规则》和《日本仲裁法》，但仲裁庭没有按照仲裁规则的规定，通知中方当事人作出仲裁裁决的期限，构成了《纽约公约》第五条第 1 款（丁）项规定的“仲裁机关之组成或仲裁程序与各造间之协议不符，或无协议而与仲裁地所在国法律不符者”的情形。另外，在日方当事人对申请事项提出变更的情况下，仲裁庭没有将该变更申请通知中方当事人，实际上剥夺了中方当事人提出申辩的权利和机会，构成了《纽约公约》第五条第 1 款（乙）项规定的“受裁决援用之一造未接获关于指派仲裁员或仲裁程序之适当通知，或因他故，致未能申辩者”的情形。最终，该仲裁裁决被中国法院拒绝承认及执行[38]。

In a case involving the application by the Japanese company Shinetsu for the recognition and enforcement of arbitral award No. 04-05 issued by the Japanese Commercial Arbitration Association in Tokyo, the rules applicable to the arbitral proceedings were the Arbitration Rules of the Japanese Commercial Arbitration Association and the Japanese Arbitration Law, but the tribunal did not inform the Chinese party to the proceedings of the time limit for the rendering of the arbitral award in accordance with the Arbitration Rules, thereby committing a violation of Article 5(1)(b) of the New York Convention ("The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.") In addition, when the Japanese party to the proceedings applied to amend its request for arbitration, the tribunal did not inform the Chinese party of the amendment of the request, depriving the Chinese party of its right and opportunity to submit a defence, in violation of Article 5(1)(b) of the New York Convention ("The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.") The Chinese court ultimately refused to recognize and enforce the arbitral award.

在世界海运管理公司向中国法院申请承认及执行英国伦敦“ABRA 轮 2004 年 12

月 28 日租约”一案[39]中，申请人在仲裁程序中通过电子邮件向被申请人送达仲裁员指定通知，虽不违反仲裁程序准据法 1996 年《英国仲裁法》亦不违反受送达人住所地法律禁止性规定，但申请人应当要求被申请人在收到电子邮件后予以回复。如未回复，申请人，必须提交被申请人收到指定通知的其他证据，否则应当视为未送达。最终，该仲裁裁决因违反《纽约公约》第五条第 1 款（乙）项“受裁决援用之一造未接获关于指派仲裁员或仲裁程序之适当通知，或因他故，致未能申辩者”的规定，被中国法院拒绝承认及执行。

In a case involving the application by the World Maritime Shipping Management Company for the recognition and enforcement of an arbitral award issued in London, England in respect of a lease contract over the ABRA vessel dated 28 December 2004, the claimant had delivered notice of its selection of an arbitrator by email during the course of the arbitration proceedings. Although this did not violate the procedural law governing the arbitration (the 1996 Arbitration Law of England), nor did it violate any mandatory legal provisions applicable at the respondent's place of domicile, the claimant should have requested that the respondent reply upon receipt of the notice regarding the appointment. In the absence of such response, the claimant had to adduce other evidence showing that the respondent had received the appointment notice; otherwise, the respondent would be deemed not to have received the notice. The Chinese court ultimately refused to recognize and enforce the arbitral award in accordance with Article 5(1) (b) of the New York Convention ("The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.")

（二） 严格按照仲裁的正当程序组成仲裁庭并进行仲裁

FORMATION OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRATION IN STRICT OBSERVANCE DUE PROCESS

《纽约公约》第五条第 1 款（丁）项规定，“仲裁机关之组成或仲裁程序与各造间之协议不符，或无协议而与仲裁地所在国法律不符者”。据此，仲裁庭和当事人必须严格按照仲裁的正当程序组成仲裁庭及进行仲裁，否则，被申请承认及执行国法院就可以拒绝承认及执行仲裁裁决。

Article 5(1) (d) of the New York Convention provides the following as one of the grounds for refusing to recognize and enforce an arbitral award: "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." Accordingly, the tribunal and the parties to the arbitration must form the arbitral tribunal and conduct the arbitration in strict observance of due process; otherwise, the courts in the country where enforcement is sought can refuse to recognize and enforce the award.

在邦基农贸新加坡私人有限公司申请承认和执行国际油、油籽和油脂协会仲裁员在英国伦敦作出的仲裁裁决一案[40]中，双方当事人明确约定适用国际油、油籽和油脂协会 2001 年 1 月 1 日修订并生效的《上诉和仲裁规则》以及英国 1996 年《仲裁法》。

《上诉和仲裁规则》第一条（F）款规定，“本协会将通知没有选定仲裁员或者替代仲裁员的一方当事人，本协会将为其指定一名仲裁员，除非该方当事人在本协会向其发出通知后的 14 日内为自己选定了仲裁员”。而本案仲裁庭在原为被申请人广东丰源粮油集团有限公司指定的仲裁员 S. BIGWOOD 先生自动回避后并没有向被申请人广东丰源粮油集团有限公司发出选定替代仲裁员的通知，而是径直为其重新指定了仲裁员。仲裁庭重新指定仲裁员的行为违反了当事人约定的仲裁规则的上述规定，应认定属于《纽约公约》第五条第一款（丁）项规定的“仲裁机关之组成或仲裁程序与各造间协议不符”的情形。据此，中国法院拒绝承认及执行该案仲裁裁决。

In a case involving Bunge Agribusiness Singapore Pte. Ltd.'s application for the recognition and enforcement of an arbitral award rendered in London by an arbitrator of the Federation of Oils, Seeds and Fats Associations ("FOSFA"), the parties to the arbitration agreement had expressly agreed to apply FOSFA's Rules of Arbitrations and Appeals as amended and entering into force on 1 January 2001, as well as the 1996 *Arbitration Law* of England. Rule 1(f) of the Rules of Arbitrations and Appeals provides that: "The Federation will notify the party who has failed to make an appointment or a substitution of its arbitrator, as the case may be, that the Federation intends to make such an appointment unless that party makes its own appointment within 14 consecutive days of notice being dispatched to it by the Federation. In the absence of an appointment being notified to the Federation within the stipulated period the Federation shall make such an appointment." In this case, following the voluntary withdrawal of Mr. S. Bigwood, the arbitrator originally appointed by the Respondent in the proceedings, Guangdong Fengyuan Grain and Oil Group Co., Ltd., the tribunal had not sent notice to the Respondent for the selection of a replacement arbitrator, but had instead directly appointed a replacement arbitrator for the Respondent itself. The tribunal's appointment of the replacement arbitrator in this way violated the above-cited provision of the Rules of Arbitration, thus constituting the circumstances stipulated under Article 5(1) (d) of the New York Convention ("The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement"). Accordingly, the Chinese court refused to recognize and enforce the arbitral award.

自 2000 年以后，与《纽约公约》相关的、上报最高人民法院并决定不予承认及执行外国仲裁裁决的案例共有二十例，其中，违反正当程序（《纽约公约》第五条第 1 款（乙）项）和仲裁庭组成或仲裁程序不当（《纽约公约》第五条第 1 款（丁）项）合计占 50%[41]。可见，这是最容易导致外国仲裁裁决被拒绝承认及执行的原因，值得当事人高度重视。

Since the year 2000 there have been 20 instances of international arbitral awards being reported to the Supreme People's Court and ultimately refused recognition and enforcement on the grounds of violating the New York Convention. 50% of these cases have involved violations of the due process provisions of the New York Convention (Article 5(1)(b)) or failure to comply with due process in the constitution or the tribunal or the arbitration proceedings (Article 5(1)(f)). It is therefore clear that it is easy for these to become grounds for the refusal of recognition and enforcement of international arbitral awards, and the parties to an arbitration should therefore place high importance on them.

X. 仲裁裁决不得违反中国的公共政策

ARBITRAL AWARDS MUST NOT VIOLATE CHINESE PUBLIC POLICY

公共政策是各国国内法上的一项重要制度。在国际私法上，公共政策通常是指一国法院依其冲突规范本应适用外国法时，因其适用会与法院地国的重大利益、基本政策、道德的基本观念或法律的基本原则相抵触而排除其适用的一种保留制度[42]。根据《纽约公约》第五条第 2 款（乙）项规定，在承认及执行外国仲裁裁决的案件中，如果被申请承认及执行国法院认为，承认及执行外国仲裁裁决有悖于该国的公共政策，法院即可依职权作出拒绝承认与执行该裁决的裁定。中国法对公共政策没有作出规定，它属于典型的法官自由裁量权范畴。

Public policy is an important doctrine under the domestic law of all countries. Under international law, "public policy" commonly refers to situations where, based purely on their own conflict rules, the courts of a particular jurisdiction should apply foreign laws, but where, because the application of such foreign laws would be inconsistent with significant interests, fundamental policies and basic moral principles of the jurisdiction in which the court is located, or inconsistent with the fundamental principles of its legal system, the court decides to exclude the application of the foreign laws. In accordance with Article V(2)(b) of the New York Convention, the courts in the country where enforcement is sought can issue a ruling refusing to recognize and enforce a foreign arbitral award where it finds that the recognition or enforcement of the award would be contrary to the public policy of that country. There is no provision relating to the definition of public policy under PRC law, and the concept is a classic example of a concept subject to judicial discretion.

1. 违反中国法律的强制性规定不构成对中国公共政策的违反
VIOLATION OF MANDATORY PROVISIONS OF PRC LAW DOES NOT CONSTITUTE A VIOLATION OF CHINESE PUBLIC POLICY

案例一，在日本三井物产株式会社申请承认及执行瑞典斯德哥尔摩商会仲裁院 060/1999 号仲裁裁决一案[43]中，最高人民法院在其复函中指出，“（被申请执行人）海南省纺织工业总公司作为国有企业，在未经国家外汇管理部门批准并办理外债登记手续的情况下，对日本三井物产株式会社直接承担债务，违反了我国有关外债审批及登记的法律规定和国家的外汇管理政策。但是，对于行政法规和部门规章中强制性规定的违反，并不当然构成对我国公共政策的违反”。

In the first case, involving the application by the Japanese company Mitsui & Co., Ltd. for the recognition and enforcement of Award No. 060/1999 issued by the Arbitration Institute of the Stockholm Chamber of Commerce, the Supreme People's Court stated in its reply letter that: "Hainan Textile Industrial General Corporation (the Respondent in the recognition and enforcement proceedings), as a state-owned enterprise, directly undertook the debts of Mitsui & Co., Ltd. without obtaining the approval of the State Administration for Foreign Exchange and without conducting the relevant procedures for the registration of foreign debt, in violation of Chinese laws and regulations regarding the approval and registration of foreign debt and national policy relating to the administration of foreign exchange. Nevertheless, the violation of mandatory provisions of administrative laws and regulations and departmental rules does not necessarily constitute a violation of Chinese public policy."

案例二，在 ED&F 曼氏（香港）有限公司申请承认及执行伦敦糖业协会第 158 号仲裁裁决一案[44]中，最高人民法院在其复函中指出，“依照我国有关法律法规的规定，境内企业未经批准不得擅自从事境外期货交易。中国糖业酒类集团公司未经批准擅自从事境外期货交易的行为，依照中国法律无疑应认定为无效。但违反我国法律的强制性规定不能完全等同于违反我国的公共政策。因此，本案亦不存在 1958 年《承认与执行外国仲裁裁决公约》第五条第二款规定的不可仲裁及承认与执行该判决将违反我国公共政策的情形”。

In the second case, involving the application by ED & F Man (Hong Kong) Co., Ltd. for the enforcement of Award No. 158 issued by the Sugar Association of London, the Supreme People's Court stated in its reply letter: "under relevant PRC laws and regulations, domestic enterprises are prohibited from conducting offshore futures transactions without approval. The conduct of China National Sugar & Wines Group Co. in entering into offshore futures transactions without approval would without doubt be deemed invalid under PRC law. However, the violation of mandatory provisions of Chinese law cannot be wholly equated with the violation of Chinese public policy. Accordingly, the circumstances stipulated under Article V(2) of the New York Convention – that the award involves non-arbitrable matters and its enforcement and recognition would constitute a violation of Chinese public policy – do not exist in this case."

2. 侵犯中国的司法主权和中国法院的司法管辖权构成对中国公共政策的违反
VIOLATION OF CHINESE JUDICIAL SOVEREIGNTY AND THE JURISDICTION OF THE CHINESE COURTS CONSTITUTES A VIOLATION OF CHINESE PUBLIC POLICY

在 Hemofarm DD、MAG 国际贸易公司和苏拉么媒体有限公司申请承认及执行国际商会仲裁院第 13464/MS/JB/JEM 号仲裁裁决一案[45]中，最高人民法院在复函中指出，“在中国有关法院就济南永宁制药股份有限公司与合资公司济南——海慕法姆制药有限公司之间的租赁合同纠纷裁定对合资公司的财产进行保全并作出判决的情况下，国际商会仲裁院再对济南永宁制药股份有限公司与合资公司济南——海慕法姆制药有限公司之间的租赁合同纠纷进行审理并裁决，侵犯了中国的司法主权和中国法院的司法管辖权”。

In a case involving application by Hemofarm DD, MAG International Trading Co., Ltd. and Sulame Media Co., Ltd. for the recognition and enforcement of Arbitral Award No. 13464/MS/JB/JEM issued by the International Court of Arbitration of the International Chamber of Commerce, the Supreme People's Court indicated in its reply letter that: "in circumstances where the relevant court in China had already issued an assets preservation order against the joint venture company and issued a judgment in respect of the lease contract dispute between Jinan Yongning Pharmaceutical Co., Ltd. and the joint venture company (Jinan Hemofarm Pharmaceutical Co., Ltd.), the conduct of the Court of Arbitration of the International Chamber of Commerce in rehearing and rendering an award in respect of the lease contract dispute between Jinan Yongning Pharmaceutical Co., Ltd. and the joint venture company (Jinan Hemofarm Pharmacetucal Co., Ltd.) constituted a violation of China's judicial sovereignty and the jurisdiction of the Chinese courts."

3. 不能以仲裁实体结果是否公平合理作为认定承认和执行仲裁裁决是否违反我国公共政策的标准

THE FAIRNESS AND REASONABLENESS OF THE SUBSTANTIVE OUTCOME OF THE ARBITRATION CANNOT BE USED AS THE STANDARD FOR DETERMINING WHETHER THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD WOULD VIOLATE CHINESE PUBLIC POLICY

在 GRD MINPROC 有限公司申请承认及执行瑞典斯德哥尔摩商会仲裁院仲裁裁决一案[46]中，上海市高级人民法院认为，“当事人双方的争议起源于买卖的特殊生产设备不能达到行业安全生产标准，从而对于被申请人厂区环境和职工身体造成严重污染和伤害，进而有损公共利益而被长期关闭和停止使用，由此导致被申请人合同目的的实质落空和经济利益的重大损失。而对此非常重要情节，仲裁院竟然未能给予应有的注意，而仅仅是简单按照合同形式条款来判定卖方提供的设备没有构成违约，显然这一做法有悖于公平正义的仲裁精神，并且客观上造成不利于我国社会公共利益的后果。而所有这些，又恰恰与《纽约公约》第 5 条第 2 款第（2）项中规定的条件相符，因此，对于该仲裁裁决应当不予承认和执行”。

In a case involving the application by GRD Minproc Co., Ltd. for the recognition and enforcement of an arbitral award issued by the Arbitration Institute of the Stockholm Chamber of Commerce, the Shanghai Higher People’s Court held: “the parties’ dispute originated in the fact that the special manufacturing equipment purchased and sold did not meet the industry’s safe manufacturing standards, thereby causing serious pollution and damage to the Respondent’s factory environment and the health of its employees. This then resulted in the long-term closure and discontinued use of the Respondent’s factory on the grounds of harm to the public, thereby resulting in the Respondent’s inability to realize the purpose of the contract and significant damage to its economic interests. However, the arbitral tribunal did not give due consideration to these important circumstances, instead concluding that the equipment provided by the seller did not constitute a breach of contract in strict application of the formal terms of the contract. This approach was clearly inconsistent with the spirit of fairness and justice underlying the arbitration process, and in an objective sense led to consequences that were adverse to China’s public interest. All of the foregoing factors satisfy the condition prescribed under Article V (2) (b) of the New York Convention, and this arbitral award should therefore not be recognized and enforced.”

最高人民法院在复函中指出，“关于本案所涉仲裁裁决的承认和执行是否将违反我国公共政策的问题。（被申请人）飞轮公司从境外购买的设备经过有关主管部门审批同意，并非我国禁止进口的设备。该设备在安装、调试、运转的过程中造成环境污染，其原因可能是多方面的。在飞轮公司根据合同中有效的仲裁条款就设备质量问题提请仲裁的情况下，仲裁庭对设备质量作出了评判，这是仲裁庭的权力，也是当事人通过仲裁解决纠纷所应当承受的结果。不能以仲裁实体结果是否公平合理作为认定承认和执行仲裁裁决是否违反我国公共政策的标准。承认和执行本案所涉仲裁裁决并不构成对我国社会根本利益、法律基本原则或者善良风俗的违反，因此，本案不存在《纽约公约》第五条第二款第二项规定的情形。”

In its reply letter, the Supreme People’s Court stated: “*On the issue of whether the recognition and enforcement of the arbitral award in question would be a violation of Chinese public policy.* (The Respondent) Feilun Company obtained the approval of the relevant government departments for its

procurement of the equipment from overseas, and the equipment was not of a kind the importation of which is prohibited. The equipment caused environmental pollution during the course of installation, testing and operation, and the reasons for this were probably multi-dimensional. Following Feilun Company's application for arbitration in respect of the quality issues surrounding the equipment in accordance with the valid arbitration clause in the contract, the arbitral tribunal conducted an assessment of the quality of the equipment, which was both within the tribunal's rights and precisely what the parties should have expected as the outcome of the resolution of their dispute through arbitration. The fairness and reasonableness of the substantive outcome of the arbitration cannot be used as the standard for determining whether the recognition and enforcement of an arbitral award would violate Chinese public policy. The recognition and enforcement of the arbitral award at issue in this case does not constitute a violation of China's fundamental community interests, nor of the fundamental principles of its legal system, nor of good morals. Accordingly, the circumstances under Article V (2) (b) of the New York Convention do not apply to this case."

4. 仲裁裁决客观上促成了外国企业向中国市场大举低价倾销，合同条件违反中国法律的基本原则 – 公平原则没有构成对中国公共政策的违反

THE FACT THAT AN ARBITRAL AWARD FACILITATES SIGNIFICANT DUMPING BY A FOREIGN COMPANY ON THE CHINESE MARKET OR VIOLATES BASIC PRINCIPLES OF PRC LAW OR PRINCIPLES OF FAIRNESS DOES NOT CONSTITUTE A VIOLATION OF CHINESE PUBLIC POLICY

在日本信越化学工业株式会社申请承认及执行日本商事仲裁协会东京 05-03 号仲裁裁决一案[47]中，天津市高级人民法院在向最高人民法院请示的报告中认为，"申请执行人日本信越化学工业株式会社向日本国内光纤企业的供货价格远远低于向天大天财公司等中国企业的供货价格，其上述不正当行为使日本企业制造成本远比中国企业要低得多，客观上促成了日本企业向中国市场大举低价倾销；被申请执行人天津天大天财股份有限公司在国外包括日本在内的企业大举倾销行为和上游供应商高价强迫采购的双重挤压下，遭受严重损害、出现巨额亏损、生产难以为继。信越公司在此情况下要求天大天财公司给其巨额补偿，而仲裁庭却支持了信越公司的仲裁请求的做法应当认定违反了我国的公共政策"。另外，双方签订的长达 5 年的不可撤销信用证的长期担保销售和采购协议不公平，"应当据此认定仲裁裁决违反了我国法律的最基本原则—公平原则"。

In the abovementioned case involving the application by the Japanese company Shin-Etsu Chemical Co., Ltd. for the recognition and enforcement of arbitral award No. 04-05 issued by the Japanese Commercial Arbitration Association in Tokyo, the Tianjin Higher People's Court, in its report to the Supreme People's Court requesting guidance, stated that: "the price offered by the applicant for enforcement, Shin-Etsu Chemical Co., Ltd., to domestic Japanese fiber-optics companies was far lower than the price offered to Genius Co., Ltd. and other Chinese companies, and the Respondent's inappropriate conduct in this regard meant that the manufacturing costs of Japanese companies were far lower than those of Chinese companies, objectively facilitating significant dumping by Japanese companies on the Chinese market; under the combined pressure of the significant dumping carried out by these foreign (including Japanese) companies and its being forced to purchase upstream inputs at high prices, the Respondent, Genius Co., Ltd., suffered serious harm, recording huge losses and ultimately

falling into a position where it found it difficult to continue its manufacturing operations. The decision of the arbitrator in these circumstances to support Shin-Etsu's request for huge amounts of compensation from Genius Co., Ltd. should be deemed a violation of Chinese public policy." In addition, the Tianjin Higher People's Court found that the irrevocable letter of credit executed by the parties guaranteeing the sale and purchase agreement for a term of more than five years was unfair, and on that basis concluded that "the arbitral award violation the most fundamental principle of PRC law – the principle of fairness."

最高人民法院在复函中对天津市高级人民法院上述违反公共政策的意见不置可否，最终以仲裁裁决存在《纽约公约》第五条第 1 款（乙）、（丁）项规定的情形，指示天津市高级人民法院不应予以承认。

The Supreme People's Court declined to take a position in respect of the Tianjin Higher People's Court's conclusion on the grounds of violation of public policy, ultimately instructing the Tianjin Higher People's Court that the award should be refused recognition on the grounds of violation of Articles V(1)(b) and V(1)(d) of the New York Convention.

总体而言，从中国的司法实践来看，中国法院的态度是"慎用公共政策"，一般不会以此为由拒绝承认及执行外国仲裁裁决。

In conclusion, therefore, judicial practice in China suggests that the Chinese courts adopt a cautious approach to the application of public policy grounds, and will generally not use public policy as a ground for refusing to recognize and enforce an arbitral award.

XI. 在中国法律规定的期限内向中国法院申请承认及执行 APPLYING FOR RECOGNITION AND ENFORCEMENT WITHIN THE PERIOD PRESCRIBED UNDER PRC LAW

《纽约公约》规定了可以拒绝承认及执行的情形，但没有规定具体的承认及执行程序。按照《纽约公约》第三条规定，当事人向某个国家的法院申请承认及执行一个外国仲裁裁决，该法院就应按照该国家的程序规则进行承认及执行该裁决，但该法院承认及执行外国仲裁裁决的程序不得比其承认及执行内仲裁裁决的程序费用更繁琐，也不得收取更高的费用[48]。

The New York Convention prescribes the circumstances in which recognition and enforcement can be refused, but it does not prescribe the specific procedures for recognition and enforcement. Under Article III of the New York Convention, where a party applies to the courts in a certain country for the recognition and enforcement of an arbitral award issued in its favor, the courts should recognize the arbitral award as binding and enforce the award in accordance with the rules of procedure in that jurisdiction. However, Article III further provides that there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of foreign arbitral awards than are imposed on the recognition or enforcement of domestic arbitral awards.

在中国法下，当事人应当在两年内向中国法院申请承认及执行仲裁裁决，超过该两年期限，法院就会裁定不予受理[49]。但需要特别说明的是，如果当事人在上述期限内提出了承认及执行的申请，则即使其提交的材料不完备，中国法院也不应直接裁定拒绝承认及执

行外国仲裁裁决，而应该明确告知当事人，并限定一合理的时间让其补正，如其在限定的合理时间内拒绝补正，则应考虑以其申请不符合立案条件为由驳回其申请[50]。

Under Chinese law, a party to a dispute must apply to the Chinese courts for recognition and enforcement of its arbitral award within two years; if that time limit is exceeded, the Chinese courts will not accept the case for hearing. However, it should be noted that where a party submits its application for recognition and enforcement of an award within the above time limit, but fails to provide sufficient supporting materials with its application, the Chinese courts should not directly refuse recognition and enforcement of the award, but should rather expressly inform the applicant and prescribe a reasonable time for the applicant to supplement its materials; if the applicant refuses to supplement its materials within such reasonable time, then the court should consider rejecting the application on the grounds that it does not meet the condition for acceptance.

上述两年期限从仲裁裁决规定履行期间的最后一日起算；仲裁裁决规定分期履行的，从规定的每次履行期间的最后一日起计算；仲裁裁决未规定履行期间的，从仲裁裁决生效之日起计算[51]。申请承认及执行时效的中止、中断，适用法律有关诉讼时效中止、中断的规定。

The above-mentioned two year period is calculated from the final day of the period prescribed for the performance of the arbitral award; where the arbitral award provides for performance in installments, the period will be calculated from the final day of each period for performance; where the arbitral award does not prescribe a period for performance, the two year enforcement period will be calculated from the day that the award enters into force. The laws applying to the suspension and termination of the statute of limitations in respect of civil litigation are also applicable to the suspension and termination of the period for the recognition and enforcement of arbitral awards.

尽管按照《纽约公约》规定，如果一个外国仲裁裁决尚无拘束力、被撤销或停止执行，经对方当事人请求并提出证据证明，被请求承认及执行国可以拒绝承认及执行，但需要特别说明的是，中国法院认为，一方当事人向仲裁地法院起诉撤销外国仲裁裁决及外国法院的审理及裁决不构成申请人申请承认及执行仲裁裁决期限中断或延长的理由[52]。因此，即使对方当事人在仲裁裁决作出之后向仲裁地法院提起诉讼，请求法院撤销仲裁裁决，当事人也要尽快在上述两年期限内向中国管辖法院申请承认及执行，不要等到仲裁地法院审理完毕作出维持裁决之后再向中国管辖法院申请承认及执行。

Even though the New York Convention provides that if an arbitral award is not yet binding, has been set aside or if the enforcement of the award has been suspended, the country in which recognition and enforcement is sought can refuse recognition and enforcement of the award upon the application of the other party to the proceedings and the adduction of evidence in proof, one must bear in mind that the Chinese courts' position is that the initiation of proceedings for the setting aside of the award by one of the parties to the arbitration in the courts of the seat of arbitration, and the hearing and issuance of a judgment by those foreign courts in respect of that party's application, does not constitute a basis for suspending or extending the time limit for the application for recognition and enforcement of the award by the applicant. Therefore, even if following the issuance of the arbitral award the counter-party to the proceedings initiates proceedings before the courts of the seat of arbitration requesting the setting aside of the award, it is imperative for the successful party under the award to apply for recognition and enforcement of the award in the courts with relevant jurisdiction in China as quickly as possible within the abovementioned two year time limit, rather than waiting for the courts in the seat of arbitration to finish hearing the dispute and issue a judgment upholding the award

before applying to the Chinese courts with relevant jurisdiction for the recognition and enforcement of the award.

《纽约公约》第四条规定了当事人申请承认及执行仲裁裁决应提交的文书要求，包括应提交仲裁裁决的正本或正式副本、仲裁协议的原本或正式副本，以及需要的译本等。在中国法下，向中国法院申请承认及执行外国仲裁裁决需要提交以下文件：

Article 4 of the New York Convention prescribes the documentary requirements for an application for recognition and enforcement of an arbitral award, which include the original award or a duly certified copy, the original arbitration agreement or a duly certified copy and a translation of the documents where necessary. In China, the following documents need to be submitted in an application for recognition and enforcement of a foreign arbitral award:

(1) 经仲裁地的公证机关公证并经当地中国使馆或领馆认证的仲裁裁决正本或正式副本；

The original arbitral award or a duly certified copy notarized by a public notary in the seat of arbitration and authenticated by the local Chinese embassy or consulate in the seat of arbitration;

(2) 经申请人住所地的公证机关公证和当地中国使馆或领馆认证的对中国代理律师的特别授权书、申请人公司登记资料和申请案件的法定代表人身份证明、申请书、仲裁协议书或含有仲裁条款的合同书之正本或正式副本；及

An original or duly certified copy of: a power of attorney issued to the applicant's legal counsel; the applicant company's registration documents; proof of identity for the company's legal representative in the case; the request for arbitration; and the arbitration agreement or the contract in which the arbitration clause is contained, each notarized by a public notary in the applicant's place of domicile and authenticated by the local Chinese embassy or consulate in the applicant's place of domicile; and

(3) 经中国法院指定的翻译公司翻译的上述文件中非中文文件的中文译文[53]。

Chinese translations of any of the above documents that are not in the Chinese language by a translation company designated by the Chinese court.

由于中国法院受理的承认及执行外国仲裁裁决案例非常少，绝大多数法院没有这方面的经验，在接到这样的案子时，往往心存疑虑。为了促使法院尽快受理，当事人要在申请书中详细说明仲裁裁决符合《纽约公约》规定的承认及执行条件并列出相关依据。

Owing to the fact that the Chinese courts receive and hear an extremely small number of cases involving the recognition and enforcement of foreign arbitral awards, and the vast majority of courts are inexperienced in this respect, Chinese courts often have considerable doubts when accepting and hearing cases of this kind. In order to facilitate the swift acceptance of the case by the courts, the applicant should explain in detail in its application that the arbitral award fulfills the conditions for recognition and enforcement set out in the New York Convention and provide corresponding evidence.

综上，外国当事人在涉华国际商事仲裁中的法律风险控制应该在签订仲裁协议时就开始，而不能等到向中国法院申请承认及执行再进行。另外，外国当事人还需要注意的是，《纽约公约》第五条规定的被请求承认及执行仲裁裁决国可以拒绝承认及执行的情形的情形分成两类。第五条第 1 款规定的是经当事人请求并提供证据证明，被请求承认及执行国方可拒绝承认及执行的情形；第 2 款规定的是被请求承认及执行国可以自行认定并拒绝承认及执行的情形。在实际案例中，某种情形可能既属于第一类情形，也可能属于第二类情形。例如，在中国“可仲裁性”就属于“公共政策”的一部分，“违反公共政策”的情形实际上就包含了“争议事项不具有可仲裁性”。

In conclusion, risk management by foreign parties in China-related commercial arbitrations should start from the time of executing the arbitral agreement; foreign parties cannot wait until applying to the Chinese courts for recognition and enforcement of their awards before implementing a risk management strategy. In addition, foreign parties should also note that the circumstances under which recognition and enforcement of foreign arbitral awards can be refused enforcement under Article V of the New York can be classified into two kinds. The provisions under Article V (1) list circumstances in which the country in which recognition and enforcement is sought can refuse recognition and enforcement only upon application by the parties, whilst Article V (2) lists circumstances in which the country in which recognition and enforcement is sought can itself decide to refuse recognition and enforcement in the absence of any application by the respondent. In practice, there will be some cases that fall under both categories. For example, in China, “arbitrability” is one aspect of “public policy”; i.e., the “violation of public policy” in fact includes circumstances where “the dispute is not capable of arbitration.”

之所以区分上述两类情形，是因为在第一类规定的情形下，如果对方当事人没有请求或者虽然请求但为提供证据证明，被请求承认及执行国不得自行认定并拒绝承认及执行。由于中国法院审理的承认及执行外国仲裁裁决案例非常少，绝大多数法院没有这方面的经验，因此，外国当事人在向中国法院申请承认及执行仲裁裁决时，一定要注意这一点[54]。

The reason for making the above distinction is that under the circumstances falling within the first category, if the respondent in the recognition and enforcement proceedings does not expressly request the application of the relevant provisions or provides insufficient evidence in proof of its request, the country in which recognition and enforcement is sought cannot itself to decide to refuse recognition and enforcement on these grounds. It is important for foreign parties to bear this in mind when applying to the Chinese courts for the recognition and enforcement of foreign arbitral awards, as the vast majority of Chinese courts do not have any experience in cases of this kind.

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[1] 根据《中华人民共和国民事诉讼法》第二百六十七条，国外仲裁机构的裁决，需要中华人民共和国人民法院承认和执行的，应当由当事人直接向被执行人住所地或者其财产所在地的中级人民法院申请，人民法院应当依照中华人民共和国缔结或者参加的国际条约，或者按照互惠原则办理。

According to Article 267 of the *Civil Procedure Law of the People's Republic of China*: "if an award made by a foreign arbitration institution needs the recognition and enforcement of a people's court of the People's Republic of China, the party shall directly apply to the intermediate people's court located in the place where the party subject to the enforcement has its domicile or where its property is located. The people's court shall deal with the matter according to the relevant provisions of the international treaties concluded or acceded to by the People's Republic of China or on the principle of reciprocity."

1986 年，中国决定加入《纽约公约》，该公约于 1987 年 4 月 22 日对中国生效。

In 1986, China decided to join the New York Convention, and the New York Convention entered into force in respect of China on 22 April 1987.

根据《最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知》（简称"《执行<纽约公约>的通知》"）第一条，根据我国加入该公约时所作的互惠保留声明，我国对在另一缔约国领土内作出的仲裁裁决的承认和执行适用该公约。

According to Article 1 of the *Circular of the Supreme People's Court on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered into by China* ("**Notice for the Implementation of the New York Convention**"): "In accordance with the reciprocity reservation statement made by China when entering the Convention, this Convention shall apply to the recognition and enforcement of an arbitral award made in the territory of another Contracting State."

[2] 例如，如果当事人选择国际条约或国际商事惯例作为商事合同的准据法，而它们又往往不包含仲裁协议效力的规定，在这种情况下，当事人就不得不另行选择仲裁协议的准据法，否则，仲裁庭也就不得不按照其他的法律来审查仲裁协议的效力。

For example, if the parties to a contract choose an international treaty or international commercial practice as the governing law of their commercial contract, because neither of these sources of law ever include provisions regarding the governing law for an arbitration agreement, the parties to the contract will have no choice but to choose a separate law as the governing law of the arbitration agreement. If the parties fail to do so, the arbitral tribunal will have no choice but to review the validity of the arbitration agreement in accordance with other laws.

[3] 根据《纽约公约》第五条第 1 款（甲）项规定，"仲裁协议的准据法依次为(1)当事人选定适用的法律；或者(2)在当事人没有选定时，作出裁决的国家的法律"

According to Article V (1) (a) of the *New York Convention*, the governing law of the arbitration agreement shall be (a) the law to which the parties have subjected it; or (b) failing any indication thereon, the law of the country where the arbitral award was made.

[4] 除《纽约公约之外》，1985 年《联合国国际商事仲裁示范法》、1961 年《关于国际商事仲裁的欧洲公约》、1965 年《关于解决各国和其他国家国民之间投资争端的公约》、1967 年《联合国国际贸易法委员会仲裁规则》及 1975 年《美洲国家间关于国际商事仲裁的公约》都有类似规定。

In addition to the *New York Convention*, the 1985 *UN Model Law on International Commercial Arbitration*, the 1961 *European Convention on International Commercial Arbitration*, the 1965 *Convention on the Settlement of Investment Disputes Between States*, the 1967 *UNCITRAL Arbitration Rules* and the 1975 *Inter-American Convention on International Commercial Arbitration* all contain similar provisions.

[5] 《最高人民法院关于确认仲裁协议效力请示的复函》([2006]民四他字第 1 号)。

Letter of Reply of the Supreme People's Court in respect of the Request for Guidance on the Validity of an Arbitration Agreement ([2006] Min Si Ta Zi No.1).

[6] 该款规定，"在中华人民共和国境内履行的中外合资经营企业合同、中外合作经营企业合同、中外合作勘探开发自然资源合同，适用中华人民共和国法律"。

This Article provides: "For a Chinese-foreign equity joint venture contract, Chinese-foreign contractual joint venture contract, or a contract for Chinese-foreign joint exploration and development of natural resources which is performed within the territory of the People's Republic of China, the law of the People's Republic of China shall be applied."

[7] 在“德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司申请确认仲裁协议效力案”中，当事人约定的仲裁条款为“Arbitration: ICC Rules, Shanghai shall apply”。最高人民法院在复函中指出，当事人没有约定仲裁条款的准据法，应当按照仲裁地的法律认定仲裁条款的效力，即本案应当根据中国法律确认所涉仲裁条款的效力。由于本案所涉仲裁条款没有明确指出仲裁机构，因此，应当认定该仲裁条款无效。《最高人民法院关于德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司申请确认仲裁协议效力一案的请示的复函》（[2003]民四他字第 23 号）。

In a case involving an application by Zublin International GmbH and Wuxi Woke General Engineering Rubber Co., Ltd. for confirmation of the validity of an arbitration agreement, the arbitration clause the parties had entered into stated “Arbitration: ICC Rules, Shanghai shall apply". In its Letter of Reply, the Supreme People’s Court held that since the parties to the agreement had not specified a governing law in their arbitration agreement, the validity of the arbitration agreement should be determined in accordance with the law of the seat of arbitration, i.e., the validity of the arbitration clause should be determined on the basis of PRC law. Because the relevant arbitration clause had not indicated an arbitral institution, the Court held that the arbitration agreement should therefore be deemed invalid. *Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case concerning the Application of Zublin International GmbH and Wuxi Woke General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement* ([2003] Min Si Ta Zi No.23).

[8] 在“中海发展股份有限公司货轮公司申请承认伦敦仲裁裁决案”中，当事人对于“在香港仲裁，适用英国法”的仲裁条款的准据法持不同意见。一方认为仲裁条款的准据法的是英国法，另一方认为仲裁条款没有明确约定准据法，应按照仲裁地确定准据法，即仲裁条款的准据法是仲裁地香港的法律。英国法与香港法关于仲裁程序的规定不同，该仲裁是按照英国法在伦敦进行的仲裁，如果准据法是香港法，其仲裁程序就违反了准据法。最高人民法院在复函中指出，仲裁条款的准据法应为香港法，仲裁程序违反了准据法，中国法院应拒绝承认及执行仲裁裁决。《最高人民法院关于对中海发展股份有限公司货轮公司申请承认伦敦仲裁裁决一案的请示报告的答复》。

In a case involving the application by China Shipping Development Co., Ltd. Tramp Co. for the recognition of a London arbitral award, the parties held differing views as to the governing law of an arbitration clause which read “arbitration in Hong Kong in accordance with English law”. One of the parties argued that the governing law of the arbitration clause was English law, whilst the other party argued that since the arbitration agreement had not expressly provided for the governing law, the governing law should be determined on the basis of the seat of arbitration, i.e., that the governing law of the arbitration agreement was Hong Kong law. The provisions of English law and Hong Kong law relating to arbitral procedures are different, and the arbitration had been conducted in London in accordance with English law. If the proper governing law was Hong Kong law, the arbitral procedures had been conducted in violation of the governing law. In its Letter of Reply, the Supreme People’s Court indicated that the governing law of the arbitration agreement should be Hong Kong law, and since the arbitral procedures had violated the governing law, the Chinese courts should refuse to recognize and enforce the award. *Letter of Reply of the Supreme People’s Court to the Request for Instructions on the Case concerning the Application by China Shipping Development Co., Ltd. Tramp Co. for the recognition of an arbitral award issued in London.*

[9] 该条规定，“第二条所称协定之当事人依对其适用之法律有某种无行为能力情形者，或该项协定依当事人作为协定准据之法律系属无效，或未指明以何法律为准时，依裁决地所在国法律系属无效者”。

That provision states: “ 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.”

[10] 在《关于福建省生产资料总公司与金鸽航运有限公司国际海运纠纷一案中提单仲裁条款效力问题的复函》（法函[1995]135 号）中，最高人民法院指出，“涉外案件，当事人事先在合同中约定或争议发生后约定由国外的临时仲裁机构或非常设仲裁机构仲裁的，原则上应当承认该仲裁条款的效力,法院不再受理当事人的起诉”。

In the *Letter of Reply of the Supreme People’s Court to the Request for Instructions on the Case Involving the Shipping Dispute Between the Fujian Province Manufacturing Materials General Co. and Golden Dove Shipping Co., Ltd. over the Validity of the Arbitration Clause in the Bill of Lading* (Fa Han [1995] No.135), the Supreme People’s Court stated: “in a foreign-related case, if the parties to the dispute provide in their contract or agree following the advent of their dispute for arbitration to be conducted by a foreign ad hoc arbitral institution or a non-permanent arbitral institution, the validity of the arbitration agreement should in principle be upheld, and the courts should not thereafter accept proceedings initiated by the parties.”

[11] 《中华人民共和国民事诉讼法》第二百一十三条使用的是“依法设立的仲裁机构的裁决”,、第二百五十八条使用的是的“中华人民共和国涉外仲裁机构作出的裁决”，第二百六十七条使用的是“国外仲裁机构的裁决”。《中华人民共和国仲裁法》使用的都是“仲裁委员会”。本文中，“仲裁机构”与“仲裁委员会”二者通用。

The term used in Article 213 of the *Civil Procedure Law of the People’s Republic of China* is “an award made by an arbitration

institution that was established in accordance with law", whilst the term used in Article 258 is "an arbitral award made by a foreign-related arbitral institution of the People's Republic of China", and the term used in Article 267 is "an award of a foreign arbitral institution". The term employed throughout the *Arbitration Law of the People's Republic of China* is "arbitration commission". In this article, "arbitral institution: and "arbitration commission" will be used interchangeably.

[12] 赵秀文：《从奥特克案看外国临时仲裁裁决在我国的承认与执行》，载《政法论丛》，2007 年 03 期。

ZHAO Xiuwen, "An analysis of the recognition and enforcement of foreign ad hoc arbitral awards in China in the context of the Aoetker case," *Journal of Political Science and Law*, Volume 3, 2007.

[13] 在"广州远洋运输公司申请承认及执行伦敦临时仲裁庭仲裁裁决并划拨被申请人期得财产抵偿债务案"中，广州海事法院受理申请后经审查认为：申请人和被申请人在三份租船合同中均定有仲裁条款，约定产生纠纷在英国伦敦仲裁，适用英国法律。广州海事法院不能依据中国法以被申请承认及执行的仲裁裁决属于临时仲裁裁决而拒绝承认及执行。因此，不能根据该案得出中国法承认临时仲裁。来源：http://law.people.com.cn/showdetail.action?id=2677519，访问日期：2012 年 8 月 20 日。

In a case involving the application by the Guangzhou Ocean Shipping Co., Ltd. for the recognition and enforcement of the arbitral award issued by an ad hoc arbitral institution in London, the Guangzhou Maritime Court, upon accepting and reviewing the case, found that the Claimant and the Respondent had entered into arbitration agreements in three ship leasing contracts, each of which provided for arbitration in London, England in the event of disputes in accordance with English law. The Guangzhou Maritime Court could not use PRC law as the basis for refusing recognition and enforcement of the award, on the basis that the award in question was an ad hoc arbitral award. Therefore, this case does not support the conclusion that Chinese law recognizes ad hoc arbitration. Source: http://law.people.com.cn/showdetail.action?id=2677519, accessed on: 20 August 2012.

[14] 很多重要国际商事仲裁机构的仲裁规则都有类似的规定。例如，1998 年《国际商会仲裁规则》第十四条规定："经与各当事人协商，仲裁庭可在其认为适当的地点开庭和举行会议，但当事人另有约定的除外；仲裁庭可以在其认为适当的任何地点进行合议"。1998 年《伦敦国际仲裁院仲裁规则》第十六条第 2 款同样规定："仲裁庭可依其职权决定在任何地理上便利的地点举行庭审、会面与合议。如果仲裁在仲裁本座地以外的地点进行，此项仲裁应被视为在本座地进行，裁决应被认为在本座地作出"。1985 年《联合国国际商事仲裁示范法》第二十条第 2 款规定："除非当事各方另有协议，仲裁庭可以在它认为适当的任何地点会面，以便仲裁庭成员之间合议案件，听取证人证言和专家意见，或者现场勘验货物、其他财产或文件"。

The arbitration rules of a great many international commercial arbitration institutions contain similar provisions. For example, Article 14 of the 1998 *Rules of Arbitration of the International Chamber of Commerce* states: "The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties." Article 16(2) of the 1998 *Arbitration Rules of the London International Court of Arbitration* similarly provides: "The Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes." Article 20(2) of the 1985 *UNCITRAL Model Law on International Commercial Arbitration* provides: "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents."

[15] 世界上超过四十多个国家的立法机构采纳了 1985 年《联合国国际商事仲裁示范法》或将其融入国内仲裁立法中，该法第二十条第 1 款就专门规定："当事各方可以自由地就仲裁地点达成协议"。

The legislative bodies of more than forty countries worldwide have adopted the 1985 *UNCITRAL Model Law on International Commercial Arbitration* or incorporated it into domestic legislation. Article 20(1) of the Model Law provides: "The parties are free to agree on the place of arbitration."

[16] 由于本文强烈建议当事人明确约定仲裁地，且在当事人没有约定仲裁地或约定仲裁地不明确的情况下，确定仲裁地比较复杂，本文不再赘述。

Because this article strongly recommends that the parties to a contract expressly agree upon the place/seat of arbitration, and given that where the parties have failed to specify the place/seat of arbitration or their agreement on the matter is unclear, determining the place/seat of arbitration becomes very complicated, this article will not explore the rules for determining the place/seat of arbitration in the absence of express agreement by the parties.

[17] 《纽约公约》第二条第 3 款规定，"如果缔约国的法院受理一个案件，而就这案件所涉及的事项，当事人已经达成本条意义内的协议时，除非该法院查明该项协议是无效的、未生效的或不可能实行的，应该依一方当事人的请求，令当事

人把案件提交仲裁”。

Article II (3) of the *New York Convention* provides: “The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

[18] 《纽约公约》第五条第 1 款（甲）项规定，“第二条所称协定之当事人依对其适用之法律有某种无行为能力情形者，或该项协定依当事人作为协定准据之法律系属无效，或未指明以何法律为准时，依裁决地所在国法律系属无效者”。

Article V (1) (a) of the *New York Convention* provides: “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.”

[19] 同上。

Ibid.

[20] 在《最高人民法院关于英国嘉能可有限公司申请承认和执行英国伦敦金属交易所仲裁裁决一案请示的复函》（[2001]民四他字第 2 号）中，最高人民法院指出，“根据联合国《承认及执行外国仲裁裁决公约》第五条第 1 款(甲)项规定，对合同当事人行为能力的认定，应依照属人主义原则适用我国法律。重庆机械设备进出口公司职员孙健与英国嘉能可有限公司签订合同，孙健在‘代表’公司签订本案合同时未经授权且公司也未在该合同上加盖印章，缺乏代理关系成立的形式要件，事后重庆机械设备进出口公司对孙健的上述行为明确表示否认。同时孙健的签约行为也不符合两公司之间以往的习惯做法，不能认定为表见代理。 …… 孙健不具代理权，其‘代表’公司签订的合同应当认定为无效合同，其民事责任不应由重庆机械设备进出口公司承担。同理，孙健‘代表’公司签订的仲裁条款亦属无效，其法律后果亦不能及于重庆机械设备进出口公司。本案所涉仲裁裁决，依法应当拒绝承认及执行”。

In the *Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case Involving the Application by UK Company Glencore Co., Ltd. for the Recognition and Enforcement of an Arbitral Award Issued by the London Metal Exchange* ([2001] Min Si Ta Zi No.2), the Supreme People's Court indicated: "In accordance with Article V(1)(a) of the *UN's Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, in determining the capacity of the parties to the arbitration agreement, Chinese law should be applied in accordance with the nationality principle. Sun Jian, an employee of Chongqing Machinery and Equipment Import and Export Co., Ltd., executed a contract with Glencore Co., Ltd.. However, in signing the contract "on behalf" of the company, Sun Jian had not been authorized to do so, and the company had not affixed its chop to the contract; the necessary conditions for a relationship of agency were therefore lacking, and Chongqing Machinery and Equipment Import and Export Co., Ltd. clearly expressed its repudiation of Sun Jian's conduct after the event. Furthermore, Sun Jian's conduct in signing the contract was not consistent with past practices between the two companies, and there was therefore no apparent agency... Sun Jian did not possess agency rights, and the contract executed by him "on behalf" of the company should be deemed invalid. His civil liability should not be borne by Chongqing Machinery and Equipment Import and Export Co., Ltd. By extension, the arbitration clause signed by Sun Jian "on behalf of" the company is also invalid, and Chongqing Machinery and Equipment Export Co., Ltd. cannot be affected by the legal consequences of that clause in any way. The arbitration clause in this case should be refused recognition and enforcement in accordance with the law."

[21] 《纽约公约》第二条第 1 款，“如果双方当事人书面协议把由于同某个可以通过仲裁方式解决的事项有关的特定的法律关系，不论是不是合同关系，所已产生或可能产生的全部或任何争执提交仲裁，每一个缔约国应该承认这种协议”。

Article II (1) of the *New York Convention* provides: “Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”

[22] 《纽约公约》第二条第 2 款，“‘书面协议’包括当事人所签署的或者来往书信、电报中所包含的合同中的仲裁条款和仲裁协议”。

Article II (2) of the *New York Convention* provides: “The term "agreement in writing" shall include an arbitral clause in a contact or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

[23] 在意大利佛罗伦萨上诉法院审理的一起案件中，美国买方将一份购货订单签字后递交给了意大利的卖方，该订单中含有一项仲裁条款。意大利卖方收到订单后未在订单上签字，也未将该订单返回给美国买方。但卖方后来在其向买方出具的一份发票上签了字，该发票则明确注明系上述购货订单项下的发票。据此，法院认定双方之间存在了书面的仲裁协议。法院进一步解释指出，当事人在公约第 2 条项下提交仲裁的意愿无须在同一份文件上表达，而且仲裁协议可以包含

在往来的文件或电报中。Reported in ICC Yearbook IV (1979)，转引自黄亚英：《论<纽约公约>与仲裁协议的形式》，《法学杂志》第 25 卷，第 14 页。

In a case heard by the Florence Court of Appeal in Italy, an American buyer signed a purchase order and delivered it to the Italian seller, the purchase order containing an arbitration clause. Upon receiving the purchase order from the purchaser, the Italian seller did not sign the purchase order, nor did it return the purchase order to the American purchaser. Nevertheless, the seller later signed an invoice that it produced to the buyer, and that invoice expressly stated that it was an invoice in relation to the abovementioned purchase order. On that basis, the Court held that a written arbitration agreement existed between the parties. The Court further reasoned that the parties' intention to submit their dispute to arbitration, as required under Article 2 of the Convention, did not need to be expressed in the same document, and that an arbitration agreement can be contained in an exchange of documents or telegrams. Reported in ICC Yearbook IV (1979) and cited in HUANG Yaying, "A Discussion of the New York Convention and the Formal Requirements of Arbitration Agreements," *Law Science Magazine*, Volume 25, p.14.

[24] 在《最高人民法院关于新加坡益得满亚洲私人有限公司申请承认及执行外国仲裁裁决一案的请示的复函》（[2001]民四他字第 43 号）中，最高人民法院指出，“根据新加坡益得满亚洲私人有限公司与无锡华新可可食品有限公司之间的来往传真，双方当事人之间未就购买可可豆事宜产生的争议达成通过仲裁解决的合意。英国伦敦可可协会以新加坡益得满亚洲私人有限公司单方拟定的仲裁条款仲裁有关纠纷缺乏事实和法律依据。…… 我国人民法院应拒绝承认与执行本案仲裁裁决”。

In the *Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case Involving the Request by the Singaporean company ED&F Man Asia Pte. Ltd. for the Recognition and Enforcement of a Foreign Arbitral Award* ([2001] Min Si Ta Zi No.43), the Supreme People's Court stated: "based on the faxes exchanged between ED&F Man Asia Pte Ltd. and Wuxi Huaxin Cocoa Food Co., Ltd., the parties had not reached an agreement to resolve disputes arising in respect of the purchase of cocoa beans through arbitration. There was no factual or legal basis for the decision of the London Cocoa Association to arbitrate the parties' dispute on the basis of the arbitration clause unilaterally prepared by ED&F Man Asia Pte. Ltd...The Chinese people's courts should refuse to recognize and enforce the arbitral award in this case."

[25] 例如，提单仲裁条款、租约并入提单仲裁条款、默示仲裁协议、仲裁条款对未约定仲裁合同的拓展、仲裁条款对未签署人的拓展。

For example, arbitration clauses contained in a bill of lading, arbitration clauses in a lease incorporated in a bill of lading, tacit arbitration agreements, the extension of arbitration clauses to cover contracts not containing an arbitration clause, the extension of an arbitration clause to cover non-signatory parties.

[26] 《中华人民共和国仲裁法》第二十条第 2 款规定，“当事人对仲裁协议效力有异议的，应在仲裁庭首次开庭前提出”。《最高人民法院关于适用<中华人民共和国仲裁法>若干问题的解释》第十三条第 1 款规定，“依照仲裁法第二十条第 2 款的规定，当事人在仲裁庭首次开庭前没有对仲裁协议的效力提出异议，而后向人民法院申请确认仲裁协议无效的，人民法院不予受理”。据此，如果仲裁协议依法应认定为无效，但一方当事人申请仲裁后，对方当事人放弃对仲裁协议效力提出异议且进行实体答辩的，可以认为达成了默示仲裁协议。

Article 20(2) of the *Arbitration Law of the People's Republic of China* provides: "If the parties contest the validity of the arbitration agreement, the objection shall be made before the start of the first hearing of the arbitration tribunal." Article 13(1) of *Interpretation of the Supreme People's Court on Several Questions concerning the Application of the Arbitration Law of the People's Republic of China* provides: "As required by Paragraph 2 of Article 20 of the Arbitration Law, if a party concerned fails to object to the effectiveness of the agreement for arbitration prior to the first hearing in the arbitral tribunal, and then applies to the people's court for confirming the agreement for arbitration as ineffective, the application shall not be accepted by the people's court." Accordingly, if an arbitration agreement is invalid in accordance with the law, but when one of the parties to the agreement applies for arbitration the other party waives its right to object to the validity of the arbitration agreement and instead conducts a substantive defence of the arbitral claims, the parties can be deemed to have reached a tacit arbitration agreement."

[27] 见四川省成都市中级人民法院在 2008 年 4 月 30 日作出的不予承认和执行该裁决书的民事裁定书。

See the civil ruling issued by the Chengdu Intermediate People's Court in Sichuan Province on 30 April 2008 refusing recognition and enforcement of an arbitral award.

[28] 英国法就认为这种情况是“不可执行的约定”，因而对当事人不具有拘束力。杨良宜：《仲裁法——从 1996 年英国仲裁法到国际商务仲裁》，法律出版社 2006 年版，第 26~28 页。

English law considers provisions of this kind to be “unenforceable agreements” and therefore not binding on the parties. YANG Liangyi, *Arbitration Law – From the 1996 English Arbitration Act to International Commercial Arbitration*, Law Press, 2006 Edition, pp.26-28.

[29] 《中华人民共和国中外合资经营企业法》第 15 条也规定了协商的程序：“合营各方发生纠纷，董事会不能协商解决时，由中国仲裁机构进行调解或仲裁，也可由合营各方协议在其他仲裁机构仲裁。”这里规定的“其他仲裁机构”，显然也包括在中国境外设立的仲裁机构。

Article 15 of The *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* also prescribes the following negotiation procedures: "Disputes arising between the parties to a joint venture that the board of directors cannot settle through consultation may be settled through mediation or arbitration by a Chinese arbitration agency or through arbitration by another arbitration agency agreed upon by the parties to the venture." The "other arbitration agencies" referred to in this provision clearly include arbitral institutions established overseas.

[30] 《纽约公约》第五条第 2 款（甲）项规定，“依该国法律，争议事项系不能以仲裁解决者”。

Article V (2) (a) of the *New York Convention* provides: "The subject matter of the difference is not capable of settlement by arbitration under the law of that country."

[31] 《中华人民共和国仲裁法》第二条。

Article 2 of the *Arbitration Law of the People's Republic of China.*

[32] 《中华人民共和国仲裁法》第三条。

Article 3 of the *Arbitration Law of the People's Republic of China.*

[33] 《纽约公约》第五条第 1 款（丙）项规定，“裁决所处理之争议非为交付仲裁之标的或不在其条款之列，或裁决载有关于交付仲裁范围以外事项之决定者，但交付仲裁事项之决定可与未交付仲裁之事项划分时，裁决中关于交付仲裁事项之决定部分得予承认及执行”。

Article V (1) (c) of the *New York Convention* provides: "The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced."

[34] 《最高人民法院关于美国 GMI 公司申请承认英国伦敦金属交易所仲裁裁决案的复函》（[2003]民四他字第 12 号）。

Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case Involving the Application by the US Company GMI for the Recognition and Enforcement of an Arbitral Award Issued by the London Metal Exchange ([2003] Min Si Ta Zi No.12).

[35] 《最高人民法院关于不予承认和执行国际商会仲裁院仲裁裁决的请示的复函》（[2008]民四他字第 11 号）。该案被拒绝承认及执行的原因还包括违反了中国的公共政策。

Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case Involving the Refusal to Recognize and Enforce an Arbitral Award of the Court of Arbitration of the International Chamber of Commerce ([2008] Min Si Ta Zi No.11. An additional reason that the award in this case was refused recognition and enforcement was for violation of Chinese public policy.

[36] 在《最高人民法院关于美国 GMI 公司申请承认及执行英国伦敦金融交易所仲裁裁决案的复函》（[2003]民四他字第 12 号）中，最高人民法院指出：仲裁庭在裁决书中多次使用“被申请人”称谓，均未指明是芜湖冶炼厂还是芜湖恒鑫铜业集团有限公司，而从裁决书首部将芜湖冶炼厂和芜湖恒鑫铜业集团有限公司均列为被申请人看，裁决书在没有特别指明的情况下，其被申请人的含义应该既包括芜湖冶炼厂，也包括芜湖恒鑫铜业集团有限公司，但使用这种称谓，并不表明有权裁决部分和超裁部分是不可分的，从最终裁决结果看，有明确裁决芜湖冶炼厂单独承担责任的部分，就该部分裁决而言，仲裁庭有权裁决，而且与超裁部分是可分的，亦不存在其他不应予以承认和执行的情形，因此对于涉及芜湖冶炼厂单独承担责任部分的裁决应予承认和执行。而其他使用“被申请人”这个称谓表明应该承担责任部分的裁决，由于对于芜湖冶炼厂及芜湖恒鑫铜业集团有限公司承担的责任没有明确区分，因此，人民法院对于仲裁庭有权裁决部分和超裁部分亦无法区分，故对于无法区分部分的裁决不应予以承认和执行。

In the *Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case Involving the Application by the US Company GMI for the Recognition and Enforcement of an Arbitral Award Issued by the London Metal Exchange* ([2003] Min Si Ta Zi No.12), the Supreme People's Court held: "there are several instances in the arbitral award where the arbitral tribunal refers simply to "the Respondent", without specifying whether it is referring to the Wuhu Smelting Plant or Wuhu Hengxing Copper Industry Co., Ltd. Given that the introductory section of the arbitral award lists both the Wuhu Smelting Plant

and Hengxing Copper Industry Co., Ltd. as Respondents, a reference to the Respondent should be interpreted as a reference to both the Wuhu Smelting Plant and to Wuhu Copper Industry Co., Ltd., unless there are any express indications to the contrary. But the mere use of the single appellation for the two Respondents does not mean that the part of the award falling within the tribunal's jurisdiction and that part of the award exceeding the tribunal's jurisdiction are inseparable. From the point of view of the final result of the arbitral award, there is one part of the award that clearly states that the Wuhu Smelting Plant shall be individually liable. The tribunal clearly had jurisdiction in respect of that part of the award. Moreover, that part of the award can be clearly separated from the part of the award exceeding the tribunal's jurisdiction, and there are no circumstances in respect of that part of the award justifying refusal to recognize and enforce the award. Therefore, that part of the award relating to the liabilities independently undertaken by the Wuhu Smelting Plant should be recognized and enforced. On the other hand, the other parts of the award that use the term "the Respondent" in providing for the allocation of liabilities do not clearly distinguish between the liabilities to be undertaken by the Wuhu Smelting Plant and Wuhu Copper Industry Co., Ltd. Therefore, there is no way for the people's court to distinguish between those parts of the award that fall within the tribunal's jurisdiction and those parts of the award that exceed its jurisdiction, and those parts of the award should not be recognized and enforced."

[37] 《最高人民法院<关于不予承认日本商事仲裁协会东经 04—05 号仲裁裁决的报告>的复函》([2007]民四他字第 26 号)。

Letter of Reply of the Supreme People's Court concerning the Refusal to Recognize and Enforce Award No. 04-05 Issued by the Japanese Commercial Arbitration Association ([2007] Min Si Ta Zi, No.26).

[38] 《最高人民法院关于裁定不予承认和执行社团法人日本商事仲裁协会东京 05-03 号仲裁裁决的报告的答复》([2008]民四他字第 18 号)。

Letter of Reply of the Supreme People's Court concerning the Refusal to Recognize and Enforce Arbitral Award No. 05-03 of the Japanese Commercial Arbitration Association ([2008] Min Si Ta Zi No.18).

[39] 《最高人民法院关于是否裁定不予承认和执行英国伦敦“ABRA 轮 2004 年 12 月 28 日租约”仲裁裁决的请示的复函》([2006]民四他字第 34 号)。

Letter of Reply of the Supreme People's Court concerning the Request for Instructions as to whether to Recognize and Enforce an Arbitral Award Issued in London in respect of a Shipping Lease for the ABRA Vessel Dated 28 December 2004 ([2006] Min Si Ta Zi, No.34).

[40] 《最高人民法院关于邦基农贸新加坡私人有限公司申请承认和执行英国仲裁裁决一案的请示的复函》([2007]民四他字第 41 号)。

Letter of Reply of the Supreme People's Court concerning the Application by Bunge Agribusiness Singapore Pte Ltd. for the Recognition of an Arbitral Award Issued in England ([2007] Min Si Ta Zi, No. 41).

[41] 万鄂湘、夏晓红:《中国法院不予承认及执行某些外国仲裁裁决的原因——<纽约公约>相关案例分析》,载《武大国际法评论》(第十三卷),2012 年 02 期。

WAN Exiang & XIA Xiaohong, "The Basis of Chinese Courts' Refusal to Recognize and Enforce a Number of Foreign Arbitral Awards – An Analysis of New York Convention-related Cases", *Wuhan University International Law Review*, Volume 13, 2012, No.2.

[42] 赵秀文:《公共政策与外国仲裁裁决的承认与执行》,载《国际贸易法论丛》,来源:http://china.findlaw.cn/bianhu/xingfazhishi/wgpj/12460.html,访问日期:2012 年 8 月 20 日。

ZHAO Xiuwen, "Public Policy and the Recognition and Enforcement of Foreign Arbitral Awards", Journal of International Trade Law, available at: http://china.findlaw.cn/bianhu/xingfazhishi/wgpj/12460.html, accessed on 20 August 2012.

[43] 《最高人民法院关于对海口中院不予承认和执行瑞典斯德哥尔摩商会仲裁院仲裁裁决请示的复函》([2005]民四他字第 12 号)。

Letter of Reply of the Supreme People's Court concerning the Request for Instructions in respect of the Haikou Intermediate Court's Refusal to Recognize and Enforce an Arbitral Award of the Arbitration Institute of the Stockholm Chamber of Commerce ([2005] Min Si Ta Zi No. 12.

[44] 《最高人民法院关于 ED&F 曼氏(香港)有限公司申请承认和执行伦敦糖业协会仲裁裁决案的复函》([2003]民四他字第 3 号)。

Letter of Reply of the Supreme People's Court concerning the Application by ED & F Man (Hong Kong) Co., Ltd. for the Recognition and Enforcement of an Arbitral Award Issued by the Sugar Association of London ([2003] Min Si Ta Zi, No.3).

[45] 《最高人民法院关于不予承认和执行国际商会仲裁院仲裁裁决的请示的复函》（[2008]民四他字第 11 号）。

Letter of Reply of the Supreme People's Court concerning the Request for Instructions on the Refusal to Recognize and Enforce an Arbitral Award of the Court of Arbitration of the International Chamber of Commerce ([2008] Min Si Tai No.11).

[46] 《最高人民法院关于 GRD Minproc 有限公司申请承认并执行瑞典斯德哥尔摩商会仲裁院仲裁裁决一案的请示的复函》（[2008]民四他字第 48 号）。

Letter of Reply of the Supreme People's Court concerning the Request for Instructions on the Case involving the Request by GRD Minproc Co., Ltd. for the Recognition and Enforcement of an Arbitral Award of the Arbitration Institute of the Stockholm Chamber of Commerce ([2008] Min Si Ta Zi, No.48).

[47] 《最高人民法院关于裁定不予承认和执行社团法人日本商事仲裁协会东京 05-03 号仲裁裁决的报告的答复》（[2008]民四他字第 18 号）。

Letter of Reply of the Supreme People's Court concerning the Refusal to Recognize and Enforce Arbitral Award No. 05-03 of the Japanese Commercial Arbitration Association ([2008] Min Si Ta Zi No.18).

[48] 《纽约公约》第三条规定，“在以下各条所规定的条件下，每一个缔约国应该承认仲裁裁决有约束力，并且依照裁决需其承认或执行的地方程序规则予以执行。对承认或执行本公约所适用的仲裁裁决，不应该比对承认或执行本国的仲裁裁决规定实质上较烦的条件或较高的费用。”

Article 3 of the *New York Convention* states: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon, under the conditions laid down in the following articles. there shall not be imposed the substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

[49] 根据《最高人民法院关于人民法院执行工作若干问题的规定（试行）》第十八条规定，中国法院受理执行案件应符合一定的条件，其中包括“申请人（应）在法定期限内提出申请”。如不符合这些条件，法院应当在七日内裁定不予受理。

According to Article 18 of the *Trial Provisions of the Supreme People's Court concerning Several Questions Relating to the Acceptance of Enforcement Cases by the People's Courts*, there are certain conditions for the acceptance of enforcement cases by the people's courts, amongst which is that "the claimant [shall] submit its application within the legally prescribed time limit." If the applicant fails to fulfill these conditions, the court should issue a ruling refusing to accept the applicant's case within seven days.

[50] 这是最高人民法院在《关于不予执行国际商会仲裁院 10334/AMW/BWD/TE 最终裁决的请示的复函》（[2004]民四他字第 6 号）中的意见。另外，最高人民法院在《关于麦考•奈浦敦有限公司申请承认和执行仲裁裁决一案请求的复函》中，也持同样的意见：“尽管申请人在有效期内提供的申请材料不完全符合有关规定，但经人民法院通知补充后基本上是符合要求的，人民法院应当立案受理并已受理，故不能以‘申请人未在法定期限内提出有效的申请’为由拒绝承认及执行本案所涉仲裁裁决”。

This was the position reached by the Supreme People's Court in its *Letter of Reply concerning the Request for Instructions on the Case involving the Refusal to Enforce the Final Award No. 10334/AMW/BWD/TE of the Court of Arbitration of the International Chamber of Commerce* ([2004] Min Si Ta Zi No.6. The Supreme People's Court also stated this position in its *Letter of Reply concerning the Request for Instructions on the Case Involving the Application by Macor Neptun GmbH for the Recognition and Enforcement of an Arbitral Award*: "even though the application materials submitted by the applicant within the statutory period were not entirely in compliance with the relevant provisions of the law, after the claimant supplemented those materials upon notice from the people's court the materials were fundamentally consistent with the statutory requirements. The people's court should therefore accept and initiate the case (and in fact has already accepted the case), and cannot refuse to recognize and enforce the arbitral award in this case on the grounds that "the applicant did not submit a valid application within the statutory time limit."

[51] 在《最高人民法院关于麦考•奈浦敦有限公司申请承认和执行仲裁裁决一案请求的复函》（法民二[2001]32 号）中，最高人民法院指出，申请承认及执行的期限应从法律文书规定的履行期限的最后一日起算。具体到本案，因裁决书没有关于履行期限的内容，但应给当事人一个合理的履行期限，故从仲裁裁决送达当事人第二日起计算较为合理，而不应从仲裁裁决作出之日起计算申请承认及执行的期限。

In the *Letter of Reply of the Supreme People's Court concerning the Request for Instructions on the Case Involving the Application by Macor Neptun GmbH for the Recognition and Enforcement of an Arbitral Award* (Fa Min Er [2001] No.32), the

Supreme People's Court indicated that the time limit for an application for recognition and enforcement should be calculated from the final date stipulated for performance in the legal document. Regarding the specific case before it, the Supreme People's Court held that because the arbitral award did not say anything regarding the period for performance of the award, and the parties should be given a reasonable period for performance, it was reasonable for the time limit for the application to be calculated from the day after the arbitral award was delivered to the parties, rather than calculating the time limit for the application for recognition and enforcement from the date upon which the arbitral award was issued.

[52] 天津海事法院作出的关于塞浦路斯瓦塞斯航运有限公司请求承认和执行英国伦敦仲裁庭所作的仲裁裁决的民事裁定书和《最高人民法院关于裁定不予承认和执行英国伦敦仲裁庭作出的塞浦路斯瓦塞斯航运有限公司与中国粮油饲料有限公司、中国人民财产保险股份有限公司河北省分公司、中国人保控股公司仲裁裁决一案的请示的复函》(民四他字[2004]第 32 号)。

See the civil ruling issued by the Tianjin Maritime Court in respect of the application by the V Y Santhi Shipping Company Limited of Cyprus for the recognition and enforcement of an arbitral award issued in London, England, as well as the *Letter of Reply of the Supreme People's Court concerning the Request for Instructions on the Case Involving the Non-recognition and Non-enforcement Ruling Issued in respect of an Arbitral Award of an Arbitral Tribunal in London, England, in respect of the Arbitral Dispute between V Y Santhi Shipping Company Limited and China Grains, Oild and Feedstuffs Co., Ltd., the Hebei Branch Office of the People's Insurance Company of China and the People's Insurance (Holding) Company of China* (Min Si Ta Zi [2004] No.32).

[53] 在我们代理的案件中，有的法院曾经要求中文译文一并公证认证，但我们解释说，这在客观上无法做到，因为公证机关和认证机关无法对译文与原文是否一致进行认证，法院最终接受了我们的意见。

In previous cases that we have handled, courts have requested that a notarized and certified Chinese translation be submitted together with the original. However, we have had to explain to the courts that this is simply not objectively possible, as neither the public notary nor the certifying authorities are capable of certifying whether an original document and its translation are identical. The courts finally accepted our argument in each case.

[54] 在《关于麦考•奈浦敦有限公司申请承认和执行仲裁裁决一案请求的复函》(法民二[2001]32 号)中，最高人民法院指出，“关于你院提出的‘本案仲裁裁决因未作初步裁决而违反仲裁地法律’以及‘裁决裁定被诉人补偿申诉人律师费，超出当事人交付仲裁范围’的问题。根据《纽约公约》第五条的规定，这类问题属应当事人请求才予审查的情形，人民法院不应依职权提起。而本案当事人始终未提及该问题，故人民法院不能以此为由拒绝承认及执行本案所涉仲裁裁决”。

In the *Letter of Reply of the Supreme People's Court concerning the Request for Instructions on the Case Involving the Application by Macor Neptun GmbH for the Recognition and Enforcement of an Arbitral Award* (Fa Min Er [2001] No.32), the Supreme People's Court indicated: "Regarding the inferior court's findings that "the arbitral award failed to make a preliminary ruling and thereby violated the law of the place/seat of arbitration" and "the arbitral award ordered the losing party to compensate for the legal fees of the winning party, in excess of the scope of authority conferred upon the tribunal by the parties": in accordance with Article V of the New York Convention, issues of this kind should only be reviewed upon express application by the parties, and should not be reviewed by the people's court on its own initiative. These issues were never raised by the parties, and the people's court cannot therefore use them as grounds to refuse recognition and enforcement of the award in this case."