

**Commercial Dispute Resolution in
China: An Annual Review and Preview
(2013)**

**Beijing Arbitration Commission
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Preface

China's commercial dispute resolution industry underwent significant change in 2012. Most notably, the amendment to the *Civil Procedure Law of the People's Republic of China* and the adoption of *The Overall Plan for Pilot Reform Concerning Dispute Resolution Mechanisms on Expansion of the Connection between Litigation and Non-litigation* broadened the developmental horizons of commercial arbitration in the country. Several Chinese dispute resolution institutions launched a new round of revisions to their procedural rules in an effort to better fulfill party needs, meet international standards, and achieve more independent, regulated, and efficient operations. Simultaneously, in moving towards diversification, China's arbitration institutions worked on providing multiple dispute resolution services. In this process, institutional caseload and total disputed amount grew steadily. Meanwhile, an increasing number of commercial mediation institutions have been established by industry associations and societies, and the cooperation and exchanges among such institutions became increasingly connected. By regularly holding high-level and high-profile academic colloquia, practice exchanges, and training sessions both domestically and abroad, China's scholars and practitioners of commercial dispute resolution took demonstrable steps towards becoming a cohesive group, united by common values and professional goals. The judicial supervision of arbitration has become more transparent, the enforcement of arbitral awards stronger, and interim measures more streamlined.

However, when judged against developed-country standards, and in terms of China's practical needs, our commercial dispute resolution is still in its early stage, with a strong need for further reforms and innovations. To this end, the sober observations, insights, and advice of long-term industry observers are indispensable.

However, great challenge also presents significant opportunities. It is necessary to look back and reflect upon our experiences lived and lessons learned, our achievements, and our problems. Currently, practice-based studies on the general state of commercial dispute resolution in China are still a bit lacking due to the macroscopic and practice-oriented nature of such an endeavor. With this view, the Beijing Arbitration Commission (BAC), an arbitration institution that focuses on theoretical study, promotion, and personnel training of diversified dispute resolution, engaged



several renowned lawyers and scholars – advocates of China’s commercial dispute resolution – in the composition of *Commercial Dispute Resolution in China: An Annual Review and Preview (2013)*. This report seeks to offer an objective retrospective of China’s commercial dispute resolution development in 2012, by organizing events and thoughts, sorting out achievements and issues, offering reference of experiences, and making suggestions.

The report has attracted the attention of a range of legal professionals and institutions, both within China and abroad. The Institute of Advanced Legal Studies (IALS) is one of such institutions. Founded as a part of the renowned University of London, IALS is one of the world’s top academic institutes, providing legal scholars and practitioners alike an authoritative platform from which to engage in the study and exchange of the trends and development on laws in different countries. As the largest developing country and economy, China is home to a commercial dispute resolution field to which IALS has accorded great attention for a long while. To facilitate deep discussion of this topic, as well as to promote quality research and practice, BAC and IALS worked closely together to hold the international conference *UNLOCKING THE INTRICACIES OF COMMERCIAL DISPUTE RESOLUTION IN CHINA* on June 14th 2013 in London.

Every beginning can be hard. But it is even harder to persevere. In cooperation with esteemed partners like IALS, and with strong support from legal experts and practitioners, BAC plans to develop an observational report every year on that year’s focus areas and topical issues while also reflecting back on those of the previous year. By recording history and looking to the future, this annual report is designed to help readers stay abreast of the latest developments in Chinese commercial dispute resolution, offer a detailed panorama of development and trends, and provide reliable materials for future historical studies, reforms, and innovations.

As China’s leading arbitration institution with rising international presence, BAC seeks to present to the outside world a window to the development of China’s dispute resolution. As one of very few annual observational reports on China’s dispute resolution produced domestically, this report will present to the world the true state of China’s dispute resolution and help improve the international understanding of China’s dispute resolution institutions. Based on substantial data and case materials, *Commercial Dispute Resolution in China: An Annual Review and Preview (2013)* focuses on objective documentations and interweaves analysis and commentary so as to present real subject matters as thoroughly as possible, with the goal of leaving readers greater room for interpretation and discussions. However, limited space requires that report contributors, unable to cover all subject matters, carefully select the most influential and groundbreaking issues in a given area. This method allows for deeper and more focused representation of the developmental perspective of the industry. The report is divided into five sub-reports, covering “Commercial Arbitration,” “Commercial Mediation,” “Construction Project,” “Finance,” and “Intellectual Property.” The first two subjects represent leading forms of alternative commercial dispute resolution, while the rest correspond to the three most active fields of substantive laws implicated in commercial dispute resolution. Each sub-report presents an update on the legislative changes,

the administration of justice, academic research, training, meetings and exchanges in the field concerned.

Authored by preeminent scholars on China's arbitration along with specialized partners from one of the world's largest law firms, the "Annual Review on Commercial Arbitration" covers a series of the most historically significant events taking place in Chinese arbitration in 2012. It includes the most important legislative achievements and revisions of arbitration rules by renowned arbitration institutions, and the general state of China's judicial supervision in 2012 by introducing concrete cases and data based on arbitration awards issued by courts across the country. The "Annual Review on Commercial Mediation," authored by youth scholars who have conducted comprehensive studies on China's development of mediation, systematically details China's achievements in 2012 in the aspect of institutional innovation, organizational development, personnel training and academic exchanges, providing the most exhaustive materials of its kind, insightfully indicating barriers faced and the ways out for China's commercial mediation. The "Annual Review on Construction Project Dispute Resolution," authored by senior arbitrators and partners from renowned Chinese and foreign law firms practicing in the field of construction-project-related legal issues, analyzes the latest development in legislation and judicial administration in the field and the consequent changes in the construction project dispute resolution market from a sophisticated and professional perspective. In terms of practical value, it was one of the most collection-worthy reports in 2012 in the field of construction project dispute resolution. Authored by well-known scholars and partners focusing on financial dispute resolution for a long time, the "Annual Review on Financial Dispute Resolution" elaborates on three different mechanisms of dispute resolutions—litigation, arbitration, and mediation—from the perspectives of existing system, new types of disputes, and advice to further development. Based on a large number of actual cases, the section analyzes the respective merits and limitations of the three mechanisms in terms of settling new types of financial disputes and then sums up this year's development involving financial-consumption-related disputes—a special type of dispute that has gained increasing attention in recent years, with suggestions provided thereto. The "Annual Report on Intellectual Property Dispute Resolution," authored by legal teams from both Chinese and British leading law firms, not only covers major changes to IP laws, high-profile cases and the most representative new academic viewpoints of 2012, but also provides materials of great reference value on the general state of development and institutional innovation in this field in 2012.

Although 2012 was but one year, it was indeed an extraordinary one in the development of China's commercial dispute resolution. Much progress has been made, and many obstacles have been overcome. However, those individuals who have silently devoted themselves to the field must not be forgotten. Special thanks is hereby offered to the team that authored and translated this report, as well as to Mr. Jules Winterton, Director and Librarian of IALS, Mr. SUN Wei and Mr. CHI Shaoyu, attorneys at Zhong Lun Law Firm, Mr. CHEN Fuyong, Deputy Secretary—

General of BAC, and Mr. SUN Wei, Case Manager of BAC. The success of this report and of this conference was only possible by their extraordinary support and contributions.

Against the backdrop of China's rapid economic growth and its flourishing civil society, we sincerely believe that the exciting developments in Chinese commercial dispute resolution will fill the page of this report for many years to come.

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Annual Review on Commercial Arbitration

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Abstract: The “Decision on Amendments to the Civil Procedure Law of the People’s Republic of China” was adopted at the 28th Session of the Standing Committee of the Eleventh National People’s Congress on 31 August, 2012. Some supplementary provisions were introduced and revisions were made regarding six issues relating to the relationship between arbitration and judicial supervision. The Arbitration Rules of China International Economic and Trade Arbitration Commission (2012 Edition) have been amended with a view to bring them in line with international practice. These new rules are adopting a number of new procedural rules which reflect modern international arbitration practice. With regard to judicial practice, in 2012 the courts published some cases progressive in conceiving judicial supervision and assistance in arbitration. From these cases we have selected 46 decisions and analysed the grounds for setting aside and non-enforcement of arbitral awards. We hope such analysis may benefit the development of arbitration practice in China.

Key words: arbitration; arbitration rules; arbitral award; judicial supervision

This article aims to summarize the trends and developments in arbitration practice in China throughout 2012, a year in which more than 200 arbitration commissions across the country

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heard a large number of cases.^① During 2012, certain amendments to arbitration legislation and arbitration rules have attracted a lot of attention, and these include the “Decision on Amendments to the Civil Procedure Law of the People’s Republic of China” adopted at the 28th Session of the Standing Committee of the Eleventh National People’s Congress on 31 August, 2012 (the “Decision”).^② The Decision introduced some new provisions and amendments to the Civil Procedure Law of the People’s Republic of China (hereinafter referred to as the “Civil Procedure Law”) focusing on six issues relating to the relationship between arbitration and judicial supervision. The adoption of the amendments to the Civil Procedure Law (effective as of 1 January, 2013) paved the way for the revisions to the Arbitration Law 1994 and improvements to the whole arbitration system. The analysis of the new provisions will be helpful for their implementation in practice and integration into the current legal regime. Likewise, arbitration institutions have started to revise their arbitration rules. China International Economic and Trade Arbitration Commission (hereinafter referred to as “CIETAC”) took the lead in publishing a new version of the “Arbitration Rules of China International Economic and Trade Arbitration Commission” (hereinafter referred to as “CIETAC Arbitration Rules”). These new rules appeared to be forward-thinking in their approach reflecting some more advanced practices in international commercial arbitration. With regards to judicial supervision over arbitration, as the court judgments and rulings have not been systematically published, very limited data has been collected. We have collected more than so courts documents relating to arbitration from various relevant websites^③, and selected 46 cases from the materials collected. We analysed the grounds on which arbitral awards have been set aside or held unenforceable in order to benefit the development of arbitration. The observations herein do not represent the opinions of any institution. They are intended to be informative to people and institutions who are interested in arbitration, so as to facilitate further discussion on issues relating to the arbitration regime in China.

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- ① According to the information released by the Department of Coordination of the Legal System Bureau under the State Council in March, 2013, 219 arbitration institutions in China heard a total of 96,378 cases in 2012, an increase of 9% over 2011, and the subject matter of cases valued RMB 131.5 billion, increased by 16% over 2011; of which, 1161 cases involved foreign parties (excluding cases handled by China International Economic and Trade Arbitration Commission). In the same year, domestic courts in the country ruled arbitral awards invalid or unenforceable in 215 cases, accounting for 0.24% of the total number of cases.
- ② Please refer to www.npc.gov.cn/npc/xinwen/2012-09/01/content_1735849.htm, last visited on 23 January, 2013.
- ③ We made references to Peking University Law Database, China Lawyee Database, China Foreign-related Commercial and Maritime Trial at <http://www.ccmt.org.cn>, <http://www.chinacourt.org> and the websites of some arbitration commissions.

I. Review of Amendments to the Civil Procedure Law and New CIEATC Arbitration Rules

(I) Review of the Amendments to the Civil Procedure Law

1. Summary of the provisions in the Amendments to the Civil Procedure Law concerning Arbitration

The Amendments to the Civil Procedure Law (hereinafter referred to as the “Amendments”) contains 60 articles, 6 of which are related to arbitration. The main points are as follows:

(1) Pre-arbitration preservation of evidence

Procedure Law states that: “In the event of an emergency which is likely to cause any evidence to be destroyed or become difficult to obtain later on, an interested party may, prior to instituting a lawsuit or applying for arbitration, apply to the People’s Court (either at the place where the evidence is located, at the place where the respondent is domiciled or to the court with jurisdiction over the case) to preserve the evidence.” This is a significant amendment to the Civil Procedure Law concerning the preservation of evidence in arbitration. In the Arbitration Law 1994, the section, entitled “hearing and awards,” deals with the preservation of evidence after the arbitration proceedings have started. That section provides: “In the event that evidence might be destroyed or become difficult to obtain later on, the parties concerned may apply for the evidence to be preserved. If the parties concerned apply for such evidence to be preserved, the arbitration commission shall submit the application to the lowest level People’s Court at the place where the evidence is located.”^① Clearly, under this provision, an application for preservation of evidence can only be made after the arbitration proceedings have started. This is potentially adverse to an applicant’s interest as a respondent may take measures to transfer, conceal or destroy evidence once he becomes aware that arbitration proceedings may be commenced. Such action would clearly hinder parties from resorting to arbitration, and there have been continuous calls for improvement from arbitration professionals. In fact, in Chapter 5 - “Maritime Evidence Preservation” of the Maritime Special Procedure Law of the People’s Republic of China 1999, it has already been expressly stipulated that a party may apply for maritime evidence preservation before arbitration proceedings start.^② This amendment to the Civil Procedure Law is a step forward.

① Article 46 of the Arbitration Law 1994.

② Article 64 of the Special Maritime Procedure Law of the People’s Republic of China 1999 stipulates that “Maritime evidence preservation shall not be restrained by a jurisdiction agreement or an arbitration agreement relating to the maritime claim as agreed upon between the parties.”

(2) Pre-arbitration preservation of property

Pursuant to Article 22 of the Amendments, Article 101 of the new Civil Procedure Law states that: “If, due to an emergency, the rights and interests of an interested party would suffer irreparable damage if the party fails to apply for a prompt preservation of property, such party may, before instituting a lawsuit or applying for arbitration, apply to the People’s Court (either at the place of the property, at the place where the respondent is domiciled, or at the place of the court which has jurisdiction over the case) for property preservation measures to be taken. The applicant shall provide security for such application. Where the party fails to provide such security, the court shall reject the application.” Similar to the provisions on pre-arbitration preservation of evidence discussed above, this is also a major change to the Civil Procedure Law in respect of the preservation of evidence in arbitration. The Arbitration Law 1994 sets out the relevant provisions in the section entitled “application and acceptance”. It states that “A party may apply for property preservation if, as the result of an act of the other party or for some other reasons, it appears that an award may be impossible or difficult to enforce. If one party applies for property preservation, the arbitration commission shall submit the application of the party to a People’s Court in accordance with the relevant provisions of the Civil Procedure Law.”^① Again, under this provision, the applicant can not apply to a court for property preservation through the arbitration institution until after the arbitral proceedings have been issued. It is clear that this does not fully protect an applicant’s interests and offers little support to arbitration. As with pre-arbitration preservation of evidence, provisions on pre-arbitration preservation of property first appeared in the Maritime Special Procedure Law of the People’s Republic of China 1999.^②

At the same time, the court must make a ruling within 48 hours after accepting an application for pre-arbitration property preservation. If the court rules to take preservation measures, enforcement shall be made immediately. If the applicant does not issue arbitration proceedings within 30 days after the court has ordered the preservation measures, the court shall cancel the preservation. The same requirements also apply to pre-arbitration evidence preservation.

① Article 28 of the Arbitration Law 1994.

② Article 14 of the Special Maritime Procedure Law of the People's Republic of China 1999 states that “Maritime claims shall not be restrained by a jurisdiction agreement or an arbitration agreement (as agreed between the parties) which relate to the maritime claim.”

(3) Prohibition on the use of arbitration as a means of evading the performance of any obligation specified in legal documents

Pursuant to Article 24 of the Amendments, Article 113 of the new Civil Procedure Law states that: “Where a party which is the subject of enforcement maliciously collaborates with any other party to evade any of its legal obligations specified in the legal documents by way of lawsuit, arbitration or mediation, the People’s Court shall order a fine or detention against such parties depending on the circumstances. Where the violation by the parties constitutes a criminal offence, such parties shall be subject to criminal prosecution in accordance with the law.” In the revised Civil Procedure Law, there is a new provision that “Civil proceedings shall follow the principle of good faith” .^① Article 113 aims to promote dispute resolution methods being selected in accordance with the principle of “good faith” and aims to punish acts which use arbitration as a means to evade any obligations specified in legal documents.

(4) Reinforce the effect of arbitration agreements precluding the jurisdiction of courts

Pursuant to Article 28 of the Amendments, paragraph 2 of Article 124 of the new Civil Procedure Law states that: “According to the law, if the parties have concluded a written arbitration agreement stating that disputes must be taken to an arbitration authority and actions cannot be initiated in the People’s Court, the plaintiff should apply for arbitration to the arbitration authority” . In paragraph 2 of Article 111 of the old Civil Procedure Law, the words “voluntarily in respect of contractual disputes” were included after the words “concluded a written arbitration agreement” . These have been deleted so as to strictly conform to the Arbitration Law 1994 in terms of the scope of arbitration.^② The effect is that arbitration agreements precluding the jurisdiction of the courts are no longer limited to contractual disputes. This remedies an obvious loophole in the Civil Procedure Law, given that this article has not been narrowly applied in practice.

(5) Rulings shall be applicable to setting aside arbitral awards

Pursuant to Article 33 of the Amendments, item 9 of paragraph 1 of Article 154 of the new Civil Procedure Law states that rulings shall be applicable to “revocation and non-enforcement of arbitral awards” . Such amendment is intended to make the Civil Procedure Law more precise and to highlight the importance of both setting aside and non-enforcement of arbitral awards. This amendment is also made to ensure consistency with

① Please refer to Article 1 of the Decision and Article 13 of the Civil Procedure Law.

② According to Articles 2 and 3 of the Arbitration Law 1994, contractual disputes and other disputes over property rights and interests between citizens, legal persons and other organizations as equal subjects can be settled by arbitration.

the provisions of the Arbitration Law 1994.

(6) Unify the conditions for setting aside and non-enforcement of domestic arbitral awards

Pursuant to Article 54 of the Amendments, items 4 and 5 of paragraph 2 of Article 237 of the new Civil Procedure Law are amended to provide “the evidence used as a basis for the award is fabricated” (item 4) and “the other party to the case conceals evidence which is substantial enough to affect the impartial award by the arbitration authority” (item 5). These amended provisions substitute the provisions of items 4 and 5 of the former Article 213 which stated “the main evidence used for ascertaining the facts is insufficient” and “any mistake exists in the application of law”. Such amendments signify that the conditions for non-enforcement of domestic arbitral awards (with no foreign related elements) set forth in Article 237 of the Civil Procedure Law are the same as those for setting aside domestic arbitral awards (with no foreign-related elements) set out in Article 58 of the Arbitration Law 1994. This therefore changes the “dual system” for setting aside and non-enforcement. Although the court will still substantively review the enforcement of such arbitral awards, the scope of such review has been greatly limited. Undoubtedly, this amendment will have a profound impact both in terms of theory and practice.

In addition, there is a minor change provided in the Amendments to Civil Procedure Law, namely Article 127, which states that if the parties concerned apply for a preservation order, a foreign related arbitration institution shall submit such application to be determined by the intermediate People’s Court at the place where the respondent is domiciled or the property of the respondent is located. Compared with the corresponding provision in the old law, the word “property” is deleted. This minor amendment signifies that interim measures are no longer only available to property preservation. The objects to be preserved may include property, evidence, etc. relating to the dispute.

China has adopted a dual system with regard to arbitration legislation, with the coexistence of legislations such as the Arbitration Law 1994 and Chapter 26 of the Civil Procedure Law. Alongside such legislation, there are provisions on arbitration scattered in other laws and regulations. Provisions on ordinary commercial arbitration are mainly prescribed in the Arbitration Law and the Civil Procedure Law. Generally speaking, although the Arbitration Law deals with the relationship between arbitration and judicial supervision, it mainly focuses on the arbitration process and procedures. On the other hand, the Civil Procedure Law regulates the relationship between arbitration and the judiciary, namely judicial supervision over the arbitration process. A comprehensive review of the new provisions on arbitration in the Amendments shows that none of the 6 items above concerns internal matters of arbitration. They are intended to affect arbitration via external support and supervision.

2. Comments on provisions in the Amendments to Civil Procedure Law on arbitration

None of the amendments to the Civil Procedure Law in 2007 related to arbitration. In contrast, 1/10 of the Amendments deals with arbitration, which indicates that greater importance is attached thereto. New provisions of the Civil Procedure Law on arbitration further reflect a more supportive approach to arbitration as compared to the former Civil Procedure Law. Provisions, like the extension of pre-litigation preservation to pre-arbitration preservation, the wider coverage of the anti-suit effect of arbitration agreements to include non-contractual disputes, the punishment of acts which aim to evade obligations specified in legal documents by means of arbitration, the unified conditions for setting aside and non-enforcement of domestic arbitral awards and the reduction of the scope of substantive review of domestic arbitral awards, clearly show a supportive approach to arbitration.

Under the new Civil Procedure Law, there is no major difference if a party chooses litigation as opposed to arbitration, especially in terms of procedural protection. For example, no express provision on pre-arbitration preservation of evidence was prescribed in the old Civil Procedure Law. Though the Maritime Special Procedure Law of the People's Republic of China 1999 included provisions as to maritime pre-arbitration preservation of evidence, there was no corresponding revisions made to the Civil Procedure Law, which was, to some extent, a failure to protect arbitration users in a procedural light. The introduction of the pre-arbitration preservation system improves arbitral preservation measures. Also, a claimant may apply to the competent court for evidence preservation and property preservation before the arbitration proceedings start, if necessary. The amended system therefore provides better protection and supports the smooth conduct of arbitration proceedings and the enforcement of awards.

The amendments to the Civil Procedure Law in 2012 have further enriched and improved the arbitration system in China. It is obvious that the new provisions, concerning pre-arbitration evidence preservation and property preservation, punishment of acts which aim to evade obligations specified in legal documents by means of arbitration, improved provisions on the anti-suit effect of arbitration agreements, the form of judicial documents for setting aside and non-enforcement of arbitral awards and the conditions for setting aside and non-enforcement of non-foreign-related domestic arbitral awards, all aim to promote the arbitration system in China.

It is particularly worth noting the significance of setting forth consistent conditions for setting aside and non-enforcement of arbitral awards and reducing the scope of substantive review. There has been a "dual system" of judicial supervision over arbitration in China, i.e, different conditions for setting aside and non-enforcement of domestic arbitral awards on the one hand and foreign-related awards on the other hand. The scope of review of the former involved procedural issues and substantive issues, while the scope of review of the latter focuses only on procedural

issues. The conditions for setting aside of domestic arbitral awards and the conditions for non-enforcement of the same also differ. Regarding the scope of review, in terms of procedural issues, the scope is the same. However, in terms of substantive issues, the former is limited to falsification and concealment of evidence, whereas the latter covers mistakes in fact finding and application of law. In contrast, the conditions for setting aside foreign-related arbitral awards are consistent with those for non-enforcement of the same. This is intended to encourage international arbitration by having different provisions for the judicial review of foreign-related and non-foreign-related arbitral awards. Nonetheless, its adverse effect on the uniform implementation of law is evident. Together with the special “reporting system” in China’s arbitration practice,^① the “dual system” gives excessive protection for foreign-related arbitration, which to a certain extent suppresses the domestic arbitration practice. Further, different conditions for setting aside and non-enforcement of arbitral awards may imply the difference in legal status.

However, for domestic arbitration which involves no extraterritorial recognition and

① Please refer to the Circular on Issues Relating to the Treatment of Foreign-related Arbitration and Foreign Arbitration Matters by People’s Courts dated 29 August, 1995 (Fa Fa [1995] No. 18). There are another two judicial interpretations on the “reporting system”, namely the Circular on Matters Relating to the Revocation of Foreign-related Arbitral Awards by People’s Courts dated 23 April, 1998 (Fa [1998] No. 40) and the Provisions on the Fee and Review Period for Recognition and Enforcement of Foreign Arbitral Awards dated 21 October, 1998 (Fa Shi [1998] No. 28). According to the three judicial interpretations, the reporting system shall mean: (1) For disputes involving a foreign party or a Hong Kong, Macao or Taiwanese party, if the parties have set forth arbitration provisions in the contract or reached an arbitration agreement afterwards and the People’s Court deems such arbitration provisions or arbitration agreement invalid, void or unenforceable due to inaccuracy, before accepting a lawsuit filed by one of the parties, the court must report the case to the higher people’s court in the same jurisdiction for review. If the higher people’s court agrees to accept the case, it shall report its opinion following its review to the Supreme People’s Court. Acceptance of the lawsuit can be suspended until the Supreme People’s Court gives a reply. (2) If one party applies to the people’s court for enforcing the award of a foreign affairs arbitration authority, or for recognizing and enforcing the award of a foreign arbitration authority, and the people’s court deems the award of the foreign affairs arbitration authority falls into any circumstances specified in Article 260 (now Article 258, sic passim) of the Civil Procedure Law, or the foreign arbitral award to be recognized and enforced is inconsistent with the provisions in any international convention to which Mainland China is a contracting party or inconsistent with the principle of reciprocity, before ruling non-enforcement or no recognition and enforcement, the court must report the case to the higher people’s court in the same jurisdiction for review. If the higher people’s court agrees with non-enforcement or no recognition and enforcement, it shall report its opinion following its review to the Supreme People’s Court. No ruling on non-enforcement or no recognition and enforcement shall be made until the Supreme People’s Court gives a reply. (3) If one party applies to the people’s court for revocation of an award according to the Arbitration Law and upon examination, the people’s court deems the foreign-related arbitral award falls into any circumstances specified in paragraph 1 of Article 260 of the Civil Procedure Law, before ruling revocation of the award or notifying the arbitral tribunal for re-arbitration, the court must report the case to the higher people’s court in the same jurisdiction for review. If the higher people’s court agrees to revoke the award or notify the arbitral tribunal for re-arbitration, it shall report its opinion following its review to the Supreme People’s Court. No ruling to revoke the award or notify the arbitral tribunal for re-arbitration shall be made until the Supreme People’s Court gives a reply. For comments on the “reporting system”, please refer to “A Probe into Several Issues Concerning the Amendments to the Arbitration Law 1994 of China” co-authored by Song Lianbin and Zhao Jian, published in the *Journal of International Economic Law* (volume 4), Law Press 2001 edition, pages 603 to 605.

enforcement of an arbitral award, the results of non-enforcement and setting aside are the same. Moreover, due to the different conditions for setting aside and non-enforcement of arbitral awards, in practice, it is possible that an arbitral award which has been held valid by the court may be subsequently treated as unenforceable. This would severely violate the principle that an arbitral award shall be final. Moreover, a party may apply for non-enforcement of an arbitral award even after an application for setting aside the award has failed.

The old regime was clearly inefficient in enforcing arbitral awards, and this increased the burden of judicial review of arbitral awards and caused confusion to the arbitration users. Consequently, in practice, there is a view that non-enforcement of awards as a remedy is unnecessary, and it is also suggested that setting aside and non-enforcement ought not to co-exist and instead setting aside of awards should be the only available remedy.

However, the problem does not originate from the provisions of non-enforcement. As remedies, setting aside and non-enforcement serve different functions. Setting aside is a remedy available to both the winning party and the losing party. Without setting aside system, the winning party can do nothing if it is unsatisfied with the award. Non-enforcement is a passive remedy for the losing party, and is a defense naturally available in the enforcement procedure, granting a right of “passive waiting” rather than actively applying for setting aside whenever it is unsatisfied with the award. This can help ease the burden on the courts. Early in the 1980s and 1990s, international arbitration professionals discussed this issue, and the mainstream view since then has been that the co-existence of setting aside and non-enforcement will improve the system of judicial supervision over arbitration.^① If consistent conditions for setting aside and non-enforcement of arbitral awards are adopted, then based on the principle of double jeopardy, it is unlikely that delay tactics employing repeated application of both procedures will succeed. The Interpretation on Several Issues Concerning the Application of the Arbitration Law of the People’s Republic of China (Fa Shi [2006] No. 7) (hereafter referred to as the “Interpretation”) published by the Supreme People’s Court on 23 August, 2006 prior to such amendments to the Civil Procedure Law, supports this position. According to Article 26 of the Interpretation: “If a party whose application to the People’s Court for setting aside an arbitral award has been rejected, pursues a non-enforcement defense based on the same reason in the course of enforcement procedure, the People’s Court shall not support such an application.”

However, though the amendments to the Civil Procedure Law in 2012 greatly favour arbitration, there is still room for the reform of the “dual system” of judicial supervision. Such reform should include unifying the conditions for setting aside and non-enforcement of domestic arbitral awards and the conditions for setting aside and non-enforcement of foreign-related arbitral awards. Such unification should be based on the provisions on setting aside and non-

① Please refer to “Research on the Jurisdiction in International Commercial Arbitrations” by Song Lianbin, Law Press 2000 edition, pages 249 to 250.

enforcement of foreign-related arbitral awards in the Civil Procedure Law and Arbitration Law.

The Amendments may make the arbitration regime in China more fragmented. Whilst there is a specific arbitration law in place, it does not cover all the relevant issues. The lack of coordination between the various laws, regulations and judicial interpretations results in poor efficiency. During the consultation on the Amendments in recent years, some scholars have suggested to set out the rules of arbitration proceedings in arbitration law, include the rules of enforcement of arbitral awards in the enforcement law, and retain provisions regarding the judicial supervision over arbitration in the Civil Procedure Law. Such a division of arbitration law would harm the development of arbitration practice, nor would it help the implementation of arbitration law in general. Considering the legislative and judicial conditions of China in the past, specific law is a better choice to regulate arbitration practice, and can allow arbitration to play its proper role in the society. We still believe that instead of making provisions on arbitration (including international commercial arbitration) in the Civil Procedure Law, it would be better to complete and improve the Arbitration Law. The new Arbitration Law should continue to adopt a unitary legislative system, i.e., one arbitration law should apply to both domestic arbitration and international commercial arbitration, and set out provisions on special issues involved in international commercial arbitration only.^①

(II) Review of the new CIETAC Arbitration Rules

CIETAC was the first arbitration institution in China, and was established in 1956. The latest version of the CIETAC Arbitration Rules took effect in 2005, and have played a major role in arbitration practice. However, with the rapid development of the economic and arbitration environment, arbitration users now have new requirements and expectations from CIETAC arbitration proceedings. As a result, CIETAC has modified the CIETAC Arbitration Rules. The new Rules were adopted at the committee meeting of CIETAC on 5 January 2012, approved by the China Council for the Promotion of International Trade/China Chamber of International Commerce on 3 February 2012, and took effect from 1 May, 2012.^②

The main features of the CIETAC Arbitration Rules are as follows:

1. Specify the functions and duties of each CIETAC organisation

Article 2 of the CIETAC Arbitration Rules makes express provisions for the organisation of

① Please refer to “Focus on the Innovation and Improvement of Arbitration System” by Song Lianbin, the *People’s Court Daily*, 10 October, 2005.

② “A Study on the 2012 Edition of Arbitration Rules of China International Economic and Trade Arbitration Commission” by Yu Jianlong, the *People’s Court Daily*, 25 April, 2012.

CIETAC as well as its functions and duties. According to paragraph 6, the parties may agree to submit their disputes to CIETAC or a sub-commission/center of CIETAC for arbitration. Where the parties have agreed to arbitration by CIETAC, the Secretariat of CIETAC shall accept the request for arbitration and administer the case. Where the parties have agreed to arbitration by a sub-commission/center, the secretariat of the sub-commission/center agreed upon by the parties shall accept the request for arbitration and administer the case. Where the sub-commission/center agreed upon by the parties does not exist, or where the agreement is ambiguous, the Secretariat of CIETAC shall accept the request for arbitration and administer the case. In the event of any dispute, a decision shall be made by CIETAC.

As such, the new CIETAC Arbitration Rules specify the allocation of work between CIETAC and its sub-commissions in respect of case administration.^①

2. Respect to the principle of party autonomy

Several provisions of the CIETAC Arbitration Rules favour the principle of party autonomy, and also set out default rules applicable to circumstances where the parties have made no specific agreement. We set out a number of examples below:

- (a) Article 3.1 of the CIETAC Arbitration Rules stipulates that CIETAC accepts cases involving economic, trade and other disputes of a contractual or non-contractual nature, based on an agreement of the parties.
- (b) Article 5.3 sets out that where the law as it applies to an arbitration agreement has different provisions as to the form and validity of the arbitration agreement, then the provisions of that law shall prevail.
- (c) Article 7.1 provides that, where the parties have agreed on the place of arbitration, the parties' agreement shall prevail, and Article 7.2 further provides that where the parties have not agreed on the place of arbitration or their agreement is ambiguous, the place of arbitration shall be the domicile of CIETAC or its sub-commission/center administering the case. CIETAC may also determine the place of arbitration to be another location having regard to the circumstances of the case.
- (d) Article 24.2 stipulates that where the parties have agreed to nominate arbitrators from outside CIETAC's panel of arbitrators, an arbitrator so nominated by the parties or nominated according to the agreement of the parties may act as arbitrator subject to the

^① This provision of the CIETAC Arbitration Rules unexpectedly led to its division, which was the most significant event for arbitration professionals in China in 2012. After the CIETAC Arbitration Rules took effect in 2012, CIETAC decided to terminate its authorization to the Shanghai Sub-commission and the South China Sub-commission for a variety of reasons. As a result, the two sub-commissions could no longer accept and administer arbitration cases submitted to CIETAC or its sub-commissions. Soon afterwards, the two sub-commissions declared that they had established independent arbitration institutions and renamed themselves as Shanghai International Arbitration Centre and South China International Economic and Trade Arbitration Commission respectively.

confirmation by the chairman of CIETAC in accordance with the relevant law.

- (e) Article 47.2 sets out that where the parties have agreed on the law as it applies to the merits of their dispute, the parties' agreement shall prevail. In the absence of such an agreement or where such agreement is in conflict with a mandatory provision of the law, the arbitral tribunal shall determine the law as it applies to the merits of the dispute.
- (f) Article 71.1 specifies that where the parties have agreed on the language of arbitration, their agreement shall prevail. In the absence of such agreement, the language of arbitration to be used in the proceedings shall be Chinese or any other language designated by CIETAC having regard to the circumstances of the case.

These provisions show that the CIETAC Arbitration Rules allow the parties to agree, amongst other things, on the nationality of arbitrators, the place of arbitration or place for hearing of an arbitration case, the language of arbitration, the method for hearing of an arbitration case, etc. This demonstrates a respect for the principle of party autonomy.

3. Improved procedures

First, the provisions regarding consolidating arbitration proceedings fill in the gap left by the Arbitration Law. Three paragraphs of Article 17 of the CIETAC Arbitration Rules deal with the consolidation of arbitration:

- (a) paragraph 1 stipulates that at the request of a party and with the agreement of all the other parties, or where CIETAC believes it necessary and all the parties have agreed, CIETAC may consolidate two or more arbitrations which are pending under the CIETAC Rules into a single arbitration.
- (b) paragraph 2 states that in deciding whether to consolidate the arbitrations, CIETAC may take into account any factors it considers relevant in respect of the different arbitrations, including whether all of the claims in the different arbitrations are made under the same arbitration agreement, whether the different arbitrations are between the same parties, or whether one or more arbitrators have been nominated or appointed in the different arbitrations.
- (c) paragraph 3 states that, unless otherwise agreed by all the parties, the arbitrations shall be consolidated into the arbitration that was commenced first.

Second, provisions on preservation and interim measures in arbitration provide, for the first time, the right of an arbitral tribunal to order interim measures. Pursuant to Article 21.1 of the CIETAC Arbitration Rules, where a party applies for conservatory measures pursuant to the laws of the People's Republic of China, the secretariat of CIETAC shall forward the party's application to the competent court designated by that party in accordance with the law. Pursuant to Article 21.2, at the request of a party, the arbitral tribunal may order any interim measure it deems

necessary or proper in accordance with the applicable law, and may require the requesting party to provide appropriate security in connection with the measure. The order of an interim measure by the arbitral tribunal may take the form of a procedural order or an interlocutory award.

Third, new provisions on the suspension of arbitration proceedings fill in the gap left by the Arbitration Law. Paragraph 1 of Article 43 of the CIETAC Arbitration Rules stipulates that where parties request a suspension of the arbitration proceedings, or in circumstances where such suspension is necessary, the arbitration proceedings may be suspended. According to paragraph 2, the arbitration proceedings shall resume as soon as the reason for the suspension disappears or the suspension period ends. Paragraph 3 sets out that the arbitral tribunal shall decide whether to suspend or resume the arbitration proceedings. Where the arbitral tribunal has not yet been formed, the decision shall be made by the Secretary General of CIETAC.

Fourth, new provisions regarding combining arbitration with mediation state that a case can be closed by a mediation statement. Pursuant to Article 45.6 of the CIETAC Arbitration Rules, where the parties request a mediation statement, the mediation statement shall clearly set forth the claims of the parties and the terms of the settlement agreement. It shall be signed by the arbitrators, sealed by CIETAC, and served upon both parties.

Fifth, provisions on the appointment of arbitrators and the composition of arbitral tribunals will change the manner in which the arbitral tribunal for a case involving several parties is established. Pursuant to Article 27.3 of the CIETAC Arbitration Rules, where either the applicant or the respondent fails to jointly nominate or jointly entrust the chairman of CIETAC with appointing one arbitrator within fifteen (15) days from the date of receipt of the notice of arbitration, the chairman of CIETAC shall appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator.

Sixth, provisions on evidence examination on paper have been improved. Pursuant to Article 40.2 of the CIETAC Arbitration Rules, where a case is to be decided on paper only, or where the evidence is submitted after the hearing and both parties have agreed to examine the evidence on paper, the parties may examine the evidence without oral hearing. In such circumstances, the parties shall submit their written opinions on the evidence within the time period specified by the arbitral tribunal.

Seventh, the amount in dispute in a case to which the summary procedure shall apply has been increased and the conditions of changing from the summary procedure to the general procedure have been modified. According to the new CIETAC Arbitration Rules, the amount in dispute to which the summary procedure shall apply is increased from RMB 500,000 to RMB 2,000,000. Article 54.1 of the CIETAC Arbitration Rules stipulates that unless otherwise agreed by the parties, the summary procedure shall apply to any case where the amount in dispute does not exceed RMB 2,000,000; or to any case where the amount in dispute exceeds RMB 2,000,000, in circumstances where one party applies for arbitration under the summary procedure and the other party agrees in writing. According to Article 61 of the CIETAC Arbitration Rules, the

application of the summary procedure shall not be affected by any amendment to the claim or by the filing of a counterclaim. Where the amount in dispute of the amended claim or that of the counterclaim exceeds RMB 2,000,000, the summary procedure shall continue to apply unless the parties agree or the arbitral tribunal decides that a change to the general procedure is necessary.

The new version of the CIETAC Arbitration Rules features improvement, internalisation and modernisation. Based on the experience and wisdom of numerous arbitrators, staff of CIETAC and its sub-commissions, judges as well as scholars, lawyers and arbitration professionals at home and abroad, the new rules will provide better dispute resolution services to Chinese and foreign parties in a fair and efficient way.^①

II. Statistics and Analysis of Judicial Supervision Cases

(I) An Overview

Because China has not established a comprehensive system for publishing court judgments and awards, information referred to in this article has been mainly collected from official online sources recognised by Chinese legal academics and practitioners, including Peking University Law Database, China Lawyee Database, China Foreign-related Commercial and Maritime Trial (<http://www.ccmt.org.cn>), China Court (<http://www.chinacourt.org>) and several official websites of arbitration commissions with sufficient and updated information. As only a small number of arbitration-related cases were collected, we eliminated the repetitive cases and those involving no substantial legal issues, and selected 46 cases relating to arbitral awards for further analysis. These cases fall into four categories (1) applications for determination of the validity of an arbitration agreement, (2) applications for property preservation in arbitration, (3) applications to set aside arbitral awards, and finally (4) applications for enforcement or non-enforcement of arbitral awards. In the following sections, we first provide a statistical summary of these cases according to their type, cause of action and results, and then, by examining these cases, we will analyse the key issues confronted with Chinese courts in hearing arbitration-related cases, with a focus on whether the courts implement the provisions of arbitration law and support arbitration in their consideration of arbitration-related cases.

① “A Study on the 2012 Edition of Arbitration Rules of China International Economic and Trade Arbitration Commission” by Yu Jianlong, the *People’s Court Daily*, 25 April, 2012.

Table 1: A Sample of Statistics of Arbitration-Related Cases Heard by Chinese Courts

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
1	The Applicant, Wang Jia and the Respondent, a Changsha Development Co., Ltd. applying for the determination of the validity of an arbitration agreement	Changsha Intermediate People's Court of Hunan Province, (2012) Chang Zhong Min Wu Zhong Zi No. 0410 Civil Ruling	Application to confirm the invalidity of the arbitration agreement	The arbitration agreement was held to be invalid. ^②
2	The Applicant, Xi'an Jianhong Real Estate Co., Ltd. applying for the determination of the validity of an arbitration agreement	Xi'an Intermediate People's Court of Shaanxi Province, (2012) Xi Min Si Zhong Zi No. 00037 Civil Ruling	Application to confirm the invalidity of the arbitration agreement	The application was rejected ^③
3	Objection regarding the validity of the arbitration agreement in the Sale and Purchase Contract in dispute between the Applicant, Zoomlion XX Material Handling Equipment Co., Ltd. and Hengyang XX Springs Manufacturing Co., Ltd.	Changsha Intermediate People's Court of Hunan Province, (2012) Chang Zhong Min Wu Zhong Zi No. 0082	Application to confirm the invalidity of the arbitration agreement	The arbitration agreement was held to be valid.

- ① In respect of the claims of the Applicants, only the main points in dispute are summarized, without providing further details in this table.
- ② The court held that according to Article 7 of The Interpretation of the Supreme People's Court Concerning Issues on the Application of the Arbitration Law of the People's Republic of China, "Where concerned parties agree that they may either apply to the arbitration authority for arbitration or bring a lawsuit to the people's court for settlement of disputes, the arbitration agreement shall become invalid." In this case, the payment of the remaining RMB 600,000 of the property purchase price arising from the performance of the Sale and Purchase Contract was in dispute. It was also the subject matter of the performance of the Escrow Agreement. The parties concerned had agreements covering both arbitration and litigation as dispute resolution mechanisms in respect of the remaining RMB 600,000. This is the circumstance prescribed by the aforesaid Article 7. The parties' agreement to litigate contained in the Escrow Agreement preceded their arbitration agreement in the Sale and Purchase Contract. This resulted in the invalidity of the arbitration agreement and Wang Jia's claim was justified.
- ③ The court held that according to Article 20 of the Arbitration Law of the People's Republic of China, "If the parties object to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a people's court for a ruling." Jianhong Company applied to the court to confirm that the arbitration clauses in the two contracts in dispute had no binding force, rather than to determine the validity of the arbitration agreement. The claim of Jianhong Company therefore had no legal grounds.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
4	The Applicant, China Construction Steel Structure XX Sunbright Co., Ltd. and the Respondent, Hunan XX Steel Co., Ltd. applying for the determination of the validity of an arbitration agreement	Changsha Intermediate People's Court of Hunan Province, (2012) Chang Zhong Min Wu Zhong Zi No. 0426 Civil Ruling	Application to confirm the invalidity of the arbitration agreement	The arbitration agreement was held to be invalid. ^①
5	The Applicant, a construction engineering company and the Respondent, Dong XX, applying for the determination of the validity of an arbitration agreement	Changsha Intermediate People's Court of Hunan Province, (2012) Chang Zhong Min Wu Zhong Zi No. 0165 Civil Ruling	Application to confirm the invalidity of the arbitration agreement	The arbitration agreement was held to be valid. ^②
6	The Applicant, Zhuzhou Huaguang Property Management Co., Ltd. and the Respondent, Zhuzhou Wangyun Property Development Co., Ltd. applying for the determination of the validity of an arbitration agreement	Zhuzhou Intermediate People's Court of Hunan Province, (2012) Zhu Zhong Fa Min Te Zi No.3 Civil Ruling	Application to confirm the invalidity of the arbitration agreement	The application was rejected.
7	The Applicant, Zhuzhou Xiangrun New Energy Co., Ltd. and the Respondent, Zhuzhou Yunlong Industries Co., Ltd. applying for the determination of the validity of an arbitration agreement	Zhuzhou Intermediate People's Court of Hunan Province, (2012) Zhu Zhong Fa Min Te Zi No.4 Civil Ruling	Application to confirm the invalidity of the arbitration agreement	The application was rejected. ^③

- ① The court held that the parties agreed to “submit the dispute to the local arbitration commission for arbitration,” but the word “local” was not defined. In these circumstances, “local” may be the place of Applicant or the Respondent, or any other place agreed to by the parties. Therefore, as the parties could not agree on the appointed arbitration commission, it was ruled that it should be deemed that the arbitration agreement does not specify an arbitration commission. As the parties failed to enter into a supplementary agreement, the court determined that this arbitration agreement was invalid.
- ② The court held that the arbitration agreement relating to this case set out a specific arbitration institution. The Applicant, Li XX's Company claimed that the arbitration agreement did not specify a specific arbitration institution and was therefore invalid. The Court held that such a claim was not justified and it did not uphold the application.
- ③ The court was of the opinion that there was no evidence to prove that this arbitration clause was entered into against the Applicant's true intention under the duress of the Respondent, and therefore it was held to be valid. In summary, the Applicant's claim was not justified and was rejected.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
8	Dispute over arbitration concerning a sale and purchase contract between the Applicant, XX Company and the Respondent, Hunan XX Company	The People's Court of Lusong District, Zhuzhou, Hunan Province, (2012) Lu Fa Min Zhong Bao Zi No.1 Civil Ruling	Application for preservation of property	The court seized and froze the property of Hunan XX Company valued at RMB 375,000.
9	Arbitration case between the Applicant, Zhuzhou Youlian Construction Engineering Limited Liability Company and the Respondent, Zhuzhou Kangtai Real Estate Development Co., Ltd.	The People's Court of Lusong District, Zhuzhou, Hunan Province, (2012) Lu Fa Min Zhong Bao Zi No.2 Civil Ruling	Applying for preservation of property	The court ruled to seal up and freeze the property of the Respondent, Zhuzhou Kangtai Real Estate Development Co., Ltd. valued at RMB 8,800,000.
10	Dispute over the application for arbitration preservation measures between XX Company and Changsha XX Company	The People's Court of Furong District, Changsha, Hunan Province, (2012) Fu Min Bao Zi No.9 Civil Ruling	Application for preservation of evidence	The court permitted the Applicant's request for preservation of evidence.
11	Property preservation in the proceedings of arbitration between the Applicant, Zuo XX and the Respondent, Hunan XX Company and Yang XX	The People's Court of Tianyuan District, Zhuzhou, Hunan Province, (2012) Zhu Tian Fa Bao Zi No.6 Civil Ruling	Application for preservation of evidence	The court seized a parcel of land in the name of the Respondent located in Tianyuan District, Zhuzhou; and ordered a freeze over the equity held by the Respondent, Yang XX in Hunan XX Company.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
12	Property preservation in the arbitration proceedings between the Applicant, Hunan XX Company and the Respondent, Zhuzhou XX Company	The People's Court of Tianyuan District, Zhuzhou, Hunan Province, (2012) Zhu Tian Fa Bao Zi No.1-1 Civil Ruling	Application for cessation of a property preservation order	The court ruled that the seizure and freezing of the property of the Applicant, Hunan XX Company valued at RMB 450,000 should cease.
13	Arbitration of a dispute over the insurance contract between the Applicant, Nanchong Tongfa Transportation Industry Co., Ltd. and the Respondent, China Continent Property & Casualty Insurance Ltd.	Changsha Intermediate People's Court of Hunan Province, (2012) Chang Zhong Min Wu Zhong Zi No. 0508 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by the Respondent. The Respondent was ordered to perform its obligations according to the award.
14	The Applicant, Liu Hongling and the Respondent, Liu Yi applying for setting aside the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2012) Bin Min Zhong Zi No.2 Civil Ruling	Application to set aside the arbitral award	The court rejected the application made by the Applicant to set aside the Bin Zhong Cai Zi [2010] No.32 Award.
15	Arbitration of the dispute over the equity transfer contract between the Applicant, XX Coalmine of Zhijin County (general partnership) and the Respondent, Hunan XX Power Construction Development Co., Ltd. at Changsha Arbitration Commission	Changsha Intermediate People's Court of Hunan Province, (2012) Chang Zhong Min Wu Zhong Zi No. 0160 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by the Applicant to set aside the [2011] Chang Zhong Cai Zi No.235 Award. The Applicant was ordered to perform its obligations according to this award.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
16	Dispute between the Applicant, Zhang Mingqian and the Respondent, China Life Property & Casualty Insurance Co., Ltd. Hengyang Sub-branch over the application for setting aside the arbitral award	Hengyang Intermediate People's Court of Hunan Province, (2012) Heng Zhong Fa Min Er Chu Zi No. 23 Civil Ruling	Application to set aside the arbitral award	The court ordered to set aside Hengyang Arbitration Commission (2011) Heng Zhong Cai Zi No. 122 Arbitral Award. ^①
17	Dispute between the Applicant, Shang XX Guang XX Company and the Respondent, Changsha XX Equipment Technology Co., Ltd. over the application for setting aside the arbitral award	Changsha Intermediate People's Court of Hunan Province, (2012) Chang Zhong Min Wu Zhong Zi No. 0348 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by the Applicant for setting aside [2011] Chang Zhong Cai Zi No.448 Award.
18	Dispute between the Applicant, Jiyuan Global Transportation Co., Ltd. and the Respondent, Ping An Property & Casualty Insurance Company of China, Jiyuan Center Sub-branch over the application for setting aside an arbitral award	Jiyuan Intermediate People's Court of Henan Province, (2012) Ji Zhong Min Yi Che Zi No.1 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by the Applicant to set aside the Jiyuan Arbitration Commission (2011) Ji Zhong Cai Zi No.7 Award.

① The court was of the opinion that whether the application of law in the arbitral award was correct or not was not to be examined in this case. As to the legality of the proceedings of arbitration, the court held that after accepting the case, the court served a "Notice of Acceptance" and other documents to Zhang Mingqian by post, c/o "Zhang Xiaomei" on 21 December, 2011. The arbitration commission served a "Notice of the Composition of the Arbitral Tribunal" and other documents to Zhang Mingqian by post, c/o "Luo Chunxiang" on 13 February, 2012. The analysis of the arbitration files shows that these two agents were not authorized by Zhang Mingqian to receive legal documents on his behalf, and there was no evidence proving that the agents forwarded the documents to Zhang Mingqian in these two circumstances. On 13 March, 2012, the arbitration commission served a "Notice of Acceptance of Change in Arbitral Claim and Burden of Proof" and other documents to Zhang Mingqian by post, but the post was returned as a result of "rejection." The delivery failure notification was not signed by the person-in-charge or the handling person and therefore the service by post was defective. The arbitration commission conducted the hearing of this case in Zhang."

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
19	The Applicant, Xuzhou Branch of the Agricultural Bank of China Co., Ltd. applying for setting aside Xuzhou Arbitration Commission (2010) Xu Zhong Cai Zi No.262 Arbitral Award	Xuzhou Intermediate People's Court of Jiangsu Province, (2012) Xu Min Zhong Shen Zi No.63 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by Xuzhou Branch of the Agricultural Bank of China Co., Ltd., to set aside the (2010) Xu Zhong Cai Zi No.262 Arbitral Award.
20	The Applicant, Cai Jinlong applying for setting aside the arbitral award by Shaoyang Arbitration Commission	Shaoyang Intermediate People's Court of Hunan Province, (2012) Shao Zhong Min Er Chu Zi No. 2 Civil Ruling	Application to set aside the arbitral award	The case was deemed as a "withdrawal of action."
21	The Applicant, Shandong No. 8 Institute of Geological and Mineral Exploration, the Respondent, Li Shuhao and the Third Person, Wang Pingguo applying for setting aside the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2012) Bin Min Zhong Zi No.3 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by the Applicant to set aside the Chen Zhong Cai Zi [2011] No. 07 Award.
22	Dispute over the application filed by Ziguang Guhan Group Co., Ltd. for setting aside the arbitral award	Hengyang Intermediate People's Court of Hunan Province, (2012) Heng Zhong Fa Min Yi Chu Zi No. 11 Civil Ruling	Application to set aside the arbitral award	The court ordered that the Heng Zhong Cai Zi No. 418 Award by Hengyang Arbitration Commission be set aside.
23	Dispute between the Applicant, Shaoyang Automobile Transportation General Company of Hunan Province and the Respondent, PICC Property and Casualty Company Limited Wugang Sub-branch over the application for setting aside the arbitral award	Shaoyang Intermediate People's Court of Hunan Province, (2012) Shao Zhong Min Er Chu Zi No. 16 Civil Ruling	Application for withdrawal of the application to set aside arbitral award	The court permitted the withdrawal of the action by the Applicant.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
24	Dispute between Shenyang Global Mineral Equipment Co., Ltd. and Benxi Tonghe Metallurgical Machinery Repair Plant over the application for setting aside an arbitral award	Benxi Intermediate People's Court of Liaoning Province, (2012) Ben Min Er Te Zi No.00001 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by Shenyang Global Mineral Equipment Co., Ltd. to set aside the Benxi Arbitration Commission (2011) Ben Zhong Cai Zi No. 30 Award.
25	The Applicant, Jiangsu Global IELTS Education Science & Technology Co., Ltd. and the Respondent, Xuzhou Yingyuan Science & Technology Co., Ltd. applying for setting aside arbitral award	Xuzhou Intermediate People's Court of Jiangsu Province, (2012) Xu Min Zhong Shen Zi No.93 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by Jiangsu Global IELTS Education Sci-tech Co., Ltd. to set aside the arbitral award.
26	The Applicant, Zhao XX and the Respondent, Chongqing XX Property Purchase & Exchange Co., Ltd. applying for setting aside an arbitral award	No. 1 Intermediate People's Court of Chongqing (2012) Yu Yi Zhong Fa Min Chu Zi No. 00444 Civil Ruling	Application to set aside the arbitral award	The court ruled to set aside (2011) Yu Zhong Zi No. 1132 Award by Chongqing Arbitration Commission.
27	The Applicant, Yiyang Wuzhou Real Estate Development Co., Ltd. and the Respondent, China Machinery International Engineering Design & Research Institute Co., Ltd. refusing to accept the arbitral award	Yiyang Intermediate People's Court of Hunan Province, (2012) Yi Fa Min Yi Zhong Che Zi No.12 Civil Ruling	Application to set aside the arbitral award	The court rejected the application to set aside the arbitration award made by the Applicant and the Respondent.
28	The Applicant, Mo Dongxiang and the Respondent, Zhuzhou Dadi Real Estate Development Co., Ltd. applying for setting aside the arbitral award	Zhuzhou Intermediate People's Court of Hunan Province, (2012) Zhu Zhong Fa Min Te Zi No.6 Civil Ruling	Withdrawing the application to set aside the arbitral award	The court allowed the Applicant to withdraw the application to set aside the arbitration award.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
29	Hengyang Huaxiang Real Estate Comprehensive Development Co, Ltd. applying for setting aside the arbitral award	Hengyang Intermediate People's Court of Hunan Province, (2012) Heng Zhong Fa Min Yi Chu Zi No. 14 Civil Ruling	Application to set aside the arbitral award	The court rejected the application filed by the Applicant to set aside the arbitration award.
30	Hubei Li Shizhen Herbal Preparation Co, Ltd. and Wuhan Branch of Hubei Li Shizhen Herbal Preparation Co, Ltd. applying for non-enforcement of the arbitral award	Wuhan Intermediate People's Court of Hubei Province, (2012) E Wu Han Zhong Zhi Cai Zi No.00021 Ruling of Enforcement	Application for non-enforcement of the arbitral award	The court rejected the application filed by Hubei Li Shizhen Herbal Preparation Co, Ltd. and Wuhan Branch of Hubei Li Shizhen Herbal Preparation Co, Ltd. for non-enforcement of the arbitral award.
31	Changde Arts and Crafts School applying for non-enforcement of the arbitral award	Changde Intermediate People's Court of Hunan Province, (2012) Chang Zhi Bu Zi No.8 Ruling of Enforcement	Application for non-enforcement of the arbitral award	The court rejected the application filed by Changde Arts and Crafts School for non-enforcement of the arbitral award.
32	Hu XX applying for the enforcement of the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2012) Chen Zhong Zhi Zi No.18 Ruling of Enforcement	Application for the enforcement of the arbitral award	The People's Court of Linwu County, Hunan Province was appointed to enforce the arbitral award and it will inform the parties concerned when it receives the court's ruling and the relevant files and documents.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
33	Huang XX applying for the enforcement of the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2012) Chen Zhong Zhi Zi No.17 Ruling of Enforcement	Application for the enforcement of the arbitral award	The People's Court of Linwu County, Hunan Province was directed to enforce the arbitral award.
34	Huang XX applying for the enforcement of the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2012) Chen Zhong Zhi Zi No.16 Ruling of Enforcement	Application for the enforcement of the arbitral award	The People's Court of Linwu County, Hunan Province was directed to enforce the arbitral award.
35	Jiang XX applying for the enforcement of the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2012) Chen Zhong Zhi Zi No.19 Ruling of Enforcement	Application for the enforcement of the arbitral award	The People's Court of Linwu County, Hunan Province was directed to enforce the arbitral award.
36	Kuang XX applying for the enforcement of the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2012) Chen Zhong Zhi Zi No.20 Ruling of Enforcement	Application for the enforcement of the arbitral award	The People's Court of Linwu County, Hunan Province was directed to enforce the arbitral award.
37	Peng XX applying for the enforcement of the arbitral award against He XX	Chenzhou Intermediate People's Court of Hunan Province, (2012) Chen Zhong Zhi Zi No.1 Ruling of Enforcement	Application for the enforcement of the arbitral award	The court ruled that the bank deposits of RMB 82,700 of He XX, the person against whom the award is being enforced, should be frozen or transferred as well as the interest on delay in performance. If the bank deposits are insufficient, other properties of an equivalent value shall be seized, detained and auctioned to cover the repayment of debts.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
38	Chen Yanlong applying for non-enforcement of Lou Zhong Cai Zi (2010) No. 18 Award by Loudi Arbitration Commission	Loudi Intermediate People's Court of Hunan Province, (2012) Lou Zhong Zhi Yi Zi No.4 Ruling of Enforcement	Application for non-enforcement of the arbitral award	The court permitted the Applicant and Opponent, Chen Yanlong, to withdraw the application for non-enforcement of the arbitral award.
39	Wuhan Haiding Real Estate Co., Ltd. applying for non-enforcement of the arbitral award	Wuhan Intermediate People's Court of Hubei Province, (2012) Wu Han Zhong Zhi Cai Zi No.00018 Ruling of Enforcement	Application for non-enforcement of the arbitral award	The court rejected the application filed by Wuhan Haiding Real Estate Limited Liability Company for non-enforcement of the arbitral award.
40	Hunan Xiangyou Real Estate Co., Ltd. applying for non-enforcement of the arbitral award	Changde Intermediate People's Court of Hunan Province, (2012) Chang Zhi Bu Zi No.5 Ruling of Enforcement	Application for non-enforcement of the arbitral award	The court rejected the application filed by Hunan Xiangyou Real Estate Limited Liability Company for non-enforcement of the arbitral award.
41	Yongxing Bureau of Land and Resources applying for the enforcement of the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2011) Chen Zhong Zhi Zi No.20 Ruling of Enforcement	Application for the enforcement of the arbitral award	The court ruled not to enforce Chenzhou Arbitration Commission Chen Zhong Cai Zi (2010) No. 27 Award.
42	Duan Shaoyi applying for the enforcement of Lou Zhong Cai Zi [2011] No. 24 Arbitral Award by Loudi Arbitration Commission	Loudi Intermediate People's Court of Hunan Province, (2012) Lou Zhong Zhi Zi No.28 Ruling of Enforcement	Application for the enforcement of the arbitral award	The People's Court of Lengshuijiang was directed to enforce the award.

No.	The Parties Concerned and Cause of Action	Court Accepting the Case and Case No.	Claim ^①	Decision
43	Hunan Zhong'ao Real Estate Development Co., Ltd. applying for non-enforcement of the arbitral award	Changde Intermediate People's Court of Hunan Province, (2012) Chang Zhi Bu Zi No.3 Ruling of Enforcement	Application for non-enforcement of the arbitral award	The court rejected the application filed by Hunan Zhong'ao Real Estate Development Co., Ltd. for non-enforcement of the arbitral award.
44	Zhou XX and Wang XX applying for the enforcement of the arbitral award	Chenzhou Intermediate People's Court of Hunan Province, (2012) Chen Zhong Zhi Zi No.15 Ruling of Enforcement	Application for the enforcement of the arbitral award	The People's Court of Linwu County, Hunan Province was directed to enforce the award.
45	Zhu Dexuan applying for non-enforcement of the arbitral award	Changde Intermediate People's Court of Hunan Province, (2012) Chang Zhi Bu Zi No.10 Ruling of Enforcement	Application for non-enforcement of the arbitral award	The court ruled that it would conclude the investigation of this case.
46	Zhu Zhengguo applying for non-enforcement of the arbitral award	Changde Intermediate People's Court of Hunan Province, (2012) Chang Zhi Bu Zi No.2 Ruling of Enforcement	Application for non-enforcement of the arbitral award	The court rejected Zhu Zhengguo's application for non-enforcement of the arbitral award.

Table 2: Summary of the Type of the Cases

	Type of the Case	No.	Percentage
1	Applications for the determination of the validity of an arbitration agreement	7	15.2%
2	Applications for property preservation in arbitration	5	11%
3	Applications to set aside arbitral awards	17	36.9%
4	Applications for the enforcement or non-enforcement of arbitral awards	17	36.9%
	Total	46	100%

Table 3: Summary of the Results of the Applications for Setting Aside Arbitral Awards

Type of the Case	Result of the Ruling	No.	Percentage
Application to set aside arbitral awards	Application rejected	11	64.7%
	Setting aside arbitral awards	3	17.6%
	Withdrawal of action	3	17.7%
	Total	17	100%

Table 4: Summary of the Results of the Applications for the Enforcement or Non-enforcement of Arbitral Awards

Type of the Case	Result	No.	Percentage	
Application for the enforcement or non-enforcement of arbitral awards	Application for non-enforcement of arbitral awards	Application rejected	6	35.3%
		Application withdrawn	2	11.8%
	Application for the enforcement of arbitral awards	Enforcement of the arbitral award	8	47.1%
		Non-enforcement of the arbitral award	1	5.8%
	Total		17	100%

As shown in Table 1, currently the arbitration-related cases accepted by the courts in China mainly fall into four types. In the cases regarding applications for determination of the validity of an arbitration agreement, the rulings given by the courts are generally based on the provisions of the Arbitration Law and relevant judicial interpretations in force, which are generally reasonable, to a certain extent. Table 2 indicates that the applications to set aside and the enforcement/non-enforcement of arbitral awards account for a relatively high percentage of the total number of cases, as these two types of cases represent the majority of arbitration-related cases accepted by the courts in China. Table 3 shows that although there were a large number of applications to set aside arbitral awards, most of them were rejected by the courts. Table 4 shows that the applications to enforce arbitral awards were mostly supported by the courts, while those applications for non-enforcement were largely rejected, and some were withdrawn by the parties concerned. From these statistics, it is evident that the courts provide strong support for arbitration, but there is still room for further improvement.

III. How the Courts Handle Applications for Setting Aside Arbitral Awards: Problems and Reflections

Table 5: Reasons for the Application for Setting Aside Arbitral Awards Filed by the Parties Concerned and Grounds for the Court Rulings^①

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
1	Arbitration of dispute over an insurance contract between the Applicant, Nanchong Tongfa Transportation Industry Co., Ltd. and the Respondent, China Continent Property & Casualty Insurance Ltd.	<ol style="list-style-type: none"> 1. Wrong subject, omission of the parties concerned and illegal arbitration proceedings; 2. The Respondent concealed evidence which was sufficient to affect the impartiality of the award in the arbitration. 	<ol style="list-style-type: none"> 1. The arbitration proceedings complied with legal procedures; 2. The arbitration did not have such procedural problems as omission of the parties concerned; 3. The household registration information of Yang XX was filed at the relevant administration, which was accessible by the Applicant and the Respondent. Therefore the evidence could not have been concealed by the Respondent, Nanchong Tongfa Transportation Industry Co., Ltd..
2	The Applicant, Liu Hongling and the Respondent, Liu Yi applying for setting aside the arbitral award	<ol style="list-style-type: none"> 1. Chenzhou Arbitration Commission failed to notify the Applicant in writing of the change of arbitrator, which constitutes illegal arbitration proceedings; 2. The arbitral award willfully distorts and conceals facts and constitutes a unlawful judgment. The opposite party concealed evidence which was sufficient to affect the impartiality of the arbitration. Meanwhile, the Applicant produced sufficient evidence to determine the facts of the case, but was not admitted by the arbitration commission. 	<ol style="list-style-type: none"> 1. At the beginning of the hearing, Chenzhou Arbitration Commission explained the change of arbitrator and the composition of arbitrators to the parties, to which Liu Hongling did not raise any objection. Therefore, the claim made by Liu Hongling that she was not notified in writing of the change of arbitrator and that the composition of the arbitral tribunal was illegal and could not be justified; 2. In the proceedings, Liu Hongling did not state that the evidence concealed by Liu Yi affected the impartiality of the arbitration, so it was impossible for the court to conduct any investigation. The Applicant applied to set aside the arbitral award on the basis that the Respondent concealed evidence which was sufficient to affect the impartiality of the arbitration. This reason was not sufficient and the court did not uphold the application.

^① This table mainly analyses the relationship between the reasons for the application for revocation of arbitral awards filed by the parties concerned and the grounds for the court rulings. As Table 1 states the case No. of the courts where the cases were heard and the final awards given by the courts, these details are omitted in this table. Moreover, only the key points of disputes are summarised and the table does not list the reasons and grounds of each party in detail.

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
3	Arbitration of the dispute over an equity transfer contract between the Applicant, XX Coalmine of Zhijin County (general partnership) and the Respondent, Hunan XX Power Construction Development Co., Ltd. at Changsha Arbitration Commission	<ol style="list-style-type: none"> 1. Changsha Arbitration Commission was not the competent arbitration authority for this case. The contract entered into by the parties did not expressly specify that the place of signing would be Changsha; therefore, the condition agreed in the arbitration clause- “the legal authority in the place of signing of the contract shall be the arbitration institution” was not justified; 2. Changsha Arbitration Commission violated legal procedures in the course of arbitration; 3. The Construction Company concealed the evidence, i.e., a Letter of Request for Payment and Registration Form of Jinqiao XX Property Inspection, which was sufficient to affect the impartiality of the arbitration; 4. The merits of the arbitral award were flawed. 	<ol style="list-style-type: none"> 1. According to the contents of the contract and the witnesses’ testimony, it was ascertained that Changsha was the final place of signing of the contract between the parties, and Changsha Arbitration Commission is the only arbitration institution in Changsha. Moreover, the Memorandum of Arbitration entered into between the parties at the time of the arbitration further specifies the intention of the parties to agree on Changsha Arbitration Commission as the arbitration institution. According to the judicial interpretation on arbitration, the court held that the parties had agreed on a specific arbitration institution; 2. The arbitration proceedings did not violate the legal provisions. In the course of arbitration, the parties did not raise any objection to the preservation procedures, and the parties agreed on the change in preservation in the Memorandum of Arbitration after the completion of the property preservation. The service procedures in the course of arbitration also complied with the law; 3. The court held that the admission of evidence and determination on the merits by the arbitral tribunal in the course of arbitration fell within the scope of its authority. This did not involve a circumstance prescribed by Article 58 of the Arbitration Law of the People’s Republic of China under which the award should be set aside. Therefore the reason for setting aside the arbitral award proposed by the Applicant was not upheld by the court.

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
4	Dispute between the Applicant, Zhang Mingqian and the Respondent, China Life Property & Casualty Insurance Co., Ltd. Hengyang Sub-branch over the application for setting aside the arbitral award	The arbitration commission gave a default award without serving the legal documents, so the arbitration proceedings were unlawful.	The court held that service by post was defective. The arbitration commission conducted a default hearing without the confirmation that Zhang Mingqian had received the relevant legal documents, thereby constituting unlawful proceedings.
5	Dispute between the Applicant, Shang XX Guang XX Company and the Respondent, Changsha XX Equipment Technology Co., Ltd. over the application for setting aside the arbitral award	<p>1. The arbitral tribunal determined that the delivery was in breach of the contract. This determination was a mistake in fact finding, which willfully distorted and concealed the facts and constituted an unlawful judgment;</p> <p>2. The arbitral tribunal determined that the delay in installation and commissioning was in breach of contract, and calculated the penalty according to the standard penalty rate for delay in installation and commissioning, which exceeded the arbitral claim. The arbitral tribunal violated the principle of “no trial without complaint” in civil litigation, which constituted a material breach of the procedural law;</p> <p>3. The arbitral application was not filed within the prescribed time for arbitration, but the arbitration commission still accepted and ruled on it, which was contrary to the legal procedures of arbitration.</p>	<p>1. The arbitral tribunal determined the facts constituting the discontinuance of the time limit pursuant to the relevant laws of arbitration. In this case, it exercised its jurisdiction as an arbitration authority according to law. The court held that it would not examine whether the arbitral tribunal was right in determining the facts constituting the discontinuance of the time limit;</p> <p>2. The arbitral tribunal determined the delay in installation and commissioning and calculated the penalty according to the standard penalty rate for delay in installation and commissioning. In doing so the arbitral tribunal exercised its jurisdiction as an arbitration authority according to law, which was therefore beyond the scope of examination of the court;</p> <p>3. The evidence submitted by the party concerned failed to prove that the arbitral tribunal made a unlawful judgment, therefore, this was not admitted by the court.</p>

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
6	Dispute between the Applicant, Jiyuan Global Transportation Co., Ltd. and the Respondent, Ping An Property & Casualty Insurance Company of China, Jiyuan Center Sub-branch over the application for setting aside arbitral award	The arbitral award committed a mistake in fact finding, which led to the error of calculation.	After examination, the court held that the facts and reasons stated by the Applicant, Jiyuan Global Transportation Co., Ltd. in the application for setting aside the arbitral award did not involve a circumstance prescribed by Article 58 of the Arbitration Law of the People's Republic of China under which the award should be set aside.
7	The Applicant, Xuzhou Branch of the Agricultural Bank of China Co., Ltd. applying for setting aside Xuzhou Arbitration Commission (2010) Xu Zhong Cai Zi No.262 Arbitral Award	The Applicant did not enter into the Commercial Property Sale and Purchase Contract with Fu Qiong. The Parties did not have an arbitration agreement and the matter was not under the jurisdiction of Xuzhou Arbitration Commission.	After examination, the court held that Jinsui Company was the counterparty of a Commercial Property Sale and Purchase Contract, so the contract was binding on Jinsui Company. Therefore, the claim made by the Applicant, Xuzhou Branch of the Agricultural Bank of China Co., Ltd. that there was no arbitration agreement between Jinsui Company and Fu Qiong could not be justified. Xuzhou Arbitration Commission accepted the case according to Fu Qiong's application, which was in conformity with the legal procedures.

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
8	The Applicant, Cai Jinlong applying for setting aside the arbitral award by Shaoyang Arbitration Commission	Applying for setting aside the arbitral award by Shaoyang Arbitration Commission	The court held that due to the failure of the Applicant, Cai Jinlong, to pay the acceptance fee within the term prescribed by the court, the case was deemed as a withdrawal of action.
9	The Applicant, Shandong No.8 Institute of Geological and Mineral Exploration; the Respondent, Li Shuhao and the Third Person, Wang Pingguo applying for setting aside the arbitral award	<ol style="list-style-type: none"> 1. No arbitration clause was set out in the Joint Exploration Agreement entered into between the parties; 2. The arbitration was contrary to legal procedures. 	<ol style="list-style-type: none"> 1. The two agreements provided by Li Shuhao were in full conformity with each other in respect of contents, seals and signatures. Therefore it was possible to ascertain that the Joint Exploration Agreement presented by Li Shuhao to the court was true and authentic. Article 7 of the Agreement specifies that in case of any dispute arising from the Agreement, it shall be settled through arbitration at Chenzhou Arbitration Commission. Therefore, Chenzhou Arbitration Commission was the competent authority to accept this case; 2. Shandong No. 8 Institute of Geological and Mineral Exploration sent a letter to Chenzhou Arbitration Commission on 1 August, 2011, which was received by on 3 August, 2011. Although the letter mentioned the issue of jurisdiction, it did not raise any objection to it. Therefore it was right for Chenzhou Arbitration Commission not to have examined any objection to jurisdiction.

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
10	Dispute over the application filed by Ziguang Guhan Group Co., Ltd. for setting aside the arbitral award	<p>1. The matter of arbitration was beyond the scope of the arbitration agreement, and was not under the jurisdiction of Hengyang Arbitration Commission;</p> <p>2. The arbitral award resulted in substantial loss of state-owned assets, which was contrary to social and public interests.</p>	<p>1. After examination, the court held that the arbitral award given by Hengyang Arbitration Commission rejected the third arbitral claim made by Tongdexiang Company, and it also rejected the third arbitral counterclaim made by Guhan Company^①. Therefore, the matter of arbitration was beyond the scope of arbitration agreed in the Arbitration Agreement dated 1 December, 2010. Therefore, the claim made by the Applicant, Guhan Company, that the matter of arbitration was beyond the scope of the arbitration agreement was upheld;</p> <p>2. Hengyang Arbitration Commission rejected the third arbitral claim made by Tongdexiang Company and the third arbitral counterclaim made by Guhan Company because neither of them provided sufficient evidence to support their respective arbitral claim and counterclaim, so it was therefore held to not be contrary to social and public interests.</p>
11	Dispute between the Applicant, Shaoyang Automobile Transportation General Company of Hunan Province and the Respondent, PICC Property and Casualty Company Limited Wugang Sub-branch over the application for setting aside the arbitral award	The Applicant applied to withdraw the action due to the need for new evidence.	After examination, the court permitted the Applicant, Shaoyang Automobile Transportation General Company of Hunan Province to withdraw the action.

① In the third arbitral counterclaim, Guhan Company claimed that in addition to the bank loan interest of RMB 17,210,596.60 incurred during the term of cooperative operation, Tongdexiang Company should pay interest of RMB 3,052,746.20 to Guhan Company.

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
12	Dispute between Shenyang Global Mineral Equipment Co., Ltd. and Benxi Tonghe Metallurgical Machinery Repair Plant over the application for setting aside arbitral award	Global Mineral Equipment Co., Ltd. claimed that Tonghe Repair Plant concealed evidence which was sufficient to affect the impartiality of the arbitration.	After examination, the court held that since Global Mineral Equipment Co., Ltd. claimed that the payment voucher provided by Tonghe Repair Plant related to the payment of previous contracts, it was liable for providing relevant contracts to prove it. Otherwise it should bear the negative consequences on its own due to its failure to discharge the burden of proof. Therefore, the claim made by Global Mineral Equipment Co., Ltd. that “the opposite party concealed evidence which was sufficient to affect the impartiality of the award” was not justified and its application for setting aside the arbitral award was rejected.
13	The Applicant, Jiangsu Global IELTS Education Science & Technology Co., Ltd. and the Respondent, Xuzhou Yingyuan Science & Technology Co., Ltd. applying for setting aside arbitral award	The Applicant claimed that the Respondent concealed evidence which was sufficient to affect the impartiality of the arbitration.	After examination, the court held that the fact that the business license of Yingyuan Science & Technology Co., Ltd. was revoked was clearly stated in the fact verification section of the arbitral award. During the court hearing of the case, the parties also recognized that the evidence had been submitted to the arbitral tribunal before the award was given, and cross-examination was conducted. Therefore, the case did not involve a circumstance prescribed by Article 58 of the Arbitration Law of the People’s Republic of China under which the award should be set aside.

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
14	The Applicant, Zhao XX and the Respondent, Chongqing XX Property Purchase & Exchange Co., Ltd. applying for setting aside arbitral award	The Applicant claimed that the contract did not contain a dispute arbitration clause. Chongqing XX Property Purchase & Exchange Co., Ltd. unilaterally applied for arbitration, while Zhao XX did not receive the notice of hearing. Therefore, the Applicant applied for setting aside (2011) Yu Zhong Zi No. 1132 Award given by Chongqing Arbitration Commission due to its procedural defects.	After examination, the court held that since the parties presented different versions of the contract, it should be determined that in entering into the contract, the parties did not agree on arbitration as the method of dispute resolution in the case that any dispute arose, i.e., the parties did not enter into any arbitration agreement. As a result, after the occurrence of the dispute, Chongqing XX Property Purchase & Exchange Co., Ltd. applied for arbitration according to the contract version unilaterally held by it which specified arbitration as the method of dispute resolution. This arbitral award was given by Chongqing Arbitration Commission without examining Zhao XX's objection, so it should be set aside according to the law.

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
15	<p>The Applicant, Yiyang Wuzhou Real Estate Development Co., Ltd. and the Respondent, China Machinery International Engineering Design & Research Institute Co., Ltd. refusing to accept the arbitral award</p>	<p>Wuzhou Company claimed that the arbitration commission disregarded the material breach of contract by China Machinery and ascertained that China Machinery suffered a loss of RMB 1,033,160, which was utterly groundless. The arbitration commission ruled that Wuzhou Company shall assume 30% of the aforesaid loss (RMB 309,948), which violated the fundamental principles of arbitration such as fairness and justice. Therefore it was clear that the ruling was an unlawful judgment.</p> <p>China Machinery claimed that:</p> <p>1. The award of the arbitration award is a typical unlawful judgment; and</p>	<p>Wuzhou Company:</p> <p>After examination, the court held that in ascertaining the loss incurred by the parties concerned, the arbitral tribunal had calculated the price specified in the agreements entered into by the parties, in relation to which the parties had no objection. Further, the tribunal fully considered the industrial characteristics and features of the design contract concerned, and determined the parties' liability according to their faults. Therefore the arbitration commission did not violate the fundamental principles of arbitration. The claim of Wuzhou Company had no legal or factual grounds, and therefore it was not justified and the court did not uphold it.</p> <p>China Machinery:</p> <p>After examination, the court held that: 1. The arbitration tribunal fully considered the industrial characteristics and features of the design contract relating to the case, and determined that Wuzhou Company should assume 30% of the liability for breach according to the parties' faults. Therefore the tribunal did not support the claim of China Machinery for continuing the performance of the contract. This was therefore a proper ruling rather than a unlawful judgment;</p>

No.	The Parties Concerned and Cause of Action	Reasons for the Application for Setting Aside Arbitral Awards	Grounds for the Court Rulings
15	The Applicant, Yiyang Wuzhou Real Estate Development Co., Ltd. and the Respondent, China Machinery International Engineering Design & Research Institute Co., Ltd. refusing to accept the arbitral award	2. The award seriously violates legal procedure.	2. It is expressly stated in the arbitral award that the ruling was based on a comprehensive consideration of the industrial characteristics and features of the design contract concerned, as well as each party's fault. Therefore the court found that the arbitral award was in conformity with the legal procedures.
16	The Applicant, Mo Dongxiang and the Respondent, Zhuzhou Dadi Real Estate Development Co., Ltd. applying for setting aside the arbitral award	The Applicant applied to withdraw the application for setting aside the arbitration award.	After examination, the court permitted the application filed by the Applicant, Mo Dongxiang, for withdrawal of the application for setting aside the arbitration award.
17	Hengyang Huaxiang Real Estate Comprehensive Development Co, Ltd. applying for setting aside the arbitral award	The Applicant claimed that the arbitration proceedings violated the law.	After examination, the court held that the Applicant, Huaxiang Company, failed to provide any evidence to prove that the Hengyang Arbitration Commission (2012) Heng Zhong Cai Zi No. 30 Award involved any of the circumstances prescribed by Article 58 of the Arbitration Law of the People's Republic of China under which the award should be set aside by the People's Court.

The table above shows that among the 17 applications to set aside arbitral awards, most of the grounds relied upon by the parties concerned were related to Article 58 of the *Arbitration Law*. Those grounds are as follows:

- (1) there is no arbitration agreement between the parties;
- (2) the matters of the award are beyond the scope of the arbitration agreement or not under the

jurisdiction of the arbitration commission;

(3) the composition of the arbitral tribunal or the arbitration procedure is contrary to the legal procedure;

(4) the evidence on which the award is based is falsified;

(5) the other party has concealed evidence which is sufficient to affect the impartiality of the award;

(6) the arbitrator(s) have demanded or accepted bribes, committed graft or perverted the law in making the arbitral award; and

(7) the award is contrary to the social and public interests.

Nonetheless, in making applications to set aside, a small number of the parties concerned proposed such reasons beyond the scope prescribed by law. For example, one applicant claimed that the arbitral tribunal committed a mistake in a finding of fact, which was clearly rejected by the court. Among these cases, only three were ruled to be set aside by the court because there was no arbitration agreement, the matter of arbitration was beyond the extent of arbitration agreement on arbitration proceedings violated laws.

In respect of the application filed by Ziguang Guhan Group Co., Ltd. to set aside the arbitral award, as set out in the table above, the arbitral award was set aside by the court on the basis that

“the matter of this arbitration is beyond the scope of the arbitration agreed in the arbitration agreement dated 1 December, 2010. The reason proposed by the Applicant, Guhan Company that the matter of arbitration is beyond the scope of the arbitration agreement is justified and the court shall accept it.”^①

However, it is inappropriate to set aside the entire arbitral award for this reason alone. In Article 19 of the *Interpretation of the Supreme People's Court Concerning Issues on the Application of the Arbitration Law of the People's Republic of China* which took effect on 8 September 2006 it is specifically stated that, “Where any party applying to set aside the arbitral award for decided matters which exceed the scope of the arbitration agreement, and it is found to be correct after examination, the People's Court shall set aside the part of the arbitral award which has exceeded the scope of the arbitration. However, if the part beyond the scope of the arbitration is inseparable from other arbitrated matters, the People's Court shall set aside the arbitral award in its entirety.” Therefore, according to this opinion, in examining an arbitral award for any matter beyond the scope of the arbitration agreement, the court should first analyse whether it is inseparable from the other matters submitted for arbitration. Only if it is indeed inseparable, should a ruling be given by the court setting aside the award. However, the court must specify its reasons for reaching this conclusion, otherwise its public credibility could be damaged.

^① See Hengyang Intermediate People's Court of Hunan Province, (2012) Heng Zhong Fa Min Yi Chu Zi No. 11 Civil Ruling.

IV. An Analysis of the Applications for Non-enforcement of Arbitral Awards Heard by the Courts

Table 4 shows 8 applications for non-enforcement of arbitral awards were considered by the courts, 6 of which were rejected and 2 were withdrawn by the parties concerned. As seen from the results, the arbitral awards were upheld. A comparative analysis of the reasons for the application for non-enforcement of arbitral awards filed by the parties concerned and the grounds for the court rulings is as follows.

Table 6: Reasons for the Application for Non-enforcement of Arbitral Awards Filed by the Parties Concerned and Grounds for the Court Rulings^①

No	The Parties Concerned and Cause of Action	Reasons for the Application for Non-enforcement of Arbitral Awards Filed by the Parties Concerned	Grounds for the Court Rulings
1	Hubei Li Shizhen Herbal Preparation Co, Ltd. and Wuhan Branch of Hubei Li Shizhen Herbal Preparation Co, Ltd. applying for non-enforcement of the arbitral award	<p>1. The arbitral tribunal ruled that Hubei Li Shizhen Herbal Preparation Co, Ltd. and its Wuhan Branch should be jointly and severally liable according to Article 87 of the <i>General Principles of the Civil Law of the People's Republic of China</i>, but this was an incorrect application of the law;</p> <p>2. The arbitral tribunal determined that Hubei Li Shizhen Herbal Preparation Co, Ltd. and its Wuhan Branch breached the contract and ruled that they should pay a penalty, but such determination and award lacked sufficient evidence.</p>	<p>1. As Wuhan Branch Company failed to perform its relevant obligations, it was appropriate for the arbitral tribunal to have applied Article 87 of the <i>General Principles of the Civil Law of the People's Republic of China</i> to rule that Hubei Li Shizhen Herbal Preparation Co, Ltd. and its Wuhan Branch should be jointly and severally liable;</p> <p>2. As Hubei Li Shizhen Herbal Preparation Co, Ltd. and its Wuhan Branch failed to handle the division and transfer of the subject matter of the contract according to contractual provisions, the arbitral tribunal had sufficient evidence to determine the breach and award penalty.</p>

① This table mainly analyzes the relationship between the reasons for the application for non-enforcement of arbitral awards filed by the parties concerned and the grounds for the court rulings. As Table 1 states the case No. of the courts where the cases were heard and the final awards given by the courts, these details are omitted in this table. Moreover, only the key points of disputes are summarized and the table will not list the reasons and grounds of each party in detail.

No	The Parties Concerned and Cause of Action	Reasons for the Application for Non-enforcement of Arbitral Awards Filed by the Parties Concerned	Grounds for the Court Rulings
2	Changde Arts and Crafts School applying for non-enforcement of the arbitral award	<p>1. The application of the law of the arbitral award was incorrect;</p> <p>2. There was insufficient evidence in the fact-finding of the arbitral award;</p> <p>3. The arbitral award was contrary to the social and public interest.</p>	<p>1. The court held that the arbitral tribunal had discretion in fact-finding and application of the law. The parties concerned should bear the relevant consequences if they have chosen arbitration as the method of dispute settlement. The arbitral tribunal did not commit any obvious mistake in finding of facts and in applying the law;</p> <p>2. From the facts of this case, the execution of the arbitral award did not involve any circumstances contrary to the social and public interest. Therefore, the application for non-enforcement due to breach of social and public interest was not justified.</p>
3	Chen Yanlong applying for non-enforcement of Lou Zhong Cai Zi (2010) No. 18 Award by Loudi Arbitration Commission	Applying for withdrawal of the application for non-enforcement of arbitral award	After accepting the case, the court established a collegial panel according to the law to conduct the examination. In the course of examination, the parties agreed to execute a settlement agreement, so the court permitted the Applicant and Respondent, Chen Yanlong, to withdraw the application for non-enforcement of the arbitral award.

No	The Parties Concerned and Cause of Action	Reasons for the Application for Non-enforcement of Arbitral Awards Filed by the Parties Concerned	Grounds for the Court Rulings
4	Wuhan Haiding Real Estate Co., Ltd. applying for non-enforcement of the arbitral award	<p>1. Lack of sufficient key evidence in fact-finding of the arbitral award;</p> <p>2. Illegal procedures in the ruling;</p> <p>3. Incorrect application of the law in the award. The agreement was invalid, so the award should have ruled on this case according to the legal provisions of the invalid contract. However, the award wrongly determined that the agreement was valid and ruled on this case according to the provisions of the contract, resulting in the incorrect application of law.</p>	<p>1. The reason for the validity of the Agreement proposed by Haiding Company was unjustified;</p> <p>2. The court should not uphold the reason for an unjustifiable overdue penalty;</p> <p>3. The procedural issue proposed by Haiding Company had been proposed before in its application for setting aside arbitral award and was rejected by the court. Therefore it should not be upheld by the court in these proceedings;</p> <p>4. The arbitral tribunal recognised the authenticity and validity of the Agreement, so it was correct to apply the provisions of the Company Law of the People's Republic of China in respect to a valid agreement in the ruling of this case.</p>
5	Hunan Xiangyou Real Estate Co., Ltd. applying for non-enforcement of the arbitral award	<p>The arbitral award given by Changde Arbitration Commission failed to add the actual developer of the “Xiangyou • Zijin Huating” Project, Changde Tiande Real Estate Development Co., Ltd. (“Tiande”) in the arbitration, but incorrectly ruled the Applicant to assume the liability for the payment of project costs, which constituted illegal procedures. This led to the incorrect application of law and further to unlawful judgment, so the Applicant applied for non-enforcement of this arbitral award.</p>	<p>After examination, the court held that it was agreed in the Construction Project Contract entered into between Xiangyou Real Estate and Guangyu Company that disputes shall be submitted to arbitration. But strictly speaking, due to the principle of privity of contract, the clause regarding dispute settlement only bound the parties to the contract. Where the parties did not enter into a supplementary arbitration agreement with Tiande or Tiande did not voluntarily participate in the arbitration, then the arbitration commission did not violate legal provisions for not adding Tiande to the arbitration.</p>

No	The Parties Concerned and Cause of Action	Reasons for the Application for Non-enforcement of Arbitral Awards Filed by the Parties Concerned	Grounds for the Court Rulings
6	Hunan Zhong'ao Real Estate Development Co., Ltd. applying for non-enforcement of the arbitral award	<p>1. The Applicant claimed that Article 37.1 of the Urban Real Estate Administration Law should apply. The arbitral award incorrectly applied Article 38 of this law.</p> <p>2. The Applicant claimed that the Article referred to in Item 1 above should be a “type 2” provision instead of a “type 1” provision referred to in the arbitral award. As the type 2 provision was violated, the Applicant claimed that the Commercial Property Sale and Purchase Contract entered into between the parties the contract should be invalid. Moreover, he argued that this contract was contrary to the interests of the State and society, which also accounted for its invalidity.</p>	<p>1. The court held that according to the Decision on Amending the Urban Real Estate Administration Law of the People's Republic of China (which was adopted at the 29th meeting of the standing committee of the 10th National People's Congress of the People's Republic of China on 30 August, 2007), Article 37 of the Urban Real Estate Administration Law of the People's Republic of China (which was adopted by the 8th meeting of the Standing Committee of the 8th National People's Congress on 5 July, 1994) has been amended to Article 38.</p> <p>2. The Court did not support the Applicant. Item 2 of Article 38.1 of the Urban Real Estate Administration Law stipulates that such real estates shall not be transferred, but it does not expressly prescribe that such sale and purchase contracts be invalid or void. Moreover, there is no evidence to prove that Su Aihua was aware that the property had been sealed up when signing the property purchase contract. As an innocent party, Su Aihua's legal rights and interests shall be protected.</p>

No	The Parties Concerned and Cause of Action	Reasons for the Application for Non-enforcement of Arbitral Awards Filed by the Parties Concerned	Grounds for the Court Rulings
7	Zhu Dexuan applying for non-enforcement of the arbitral award	Zhu Dexuan applied to the court for withdrawal of the application in the course of trial.	The court held that this application is the Applicant's genuine expression of intent, which did not breach the mandatory provisions of law and should therefore be permitted. The court ruled to terminate the trial of this case.
8	Zhu Zhengguo applying for non-enforcement of the arbitral award	The arbitral award given by Huizhou Arbitration Commission had errors in fact-finding and the application of law. The Applicant applied for non-enforcement of the award.	The court held that in respect to the incorrect determination of the subject of the arbitration, Article 41 of Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Trial Implementation) stipulated that for an individual business under a shop title, the litigant shall be the owner registered with a business license in a civil action. Therefore, as the owner registered with the business license of Weimin Agricultural Supply Wholesale Department of Hanshou County, Zhu Zhengguo should assume the relevant liabilities. With regard to the debt of RMB 61,979 as claimed by the Applicant, the court would not admit it due to a lack of sufficient evidence.

From the eight applications for non-enforcement of arbitral awards in the table above, it is evident that the reasons for applying for non-enforcement as proposed by the Applicants are mainly related to the provisions of Article 217 from the previous version of *Civil Procedure Law 2007*, which are as follows:

- (1) the parties have neither included an arbitration clause in their contract, nor subsequently

reached a written arbitration agreement;

(2) matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;

(3) the composition of the arbitral tribunal or the arbitration procedure did not conform to statutory procedure;

(4) the evidence used as a basis for ascertaining the facts in the original ruling is fabricated;

(5) the application of law is incorrect; and

(6) one or several arbitrators acted corruptly, accepted bribes or practiced graft or made an award that undermined word choice is not ideae the law.

The court conducted careful analysis in examining the grounds proposed by the parties. Except for the actions withdrawn by the applicants themselves, the court rejected most of the applications, which affirmed the binding force of arbitral awards and thereby facilitated their enforcement.

With regard to the application for non-enforcement of the arbitral award filed by Wuhan Haiding Real Estate Co., Ltd., the court found that Haiding Company applied to the court to set aside the (2010) Wu Zhong Cai Zi No. 01353 Arbitral Award^① in October 2011, and it then applied for non-enforcement of the same arbitral award. In respect to the issue of illegal arbitration proceedings claimed by the Applicant, the court held that pursuant to the provisions of Article 26 of *The Interpretation of the Supreme People's Court Concerning Issues on the Application of the Arbitration Law of the People's Republic of China*, the procedural issue had been proposed by Haiding Company in its application for setting aside the arbitral award and was rejected by the court, so the court shall not uphold these proceedings either.^②

This case demonstrates that if a party applies for non-enforcement of an arbitral award after it has failed in an application to set aside the same, the court will not examine the same grounds again. This practice saves judicial resources and is a welcomed development.

V. Conclusion

The new Civil Procedure Law, which became effective in 2013, will undoubtedly bring new ideas and new grounds for challenging arbitration decisions. Moreover, many innovative provisions of the CIETAC Arbitration Rules will also introduce fresh thinking to arbitral tribunals when hearing cases. As principles of arbitration become more and more standardised, there will be challenges from judicial supervision. This is a process of interaction and evolution, and both will contribute

① See Wuhan Intermediate People's Court of Hubei Province, (2012) E Wu Han Zhong Zhi Cai Zi No.00018 Ruling of Enforcement.

② See Wuhan Intermediate People's Court of Hubei Province, (2012) E Wu Han Zhong Zhi Cai Zi No.00018 Ruling of Enforcement.

to the continuous development of the arbitration regime. With regard to practice of judicial supervision over arbitration in 2012, the 46 cases sampled and analysed herein reflect, to a certain extent, the overall judicial practice in arbitration in China, i.e., on the one hand, arbitration shall be properly supervised by courts so as to establish the credibility of the arbitration system, whilst on the other hand, courts' supervision over arbitration must be accompanied by support so that it can effectively promote the development of arbitration and consequently boost the establishment of a highly efficient and diversified alternative dispute resolution system.

(Footnotes)

1. In respect of the claims of the Applicants, only the main points in dispute are summarized, without providing further details in this table.

2. The court held that according to Article 7 of The Interpretation of the Supreme People's Court Concerning Issues on the Application of the Arbitration Law of the People's Republic of China, "Where concerned parties agree that they may either apply to the arbitration authority for arbitration or bring a lawsuit to the people's court for settlement of disputes, the arbitration agreement shall become invalid." In this case, the payment of the remaining RMB 600,000 of the property purchase price arising from the performance of the Sale and Purchase Contract was in dispute. It was also the subject matter of the performance of the Escrow Agreement. The parties concerned had agreements covering both arbitration and litigation as dispute resolution mechanisms in respect of the remaining RMB 600,000. This is the circumstance prescribed by the aforesaid Article 7. The parties' agreement to litigate contained in the Escrow Agreement preceded their arbitration agreement in the Sale and Purchase Contract. This resulted in the invalidity of the arbitration agreement and Wang Jia's claim was justified.

3. The court held that according to Article 20 of the Arbitration Law of the People's Republic of China, "If the parties object to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a people's court for a ruling." Jianhong Company applied to the court to confirm that the arbitration clauses in the two contracts in dispute had no binding force, rather than to determine the validity of the arbitration agreement. The claim of Jianhong Company therefore had no legal grounds.

4. The court held that the parties agreed to "submit the dispute to the local arbitration commission for arbitration," but the word "local" was not defined. In these circumstances, "local" may refer to the place of the Applicant or the Respondent, or any other place agreed by the parties. Therefore, as the parties could not agree on the appointed arbitration commission, it was ruled that it should be deemed the arbitration agreement does not specify an arbitration commission. As the parties failed to enter into a supplementary agreement, the court determined

that this arbitration agreement was invalid.

5. The court held that the arbitration agreement relating to this case set out a specific arbitration institution. The Applicant, Li XX's Company claimed that the arbitration agreement did not specify a specific arbitration institution and was therefore invalid. The Court held that such a claim was not justified and it did not uphold the application.

6. The court was of the opinion that there was no evidence to prove that this arbitration clause was entered into against the Applicant's true intention under the duress of the Respondent, and therefore it was held to be valid. In summary, the Applicant's claim was not justified and was rejected.

7. The court was of the opinion that whether the application of law in the arbitral award was correct or not was not to be examined in this case. As to the legality of the proceedings of arbitration, the court held that after accepting the case, the court served a "Notice of Acceptance" and other documents on Zhang Mingqian by post, c/o "Zhang Xiaomei" on 21 December, 2011. The arbitration commission served a "Notice of the Composition of the Arbitral Tribunal" and other documents on Zhang Mingqian by post, c/o "Luo Chunxiang" on 13 February, 2012. The analysis of the arbitration files shows that these two agents were not authorized by Zhang Mingqian to receive legal documents on his behalf, and there was no evidence proving that the agents forwarded the documents to Zhang Mingqian in these two circumstances. On 13 March, 2012, the arbitration commission served a "Notice of Acceptance of Change in Arbitral Claim and Burden of Proof" and other documents on Zhang Mingqian by post, but the post was returned as a result of "rejection". The delivery failure notification was not signed by the person-in-charge or the handling person and therefore the service by post was defective. The arbitration commission conducted the hearing of this case in Zhang Mingqian's absence without the proof of receipt of the relevant legal documents by Zhang Mingqian, which constituted a breach of the procedural law.

8. In the third arbitral counterclaim, Guhan Company claimed that in addition to the bank loan interest of RMB 17,210,596.60 incurred during the term of cooperative operation, Tongdexiang Company should pay interest of RMB 3,052,746.20 to Guhan Company.

Annual Review on Commercial Mediation*

WU Jun **

Abstract: The year of 2012 is a key time period that connects the past and future development of China's commercial mediation. The Civil Procedure Law made mediation function as a mechanism of caseload split-flow, and the Supreme Court designed a new map for the future development of alternative dispute resolution. Trade group mediation organizations flourished and a lot of training programs and seminars on commercial mediation with cooperative mechanisms have been established. However, there still remain a lot of blanks for China's commercial mediation to fill in and institutional barriers to the development of China's commercial mediation still exist.

Key words: commercial mediation; mediation organization; mediation institution; institutional mediation

Mediation is a dispute resolution mechanism based on the agreement of the parties, and each of the parties has significant autonomy and control in the proceedings. Commercial mediation – as a form of mediation for commercial disputes – represents an important part of the diversified commercial dispute resolution mechanism.

In 2012, the Chinese government issued the White Paper “Judicial Reform in China,” signaling the close of a round of judicial reforms starting from 2008. Those reforms constitute the biggest reforms so far to the Civil Procedure Law of the People's Republic of China (the “Civil Procedure Law”) which was promulgated in 1991. One of the cornerstones of the 2012 reform was the connection of mediation to court litigation in China. The Overall Plan which was issued for the Pilot-Reform of Dispute Resolution Mechanisms witnessed a further development in this regard.

Thereby, commercial mediation saw great progress in China. As a part of the broader judicial system, China's commercial mediation mechanism made great achievements in innovation, systematic, organization, training and research. The progress was driven by a high demand for

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commercial mediation in China and abroad. It was promoted by domestic industrial organizations and dispute resolution institutions. However, the development of commercial mitigation still faces institutional obstacles.

1. System Development

As one of the most important dispute resolution mechanisms, the operation and development of mediation depends on the rules of procedure. In 2012, the commercial mediation system made a breakthrough in the fields of legislation, judicial policy and industrial mediation rules.

1) New Civil Procedure Law Sets Out the Principle of Mediation First

According to Article 122 of the amended Civil Procedure Law which was adopted on 31 August 2012, “any civil dispute suitable for mediation brought before a people’s court shall be attempted to be solved by mediation first, unless the parties refuse to mediate.” For the purpose of Article 122, the term “civil disputes,” refers to almost all disputes among equal parties. In essence this term only excludes criminal cases and administrative disputes. Within the category “civil disputes”, commercial disputes account for the largest proportion. According to Article 133 of the amended Civil Procedure Law, “a people’s court shall, depending on the circumstances, handle an action it has accepted the following: (i) if the parties are not in disagreement and the case satisfies the conditions specified for the procedure for recovery of debts, it may be turned over to such procedure; (ii) if the case can be mediated before the commencement of the trial, mediation shall be conducted to resolve the dispute promptly; (iii) depending on the circumstances of the case, it decides to apply the summary procedure or ordinary procedure; or (iv) if a trial is necessary, it shall clarify the points in dispute by the exchange of evidence among the parties or other means.” Therefore, the Civil Procedure Law set out the role of mediation in dispute settlement. As the Pilot Program will start off before the reform of the system will be finished, it is inevitable that applicable rules will lag behind. Nevertheless, the principle of “mediation first” set out in the amended Civil Procedure Law only upholds the already existing judicial practice of “mediation first” which was adopted by the courts. In addition, the judicial confirmation procedure for mediation agreements reached outside of court^① is reinstated and set out in the section of “Special Procedure” of the Civil Procedure Law. This principle was established by the Supreme People’s Court.

① The mediation agreement reached outside the court which has been reviewed and confirmed is enforceable. See Article 20-25 of the Certain Opinions on the Establishment and Improvement of Dispute Resolution Mechanism which Links the Litigation and Non-litigation Practice (Fa Fa No. 45 [2009]). The judicial confirmation procedure is also confirmed in the Law of People’s Mediation” issued in 2010.

It can be seen from the position and meaning of Article 122 in the amended Civil Procedure Law that, the principle of “mediation first” is included in the chapter of “Judicial Procedure.” Therefore, it can be concluded that, “mediation first” only refers to mediations assisted or provided by the courts. It is intended only to prioritize mediation before litigation, rather than prioritizing court procedures before a private alternative dispute resolution process. On the other hand, considering the context of “broad mediation” and the recent changes of mediation policy within the last 10 years, it is likely that the mediator within “mediation first” is not a judge but a so-called neutral third party mediator. “Neutral” means that the third party mediator can by no means be a party to the litigation. A third party mediator can be appointed for both mediating the case before it is put on file and mediating the case during pending court proceedings which will be suspended for the mediation. In any case, the amended Civil Procedure Law is intended to emphasize the role of the mediation in the dispute resolution, but it is still unclear how to establish a standardized diversion procedure and how to mitigate the adverse impact of mediation on the procedural justice.

2) The Promulgation of the Overall Plan for the Pilot of Reform of Dispute Resolution Mechanism Connecting Litigation and Mediation

Since 2002, mediation is playing an increasingly important role in China’s dispute resolution system. In 2008, the Supreme People’s Court introduced the principles of “mediation first.” Furthermore, it developed a combination of mediation and adjudication, which is included in the “2009 Job Outline of the People’s Court” in the form of judicial documents published by the Supreme People’s Court. In July 2009, Wang Shengjun, the President of the Supreme People’s Court stated in the National Court Mediation Work Meeting that, “mediation is necessary for the harmony and stabilization of the society. Therefore, we should ensure the development of mediation by the people’s court under the principle of mediation first, and combine mediation and adjudication to establish a sound dispute resolution mechanism connecting the litigation and non-litigation practice”.^①

In the same year, the Supreme People’s Court issued *Certain Opinions on the Establishment and Improvement of Dispute Resolution Mechanisms which links the Litigation and Non-litigation Practice* (Fa Fa No. 45 [2009]). The purpose of this paper is to regulate the establishment and improvement of dispute resolution mechanisms. In June 2010, the Supreme People’s Court issued *Certain Opinions on the Implementation of the Principle of “Mediation First, and Combination of Mediation and Adjudication”* (Fa Fa No. 16 [2010]). In December 2010, the Supreme People’s

① The article Wang Shengjun stressed in the National Court Mediation Experience Exchange Meeting that “we should ensure the development of mediation by the People’s Court under the principle of mediation first, and combination of mediation and adjudication and establish a sound dispute resolution mechanism which links the litigation and non-litigation practice,” was published in the *People’s Court Daily* on 29 July 2009.

Court held two court mediation training sessions, which were attended by over 400 judges from intermediate and grass-root courts across China. In 2011, the Central Committee of Public Security Commission and other 15 government authorities jointly issued the *Guideline on Promotion of Dispute Mediation* (Zong Zhi Wei No. 10 [2010]) to establish a nationwide mediation mechanism. On 10 April 2012, the Supreme People's Court issued the Overall Plan for the Pilot of Reform of Dispute Resolution Mechanism which Links the Litigation and Non-litigation Practice (Fa No. 116 [2012]) to ensure the further development of dispute resolution mechanism which links the litigation and non-litigation practice.

It can be concluded that, during the last 10 years, mediation in China experienced the revival of the people's mediation with an emphasis on court mediation and the combination of judicial mediation and dispute resolution mechanisms. The "mediation first."

The Overall Plan for the Pilot of Reform of Dispute Resolution Mechanism which Links the Litigation and Non-litigation Practice (Fa No. 116 [2012]) is intended to implement the *Guideline on Promotion of Dispute Mediation* (Zong Zhi Wei No. 10 [2010]). This guideline was jointly issued by the Central Committee of Public Security Commission and 15 other government authorities. It thereby outlined the pattern for future development of diversified dispute resolution mechanisms. According to the Overall Plan, Beijing Chaoyang District People's Court and 41 other courts were designated as pilot courts for further developmental reform of dispute resolution. The Overall Plan introduced a new mechanism for diversified dispute resolution within the judicial system, such as: separation of hearing and investigation, independent assessment, no-objection mediation acceptance mechanisms and undisputed facts recording. The Overall Plan also required that, the pilot courts establish stable relationships with mediation organizations, provide full support to mediations by commercial mediation organizations, industrial mediation organizations or other mediation organizations. The pilot courts should also provide assistance to such organizations in the establishment of their mediation systems and establish a regular communication system with these organizations. Finally, they should promote a lawyer mediator system. The pilot courts should encourage the lawyer's associations and law firms to establish teams of lawyer mediators for the mediation of disputes and assign them in the establishment and improvement of relevant systems.

The system introduced by the Overall Plan is still in progress. In light of the Overall Plan, the commercial mediation organizations in the pilot areas, have made lots of attempts to incorporate the system introduced by the Overall Plan into their own mediation rules.

3) Promulgation of Industrial Mediation System

Mediation institutions shall conduct mediation in compliance with the mediation rules. In 2012, various mediation systems and rules were issued in insurance, securities, construction and other sectors based on the characteristics of relevant industrial disputes and industrial development.

Considering the professionalism and complexity of the industrial disputes, it can be seen that commercial mediation is increasingly recognized in most industries around the globe.

Insurance disputes are a typical type of commercial disputes, generally involving civil legal relations. The linkage of litigation and mediation for the settlement of insurance disputes reflects the extension of the linkage of litigation and mediation from civil disputes to commercial disputes. On 18 December 2012, the Supreme People's Court and the China Insurance Regulatory Commission jointly issued the publication "Circular on Pilot of Linkage of Litigation and Mediation for Insurance Disputes in Certain Regions" (Fa No. 307 [2012]) to start off a pilot program for insurance disputes in certain areas. According to the "Circular", the people's courts in the pilot areas shall, in accordance with the "Overall Plan for the Pilot of Reform of Dispute Resolution Mechanism which Links the Litigation and Non-litigation Practice" (Fa No. 116 [2012]), prepare a list of the appointed mediation organizations and mediators, and provide parties to insurance disputes complete and accurate information in relation to possible mediation organizations and mediators for their selection. To even possible extent, the people's courts should also establish a special office for insurance dispute mediation to facilitate mediation by appointed mediation organizations and mediators. In addition, the industrial organizations within the insurance sector shall further encourage the establishment of insurance dispute mediation organizations and relevant mediation procedures and rules.

Another example is the securities industry. On 11 June 2012, the Securities Association of China issued the "Administrative Measures for Securities Dispute Mediation (trial), the Rules of Securities Dispute Mediation (trial) and Administrative Measures of Mediators." Securities dispute resolution is one of the duties and functions granted to the Association by the Securities Law. In 2011, the Securities Association of China established a securities dispute mediation center, which was changed into the Securities Dispute Mediation Centre in 2012. Based on the measures and rules above, the Association conducted the securities dispute mediation based on the principle of law compliance, voluntariness, fairness and secrecy, and commenced the securities mediation in certain developed areas.

In actual practice, the securities dispute mediation is conducted by 36 local branches, in which, the parties to securities disputes are encouraged to reach a compromise within mediation.^① According to the "Administrative Measures for Securities Dispute Mediation (trial)", the Securities Dispute Mediation Committee is the professional organization to conduct the mediation, which is in charge of analyzing and addressing the technical issues in relation to the securities dispute mediation. The Securities Dispute Mediation Center is also responsible for the management and conduct of the mediation. The Securities Dispute Mediation Center only accepts securities disputes in which at least one of the parties is a member of a securities association. This can

① Ma Jingyu: To Securities Association of China for Securities Dispute Resolution published in *Shanghai Securities Daily* dated 12 June 2012.

include disputes between two members or between one member and an investor or other interested party. The expenses incurred by the mediation will be financed by the Association and other sources. No costs will be charged to the investors.

According to the Notes to Submission of Securities Disputes issued by the Securities Dispute Mediation Centre of the Securities Association of China, any mediations by the Centre will be assisted by local securities associations. The procedures for securities dispute mediation include the “mediation–first” procedure, a mediation procedure, in which local securities industrial associations will initially, by mediation–first procedure, communicate with the parties to the securities disputes and encourage the parties to reach a compromise. If such the parties cannot resolve the disputes on their own, they can individually or jointly submit an application for mediation through the relevant local securities industrial association. The motion has to be filed with to the Securities Dispute Mediation Centre of the Securities Association of China. If the application is accepted by the Securities Dispute Mediation Centre of the Securities Association of China, mediators will be appointed with the assistance of the local securities industrial associations and the mediation will commence.^①

The Administrative Measures for Securities Dispute Mediation (trial), the Rules of Securities Dispute Mediation (trial) and Administrative Measures of Mediators promulgated by the Securities Association of China are not only complete but also practicable. According to the Securities Law, all securities companies must be members of the securities associations. Other organizations or individuals may become members at their own will. Therefore, the mediation mechanism of the Securities Association of China will cover most disputes in relation to securities companies. However, the mediation mechanism in China’s securities industry still requires further development and the role of local securities associations still remains to be seen.

In addition to the insurance and securities sector, the mediation rules in the construction sector experienced some development as well. In March 2012, the Shanghai Construction Trade Association promulgated the Mediation Rules of Disputes among the members of the Shanghai Construction Trade Association. Those rules apply to any disputes among its members in their economic exchanges and cooperations. However, if a party to the dispute is not a member to the association, the rule may also apply if the party submitting the application or complaint is a member to the association. The Shanghai Construction Trade Association established a member dispute mediation committee comprising of the officials from the association. Those officials are senior experts and legal experts, which will be responsible for the mediation of relevant disputes. The dispute mediation is intended to resolve the disputes through amicable consultation organized by the dispute mediation committee, which is not legally binding. If the parties to the dispute reach an agreement, such agreement shall be complied with by relevant parties. If no agreement is

① Securities Dispute Mediation Centre of the Securities Association of China Notes to Submission of Securities Dispute on the official website of Securities Dispute Mediation Centre of the Securities Association of China.

reached, the subsequent litigation or arbitration will not be affected by the mediation in any way.

Though the Mediation Rules of Disputes among the Members of the Shanghai Construction Trade Association did establish the mechanism for dispute resolution, those rules are incomplete in so far as they do not involve any linkage between the mediation and litigation. In addition, it is arguable that they exclude means of expert testimony within their mediation procedure. In any case, the attempt of local industrial associations to establish their own mediation mechanisms should be encouraged. Those attempts will be helpful to the further development of industrial mediation.

2. Organization Building

Mediation organizations are the “physical media” operating mediation. There is no comprehensive mediation organization law in China. The Civil Mediation Law only provides for the establishment of civil mediation organizations. Although there is no comprehensive rules and procedures on the establishment of mediation organizations, commercial mediation organizations in China do develop constantly. In 2012, several commercial mediation organizations were established, with the support of current legal regime and social framework. Those commercial mediation organizations have the following two features:

(1) The founders of mediation organizations are more diversified. They also include social organizations that establish mediation organizations employing their own resources. They act in addition to courts and arbitration commissions which represent the traditional dispute resolution institutions that also set up affiliated mediation centers. With respect to the regions where such newly-established mediation organizations are located, in Beijing, Tianjin, Shenzhen and Changsha—these are all regions where economic activities are active. Therefore, new mediation organizations seem to reflect the needs for mediation of disputes in the market and the passion of various parties dedicated to commercial mediation services.

(2) Mediation organizations tend to merge with legal service institutions. Comprehensive legal service organizations are established specifically for certain fields in many industries. They provide commercial participants of their industry with a full range of legal services. This incorporates participation in legislation proposals, urging the performance of agreements as well as mediating disputes, legal counseling, communication, and training.

1) Mediation organizations established by social organizations

In China, social organizations include the following four categories: (i) people’s groups which have participated in the Chinese People’s Political Consultative Conference; (ii) organizations which have been confirmed by the administrative department as an institutional organization under the

State Council and are therefore exempt from registration as approved by the State Council; (iii) organizations which are established within organs, organizations, enterprises and institutions with the approval of their own; and (iv) social organizations established upon registration pursuant to Administrative Regulations on Registration of Social Organizations. Industry associations are important parts of social organizations. An industry association has both the external function of representation and communication as well as the internal function of order maintenance. An industry association is established by law. It is allowed for an industry association under the legal regime and encouraged by policy to provide mediation services regarding disputes among its members and industrial disputes to which a member is a party. In addition, as a social organization which is approved by the State Council to be exempted from registration, China Council for the Promotion of International Trade (“CCPIT”) actively explore the possibility for development in commercial mediation and commercial legal services.

The Securities Industry Association is a self-regulating organization in the securities industry. Chapter 9 of the Securities Law of the People’s Republic of China (“Securities Law”) provides specifically for “Securities Industry Association.” The functions and duties of the Securities Industry Association includes “mediating any dispute relating to securities operations that arises as between members or as between members and their clients.” According to the Charter of the Securities Association of China, the Securities Association of China (“SAC”) is a self-regulating national organization established under Securities Law and Administrative Regulations on the Registration of Social Organizations. It is a non-profit social organization with the status of a legal person. The functions and duties of SAC also include “mediating any dispute relating to securities operations that arises as between members or as between members and their clients.” In February 2012, the Securities Dispute Mediation Center under SAC was established. In July of the same year, SAC opened a special column on its official website dealing with securities dispute mediation. It released the rules regulating securities dispute mediation as well as materials relating to mediation work, list of mediators, dynamics of mediation work and other relevant information and materials to the public. Parties to a securities dispute may submit application for securities dispute mediation through the online application platform opened with the special column dealing with securities dispute mediation. In August, SAC appointed the first 111 securities dispute mediators, and in December, appointed the second 16 securities mediators.^① The establishment of the mediation in securities industry injects stable and harmonious factors to the development of the securities industry.

In December 2012, the mediation center under Tianjin Bar Association was established. This center is an organization dedicated to providing mediation services to the public. It selected 64 lawyers as its first mediators. This center mainly accepts civil and commercial disputes,

① “Review on the Process of the Establishment of Securities Dispute Mediation Mechanism under Securities Association of China,” published on the website of www.stcn.com at <http://news.stcn.com/2013/0122/10244543.shtml>, last visited: 24 March 2013.

administrative disputes, and other disputes suitable for mediation between the parties. Those disputes include disputes applied to be mediated by the parties and disputes to be mediated under the mandate of people's courts or people's governments at various levels. They further include disputes under the mandate of the composing departments of the people's government as well as disputes mandated under social organizations and other organizations. Parties may choose or appoint mediators by themselves. A mediation agreement (settlement agreement) may be made when such agreement is reached by the parties through mediation. Such agreement has the nature of a civil contract. The center may also, upon request of the parties, assist in applying for judicial confirmation as to the legal effect of the mediation agreement.^① This is not the first time that a mediation center is established by a bar association. For example, the mediation center under Qingdao Bar Association, which was established in 2011, was founded by Qingdao Bar Association. It is a non-profit, private, non-incorporated entity with the status of a legal person. The center is responsible for its own income and expenditure, and mainly mediates commercial disputes. However, the mediation center under Shantou Bar Association, which was also established in 2011, but within the Shantou Bar Association, provides mediation services for civil and commercial cases free of charge although their mediations are presided by lawyers. Lawyers stand at the frontier of disputes before they are resolved. It is obvious that lawyers have significant influence on the clients' choice of dispute resolution. The establishment of the mediation center under Tianjin Bar Association is definitely important for promoting lawyers in Tianjin to participate in mediation, either as a neutral party or as counsel that provides legal services to a party. However, lawyers charge less in cases of mediation than they would do for the same cases resolved by litigation or within arbitration proceedings. It seems that mediation means a substitute for the professional services of lawyers. The advantages of mediation compared to litigation in terms of simplifying disagreements, reducing time for resolution and costs are usually the reasons why lawyers are reluctant to suggest clients to choose mediation instead of litigation at courts. The conflict of interest that results from the comparative advantages of mediation compared to litigation or arbitration is the source why lawyers are reluctant to participate in social mediation. This might also explain the slow development and unsound operation of mediation organizations established by lawyers. Therefore, in the context of minor and slow development of the mediation services market and the lack of understanding and coordination from the legal service community for socialized civil and commercial mediation, the judicial society still needs to further search for incentives and motivations for lawyers to participate in mediation services.

In sum, the new mediation centers established by various industry organizations will further upgrade the professionalism of mediation services and will also encourage the parties to voluntarily conduct business in order. However, the mediation mechanism affiliated to or established under

① Fenglin: The Establishment of the Mediation Center under Tianjin Bar Association, published at <http://news.163.com/12/1214/16/8IMRQFCG00014JB6.html>, last visited: 24 March 2013.

an industry association generally covers limited disputes, i.e. only disputes involving the rights and responsibilities of its members. From the perspective of professionalism and industrialism of mediation, the mediation affiliated with an industry association should evolve into an independent mediation organization registered and established by law to enlarge its authority over cases and to further provide a platform and a mechanism towards friendly resolution of industrial disputes.

2) Mediation Organizations Established by Courts or Arbitration Authorities

The mediation centers established by traditional dispute resolution organizations, such as courts or arbitration authorities, can make full use of the resources accumulated by various dispute resolution organizations in terms of human resources, institution and organization. Further, they can successfully deal with the enforceability of mediation agreements. In 2012, many courts and arbitration authorities established mediation organizations to carry out independent mediation proceedings. In January, Shenzhen Nanshan District People's Court ("Nanshan Court") established an Internet Civil Dispute Mediation Center. Nanshan Court is one of the first three grass-roots litigation courts in Guangdong Province that hears intellectual property cases. Internet enterprises within the district develop rapidly and Internet-related disputes increase as well. To resolve Internet civil disputes in a flexible, convenient and efficient manner, Nanshan Court established the Internet Civil Dispute Mediation Center. With respect to copyright disputes, trademark disputes, right of reputation disputes, and other Internet-related civil disputes, Nanshan Court first transfers such cases upon acceptance to the mediation center to be mediated. The mediation is done by volunteer colleges students who majored in intellectual property rights and by relevant experts in intellectual property rights under the guidance from judges. A mediation agreement (settlement agreement) may be made when such agreement is reached through mediation. As stated before, such agreement has the nature of a civil contract. Parties may apply to Nanshan Court for judicial confirmation to give it enforceability. If no mediation agreement is reached through mediation, mediators will issue a Notice of Termination of Mediation and help parties to go through case filing formalities as soon as possible to proceed with litigation so as to avoid prolonged delay.^① The Internet Civil Dispute Mediation Center established by Nanshan Court is a mediation organization affiliated with the court and is one of those mediation organizations affiliated nationwide with or within various courts. In terms of operation and administration of the organization, it relies on the body of courts but is more dedicated in positioning and more professional in its function.

In March, the China Maritime Arbitration Commission ("CMAC") Anhui Maritime Mediation Center ("Anhui Center") was established in Wuhu. Anhui Center is Anhui's first maritime professional mediation institution and the third maritime professional mediation institution in

^① "Nanshan Court Is the First to Establish An Internet Civil Dispute Mediation Center in China", published in *The Southern Daily* on 26 April 2012, SC03 edition.

China approved by CCPIT after CMAC Shanghai Maritime Mediation Center (established in August 2006 in Shanghai) and CMAC Jiangsu Maritime Mediation Center (established in March 2009 in Nanjing).^① In August, CMAC Tianjin Maritime Arbitration Center (“Tianjin Arbitration Center”), CMAC Tianjin Maritime Mediation Center (“Tianjin Mediation Center”) and CCPIT Tianjin Adjustment Center were established. Tianjin Arbitration Center (also known as “CMAC Tianjin Sub-council”) mainly resolves maritime disputes through arbitration, in relation to shipping, shipping insurance or vessel building in an independent and fair manner. It may hear cases independently and provide parties with uniform maritime arbitration services under the direct management of CMAC. Tianjin Mediation Center established by CMAC, with the cooperation of Tianjin Maritime Safety Administration, offers parties to maritime accident disputes a new option to resolve disputes rapidly by “maritime mediation” and “mediation in combination with arbitration.” Tianjin Mediation Center is the fourth national maritime professional mediation organization established by CMAC. The CCPIT Tianjin Adjustment Center will carry out such businesses in Tianjin as adjustment, assessment of property loss, appraisal of property loss, adjustment of property loss, maritime technology and legal counseling.^② The four maritime mediation centers above, established by CMAC, follow one same set of mediation rules, the China Maritime Arbitration Commission Maritime Mediation Center Mediation Rules (“Mediation Rules”). The maritime mediation centers is affiliates with CMAC and aims to make full use of the combination between civilian mediation or maritime mediation and arbitration in resolving maritime accident disputes. The Mediation Rules provide the mechanism for converting a mediation agreement to an enforceable arbitration award. Article 15 of the Mediation Rules provides that “the parties may agree in a mediation agreement or settlement agreement that a sole arbitrator jointly appointed by the parties from CMAC arbitrators’ list or appointed by the chairman of CMAC can make awards pursuant to the settlement agreement, the specific procedures and terms of which are not subject to Mediation Rules. Unless opposed by any party, if the mediator in a maritime mediation proceeding is also an arbitrator of CMAC, the mediator may proceed to render award as an arbitrator.”

3) Construction of Comprehensive Legal Services Platform and Dispute Resolution Coordination Mechanism

It is not only dispute resolution but also comprehensive legal services that are needed by commercial activities. Therefore, some comprehensive legal service platforms or dispute resolution coordination mechanism are established.

① “The Inauguration of CMAC Anhui Maritime Mediation Center in Wuhu,” published on the website of Legislative Affairs Office of Anhui Provincial Government at http://www.ahfzb.gov.cn/content/news_view.php?id=25086, last visited: 24 March 2013.

② Yuefuyu: “The Inauguration of Tianjin Maritime Arbitration, Mediation and Adjustment Centers,” published at <http://news.163.com/12/0804/08/8823JV1200014AED.html>, last visited: 24 March 2013.

Such attempts are first made in Beijing film and television industry. In May, the Capital Film and Television Legal Service Center (“CFTLSC”) was established by Beijing TV Artists Association in a joint effort by Beijing Film and TV Artists Association, Beijing Bar Association and Beijing BAC Mediation Center, and professionals in both film and TV industry and legal services. participated In CFTLSC, capital film and TV legal specialists panel will play the role of “information desk,” providing film and TV practitioners with non-profit legal services to resolve relevant legal issues in the process of film and TV production, shooting, distribution or transmission; people’s mediation commission in the film and TV industry will act a “voluntary mediator” to help parties to a dispute consult with each other equally and to resolve various disputes in private; the commercial mediation and arbitration service commission will become the platform providing film and TV practitioners with a platform to carry out commercial mediation and arbitration.^①

The establishment of CFTLSC aims to safeguard the rights and interests of members of Beijing TV Artists Association to the maximum extent and to protect intellectual property rights in films and TV programs by systematic legal services. The capital film and TV legal specialists panel affiliated with CFTLSC consists of almost 100 hundred film and TV experts and lawyers specializing in intellectual property rights located mainly in Beijing but also major cities nationwide.^② The establishment of CFTLSC is driven by industrial organizations, which represents the self-regulating and industrial service function of Beijing TV Artists Association. In addition, CFTLSC is a legal service institution with multiple functions. It provides mediation service upon occurrence of disputes and comprehensive legal services for film and TV industry as well.

The E-commerce Mediation Center (“EM Center”) under CCPIT/China Chamber of International Commerce Electronics Sub-council established in December is China’s first e-commerce mediation center. EM Center aims to promote industrial self regulation, study the organization in the industry, establish a platform for the release and communication of e-commerce information, provide e-commerce legislation advice and policy proposals, advocate relevant e-commerce knowledge and offer relevant professional trainings^③, emphasize and enhance non-litigation resolution for e-commerce disputes, and provide parties both at home and abroad with first-class, flexible and efficient mediation services.^④ With the development of e-commerce, e-commerce dispute mediation will further develop as well. However, as e-commerce involves

① Han Yadong: “Mediator Appears in Film and TV Society for Legal Disputes,” published on *Beijing Daily* on 9 May 2012, 11th edition.

② “The Establishment of Capital Film and Television Legal Service Center,” published at <http://www.bjwl.org.cn/Article.aspx?id=4864>, last visited: 24 March 2013.

③ Huang Jing: “Inauguration of China’s First E-commerce Mediation Center,” published on the website of *China Council for the Promotion of International Trade Electronics information Industry Sub-council* at <http://www.ccpitecc.com/article.asp?id=4457>, last visited: 24 March 2013.

④ “The Sub-council Is Authorized to Establish E-commerce Mediation Center,” published on the website of *China Council for the Promotion of International Trade Electronics information Industry Sub-council* at <http://www.ccpitecc.com/article.asp?id=4227>, last visited: 24 March 2013.

virtual exchange in space and distance it creates disputes of civil and commercial relations scattered in broader regions and therefore might involve quite complicated legal relations. Hence, the operation of EM Center should be closely consistent with the features of e-commerce, and further enhance its foundation and professionalism in mediation services leveraging on the advantages of CCPIT/CCOIC in organization networks and knowledge base.

Similar to EM Center, CCPIT (Changsha) Legal Counseling and Complaining Center (“LCC Center”), also established in December of the same year positioned as a comprehensive legal service platform serving the business operation and trade. LCC Center aims to provide Hunan-based enterprises with convenient and efficient commercial legal services involving foreign affairs and ensure seamless matches with enterprises’ needs for commercial legal advice involving foreign affairs. The functions of LCC Center include the following six aspects: (i) accepting advice inquiry and complaints from domestic and foreign enterprises in commercial field involving foreign affairs; (ii) acting as a bridge between the government and enterprises and participating in legislation process as a representative of industrial and commercial enterprises; (iii) providing enterprises with services “urging the performance of international commercial agreements”; (iv) providing enterprises with legal advice and litigation representation services; (v) promoting legal communication and cooperation between China and abroad; and (vi) providing enterprises with commercial legal trainings involving foreign affairs.^① LCC Center will provide local enterprises with professional commercial legal advice and services involving foreign affairs, which in turn will help local enterprises to reinforce legal risk prevention consciousness, to improve their capability to deal with international economic and commercial disputes and to protect their rights and interests according to law, so as to carry out international trade in a better and well-assured manner.

Shenzhen Civil and Commercial Mediation Center (“Shenzhen CCMC”) has made useful trial in the building of dispute resolution coordination mechanism. Shenzhen CCMC was established in April 2011 and is a non-profit, private, non-incorporated entity with the status of a legal person. Shenzhen CCMC is a civil and commercial mediation institute covering all kinds of industry in Shenzhen as approved by Shenzhen People’s Government, led by Shenzhen Arbitration Commission, and jointly founded by Shenzhen Bar Association, Shenzhen General Chamber of Commerce, Shenzhen Individual Laborer Association and Shenzhen Private Enterprise Association. According to Article 15 of Shenzhen CCMC Mediation Rules, the parties may—in accordance with the arbitration agreement contained in a settlement agreement – apply to Shenzhen Arbitration Commission for arbitration and request the arbitration tribunal make a mediation agreement or award in accordance with the settlement agreement. In case no settlement agreement can be reached, either party is entitled to submit the dispute to Shenzhen Arbitration

^① Zhang Xianghua, Liu Xiyong: “New Era of Commercial Legal Services Involving Foreign Affairs in Hunan space- The Establishment of CCPIT (Changsha) Legal Counseling and Complaining Center,” published on *China Trade News* on 6 December 2012, 6th edition.

Commission in accordance with the arbitration agreement. In this sense, Shenzhen CCMC links to Shenzhen Arbitration Commission in business. In December 2012, Shenzhen CCMC set up mediation offices in seven major law firms in Guangdong, placing the platform for professional and institutional mediation of the mediation center in laws firms the frontier of disputes. These mediation offices facilitate lawyers' utilization of the mediation platform. Meanwhile, lawyers are able to participate in the building of mediation mechanism as an intermediate mediator, which helps to enlarge lawyers' role from simple acting to dispute resolution and to improve lawyers' professional image in society. In addition, the mediation center may mediate cases promptly leveraging the professional human resource of lawyers, which in turn is helpful for the development and growth of mediation mechanism.^① The establishment of the mediation offices helps to extend mediation services and develop mediation cases. However, the effective operation of the mediation offices is subject to the balance of market value of commercial lawyers and revenue of commercial lawyers participating in mediation.

3. Mediation Training

Commercial activities and commercial disputes are featured with their technical and professional nature. The development of human resources of mediation has special significance for the operation and development of commercial mediation. The trainings on theories, skills and experience are essential for the commercial mediators. The training courses of commercial mediation shall cover the basic principles of mediation, commercial mediation, the development trend of mediation in China and abroad, the nature, characteristics and mediation skills of industrial disputes, national mediation policy and related legal system. In 2012, most mediation trainings activities organized in China were industrial and professional trainings.

1) Professionalization of Mediation Training

After the establishment of the Mediation Center, the Securities Association of China ("SAC") employed over 100 securities dispute mediators and organized two large-scale mediator training sessions in 2012. The mediator training sessions are aimed at helping the securities mediators and the staff of local securities association improve the understanding of the meaning of securities dispute mediation, learn about the rules of mediation and master the skills of mediation.^②

55 mediators from 18 provinces, autonomous regions, direct-controlled municipalities,

① Yang Chengming: "The Inauguration of Shenzhen CCMC Mediation Offices," published on the website of *Shenzhen Arbitration Commission* at <http://www.szac.org/news/detail.aspx?MenuID=01030201&id=7010>, last visited: 24 March 2013.

② "First Securities Mediators Training Session of SAC held in Beijing," published on the website of *SAC* at http://www.sac.net.cn/ljxh/xhgzdt/201210/t20121008_59933.html, last visited: 24 March 2013.

independent–budget cities and local securities associations attended the first SAC training session. Professionals and practitioners from the Ministry of Justice, the Supreme People’s Court, CSRC and Beijing Arbitration Commission were invited to give lectures. The external trainers included the experts who had made in–depth analysis on the domestic and foreign mediation systems, leaders of the diverse dispute resolution mechanism reform project, practitioners who had extensive experiences in mediation and officials in charge of investor protection in the regulatory agencies. Dr. Xu Bing of the Research Institute of Ministry of Justice, Judge Fu Yu of the Reform Leading Group Office of the Supreme People’s Court and Director Chen Fuyong of BAC introduced the basic information of the mediation system, status of the diverse dispute resolution mechanism reform project and concepts and techniques of modern commercial mediation. Ms. Lin Lixia, Director of the Investor Protection Bureau of CSRC, raised three suggestions with respect the protection of investors: effectively protecting the interests of relevant parties based on the principles of essential fairness; strictly performing the mediation duties and analyzing and improving the system design; summarizing cases and making suggestions on improving regulation. Mr. Tan Zhiqi, member of the mediation committee of SAC introduced the organizational framework, working mechanism and work processes of the securities mediation work of SAC and management methods and the qualification requirements on the securities disputes mediators.^①

A total of 98 mediators from 24 provinces, autonomous regions, direct–controlled municipalities, independent–budget cities and local securities associations attended the second SAC training session. Professor Fan Yu, Director of the Dispute Resolution Research Center of Renmin University, introduced the basic concept of mediation and diverse dispute resolution mechanism and the latest development in China and aboard; Mr. Zhang Haoliang, Deputy Director of BAC, and Mr. Xu Jie introduced the concept and techniques of modern commercial mediation; Mr. Tan Zhiqi, member of the mediation committee of SAC, introduced the organizational framework, working mechanism and work processes of the securities mediation work of SAC and management methods and the qualification requirements on the securities disputes mediators. Mr. Li Zhaohui, Deputy Director of the Letters and Visits Office of the General Office of CSRC, introduced the general information of the work of securities regulatory bodies on handling letters and visits, analyzed the feasibility of reducing the pressure of letters and visits through industrial mediation and raised three suggestions with respect the mediation work of SAC: through a variety of ways actively guiding investors to resolve securities disputes through voluntary industrial mediation; making efforts to improve the working mechanism and structure and taking advantages of the efficiency, flexibility, profession and low–cost of industrial mediation; strengthening the mediator team building and improving the ability of resolving disputes.^②

① “First Mediator Training Session of SAC held in Beijing,” published on the website of SAC at http://www.sac.net.cn/ljxh/xhgzt/201210/t20121008_59933.html, last visited: 24 March 2013.

② “Second Mediator Training Session of SAC held in Xiamen,” published on the website of SAC at http://www.sac.net.cn/ljxh/xhgzt/201212/t20121204_60788.html, last visited: 24 March 2013.

2) Internationalization of Mediation Training

The development of mediation represents the trend of globalization, accompanied by the spread of the concept of mediation and internalization of skills training. In 2012, the advanced foreign experience in mediation had been spread in China through academic exchanges and training sessions.

The dispute resolution services are well-developed in the US, the mediation theoretical research, curriculum development and skills training are advanced as well. In June 2012, Straus Institute for Dispute Resolution of the School of Law of Pepperdine University of the U.S. held its 25th anniversary ceremony. BAC was invited to attend the ceremony and observed the training courses at the School of Law of Pepperdine University which ranked first in dispute resolution in the US. Taking the advantage of its abundant research resources and the faculty of high caliber, Straus Institute for Dispute Resolution has designed and carried out multi-type training programs of dispute resolution, and has continuously innovated in its training programs to accommodate the development and meet the needs of the society. The current mediation training program constitutes 15 short term training courses of three days. One of the courses of “advanced mediation” was lectured by Bruce Edwards, the founding partner of JAMS, an American arbitration institution, and Nina Meierding, a senior lawyer and mediator. The course of the “Mediation in Construction Work” was lectured by George Calkins, a senior expert of the JAMS and Victoria Chaney, a justice of Second Circuit of the United States Court of Appeals. During the visit, all members of the delegation attended all the sessions of such two courses and gained a deep understanding of their contents and teaching methodology.^①

The mediation experiences within the US is also shared in Hunan. In June 2012, the Fourth Sino-US Legal Forum and the Second Sino-US Mediation International Conference co-sponsored by Xiangtan University, Hunan Provincial Department of Justice, the University of Massachusetts and the Association of Judges of Massachusetts and co-organized by Hunan Traffic Police Corps, Changsha Economic and Technological Development Zone Management Committee and Hunan Mediation Theory and Research Personnel Training Center was held on 25 June in Changsha and continued till 29 June. Over 100 professionals, experts and scholars from the Massachusetts legal delegation as well as from Xiangtan University, Central South University, Hunan University, Hunan University of Science and Technology, Hunan Business College and other colleges and universities, the court system, justice system, administration system and traffic police system and other practitioners attended the conference. The members of the US delegation included Honorable Rosalind H. Miller (first justice of Dorchester Division, Boston Municipal Court Department), Professor Robert Smith (former dean of Suffolk University Law School), Mr. David

① “BAC Attended the 25th Anniversary Ceremony of Straus Institute for Dispute Resolution and Observed the Training Courses at the School of Law of Pepperdine University,” published on the website of SAC at <http://www.bjac.org.cn/news/view.asp?id=2070>, last visited: 24 March 2013.

Matz (professor of University of Massachusetts Boston), Mr. Brad Honoroff and Ms. Jane Honoroff (senior mediation experts of The Mediation Group). The members of the US delegation introduced the mediation experience in the US through lectures, demonstrations, simulation exercises and interactive discussion.^①

In December, the Third Sino-US Mediation International Conference was successfully held in Changsha. Professor Frank Elliott and Kay Elliott from the Texas Wesleyan University School of Law were invited to Hunan to deliver lectures. Over 100 practitioners engaged in mediation attended the training.^②

In addition to the US, Hong Kong and Taiwan can also be regarded as well-developed areas in terms of mediation experience. The mediation experiences of such two areas integrate the western concept of mediation and institutional mechanism with the modern and traditional Chinese mediation culture. This culture is more adapted to the situation of Mainland China. On the 28th to 30th March 2012, the Mediation Center of BAC, jointly with Hong Kong's Institute of International Experts (IIE) and Taiwan's Mediation Center of the Internet Society of China, offered training courses on commercial mediation with Mr. Raymond HM Leung and Mr. Denys Look from IIE. The training was supported by the Securities Association of China and the Beijing Lawyers Association. 24 legal and commercial experts attended the training.^③

From 15th to 17th August, the Mediation Center of BAC offered training courses jointly with the Mediation Center of Chinese Arbitration Association on "communication and negotiation skills and mediation practice," with the Ms. Lin Yao, Ms. Chen Xijia and Mr. Li Jihong from the Mediation Center of Chinese Arbitration Association as the speakers. 28 legal and commercial experts attended the training.^④

In summary, the Securities Association of China developed rapidly in commercial mediation training. It put in great effort to train securities dispute mediators through training courses conducted by theoretical and practical elites and those who keep a close eye on the field of securities disputes. The training provided by the Securities Association of China are extensive and of high standard, and showed the importance attached by the Securities Association of China on promoting the industry self-regulation and dispute resolution. The training sessions of the Sino-US Mediation International Conference provided intellectual support for the localization of modern mediation practice. BAC maintained good communication and cooperative relations with

① "The Fourth Sino-US Legal Forum and the Second Sino-US Mediation International Conference was held in Changsha," published on the website of *Xiangtan University* at <http://lptc.xtu.edu.cn/e/action/ShowInfo.php?classid=1&id=146>, last visited: 24 March 2013.

② "The Second and Third Sino-US Mediation International Conference was held in Changsha," published on the website of *Ifeng* at http://news.ifeng.com/gundong/detail_2012_12/03/19783403_0.shtml, last visited: 24 March 2013.

③ "BAC offered training courses on commercial mediation," published on the website of *BAC* at <http://www.bjac.org.cn/news/view.asp?id=2036>, last visited: 24 March 2013.

④ "BAC offered training courses on communication and negotiation skills and mediation practice," published on the website of *BAC* at <http://www.bjac.org.cn/news/view.asp?id=2107>, last visited: 24 March 2013.

oreign dispute resolution R&D institutions. The training courses on open mediation provided by the Mediation Centre of BAC are prospective, international and practical. The multiple projects, diverse training methods and strong faculty support showed the great effort attached by the Mediation Centre of BAC on promoting a mature mediation model.

4. Conferences and Seminars

Commercial mediation is in the early stage of development in China, is related to issues covering institutional mechanism and policies system and involves technical issues. The sustainable development of commercial mediation in China requires the interaction of theorists and practitioners, the adoption of foreign experience in commercial mediation and dispute resolution and close attention to the leading edge of development of global mediation. In 2012, the Chinese mediation agencies actively participated and organized various conferences and seminars to promote the in-depth exchange, analysis and solution of commercial mediation related issues.

1) International Mediation Exchange Activities

In 2012, various commercial mediation communication and discussion activities were organized around the world. The Chinese dispute resolution institutions actively participated in international exchange to learn from international experience and at the same time showed the world the development trend of China's commercial mediation.

The "International Arbitration and Mediation Summit 2012," organized by the famous international legal publication CCH and WOLTERS KLUWER, was held in Hong Kong. The topics included arbitration and mediation. Experts from Mainland China, Hong Kong, Germany, the United Kingdom, Saudi Arabia, Tanzania, the United States, South Korea, India and other countries expressed their views on construction dispute arbitration, effective defense in international arbitration, dispute resolution of M&A transactions, the role of FIDIC in Asian arbitration, new developments of arbitration in India, status and future of arbitration in South Korea, arbitration in Arab countries, investment dispute in Africa, provisions of Islamic law relating to commercial and banks arbitration, new developments of mediation in Hong Kong, the role of mediation in international trade, "bad faith" in mediation, international and cross-border mediation and finally, mediation in construction disputes. The officials from the Arbitration Institution of the China International Economic and Trade Arbitration Commission (CIETAC) attended the summit.^① Another event, the Asia-Pacific Mediation Conference 2012 was also held

^① Fu Chengwei: "CCPIT Attended the International Arbitration and Mediation Summit 2012," published at the website of *All China Federation of Supply and Marketing Cooperatives* at <http://www.zh-hz.com/html/2012/07/04/156023>, last visited: 24 March 2013.

in Hong Kong. Experts and scholars from Mainland China, Australia, the United States, Canada, New Zealand, India, Japan, Korea, Hong Kong and Taiwan attended the conference and discussed the impact of culture differences on mediation, development status and the practice of mediation, latest development of legislation, the impact of social and economic environment and political and legal system on the development of mediation. Officials from the Mediation Center of China Council for the Promotion of International Trade (CCPIT) attended the conference.^①

The 16th UIA World Forum of Mediation Centers organized by Union Internationale des Avocate (“UIA”) was held in Lisbon, Portugal. About 90 representatives from mediation centers and mediators and lawyers from 31 countries attended the forum. The officials of the Mediation Center of CCPIT attended the forum.^② The Shanghai Commercial Mediation Center attended the Commercial Mediation Summit held in Athens, Greece which was co-organized by Greece-China Chamber of Commerce and Industry, Greece-America Chamber of Commerce, Greece-France Chamber of Commerce and University of Athens.^③

In addition, to actively participating in high-level international mediation exchanges, the Chinese mediation practitioners also organized various activities to introduce to the world the development of diverse dispute resolution in China.

The “First Commercial Dispute Resolution Forum” organized by the Shanghai Commercial Mediation Center, the Hong Kong Mediation Council and the Joint Mediation Helpline Office Ltd. was held in Shanghai in March 2012. Around 200 members of the legal profession and experts from the mediation agencies and industry organizations of Shanghai and Hong Kong as well as authorities from the US and UK attended the forum. Many Chinese and foreign commercial mediation experts, scholars and guests with extensive mediation experiences were invited to attend and make lectures at this high-level commercial mediation forum. Under the themes of “Characteristics and Needs of Commercial Mediation,” “Rules and Application of Commercial Mediation,” “Connection of Commercial Mediation and Litigation” and “Promotion and Popularization of Mediation Mechanism,” the attendees delivered thematic speeches, including “Actively Exploring the Diverse Commercial Dispute Resolution Mechanism,” “Mediation Practicing System of Hong Kong,” “Characteristics of Commercial Mediation in Asia-Pacific Region,” “Inspiration of Development of Hong Kong Commercial Mediation on the Mediation Work of Mainland China,” “Experience and Expectations of Hong Kong Mediation

① “Asia-Pacific Mediation Conference 2012 Held in Hong Kong,” published at the website of *CCPIT/Mediation Center of China International Chamber of Commerce* at <http://adr.ccpit.org/newsInfo.aspx?id=857>, last visited: 24 March 2013.

② Wang Chengjie Attended the 16th UIA World Forum of Mediation Centers,” published at the website of *CCPIT/Mediation Center of China International Chamber of Commerce* at <http://adr.ccpit.org/newsInfo.aspx?id=674>, last visited: 24 March 2013.

③ “Shanghai Commercial Mediation Center attended the Commercial Mediation Summit held in Greece,” published at the website of *Shanghai Commercial Mediation Center* at http://www.scmc.org.cn/news_content.aspx?NID=169, last visited: 24 March 2013.

Users,” “Connection of Commercial Mediation and Arbitration,” “Arbitration – Mediation in Hong Kong: Legal Framework and a Recent Case,” “Differences and Complementation of Mediation and Arbitration,” “Solicitor – Path to Hong Kong’s Commercial Mediation,” “Role of Industry Associations in Professional Mediation,” “Successful Mediation Cases of Hong Kong Professionals,” “Mediation of Financial Disputes – Ombudsman System” and “Promotion of Commercial Mediation Mechanism.”^① In November, the “International Arbitration and Alternative Dispute Resolution China Conference” was held in Beijing. This conference was organized by CCPIT and Wolters Kluwer and supported by KCAB, CEDR, HKIAC and other organizations. Mr. Li Hu, Deputy Secretary-General of CIETAC, Ms. Guo Tuohua, Vice-Chairperson of ICCA and Chairperson of the Financial Dispute Resolution Centre of Hong Kong and legal professionals of China and abroad attended the meeting and delivered speeches. Around 100 representatives from law firms, arbitration institutions and law schools from the United States, Australia, United Kingdom, Sweden and Mainland China, Hong Kong and Taiwan attended the conference. Hot issues were discussed during the conference, including Chinese arbitration culture and legal system, how to conduct arbitration in China, arbitration agreements and practices of objection to the jurisdiction under the new CIETAC rules, international investment dispute resolution, financial dispute resolution by arbitration and online dispute resolution. The conference aimed to provide a platform of exchanging knowledge and understanding relating to international commercial arbitration and ADR for the arbitration professionals and legal counsels.^②

2) Conferences and Seminars Addressing Disputes of Specific Areas

In addition to large-scale conferences, seminars on dispute resolution in specific sectors, such as internet, overseas investment, investment in Taiwan, etc. were also regularly organized in 2012.

The seminar of “Dispute Resolution Needs and Response of Internet Companies” jointly organized by BAC and the China Internet Association addressed the dispute resolution in the internet industry. More than twenty representatives from famous internet companies attended the seminar. BAC introduced the establishment, business and development of BAC and the Mediation Center of BAC, analyzed the dispute resolution relating to internet companies from various aspects, such as arbitrability, proportion of cases, the key issues and typical disputes, and explained the advantages and characteristics of resolution through arbitration of internet-related disputes. Mr. Song Lianbin, Professor of China University of Political Science International Law

① “First Commercial Dispute Resolution Forum,” published at the website of *Shanghai Commercial Mediation Center* at http://www.scmc.org.cn/news_content.aspx?NID=146, last visited: 24 March 2013; He Xiufang, Liu Yuda: “Building the Platform of Exchange for Commercial Mediation Agencies and Promoting the Cooperation and Development of Commercial Mediation in Shanghai and Hong Kong,” published on PageA25 of the *China Trade News* dated 8 March 2012.

② “International Arbitration and Alternative Dispute Resolution China Conference,” held in Beijing, published at the website of *Xinmin Network* at <http://biz.xinmin.cn/2012/11/29/17398651.html>, last visited: 24 March 2013.

School and arbitrator of BAC explained the concept, development, status in developed countries and in China and prospects of online arbitration.^①

The seminar of “International Commercial Law Services Forum” organized by CCPIT addressed the resolution of disputes arising from foreign-related investment and trade to explore and promote the development of the commercial law services in China. Various topics were discussed at the forum, including Chinese enterprises’ overseas investment and trade, problems encountered by foreign invested enterprises in China, prevention of legal risks and dispute resolution, and speeches were made covering economic and hot trade issues, resolution of commercial disputes through arbitration, implementation of commercial arbitration and prevention of legal risks.^②

With respect to the resolution of disputes in investments between both sides of the Taiwan Strait, Chen Yunlin, Chairman of Association for Relations Across the Taiwan Straits and Jiang Bingkun, Chairman of Straits Exchange Foundation signed the Cross-Strait Investment Protection and Promotion Agreement (“Agreement”), which provides that “the investment compensation disputes arising from the Agreement between an investor and the party at the place of investment, may be submitted by the investor to cross-strait investment dispute resolution institution to be resolved through mediation.” The schedules of the Agreement make special provisions to the mediation procedure of investment compensation disputes.^③ The execution of the Agreement developed new space for the services of China’s commercial mediation institution. Subsequently, CCPIT mediation center and Liaison Bureau under Taiwan Affairs Office of the State Council jointly held a “Cross-Strait Investment Dispute Mediation Seminar.” The attendants of the seminar exchanged ideas on how to read the text of the Agreement and how to implement the mediation procedure.^④

With respect to the resolution of bilateral trade disputes, CCPIT mediation center held a “Lecture on Commercial Mediation— A New Way to Resolve Bilateral Trade Disputes, i.e. Seminar among Divisions of Commerce of Embassies of Certain Countries to China,” which was attended by officials from Divisions of Commerce of Embassies of Zimbabwe, Bengal, India, Syria and China. These Divisions of Commerce of Embassies to China communicated and consulted with the

① “Dispute Resolution Needs and Response of Internet Companies Successfully Held,” published at the website of BAC at <http://www.bjac.org.cn/news/view.asp?id=2114>, last visited: 24 March 2013.

② “International Commercial Law Services Forum Held in Beijing,” published on <http://news.163.com/12/0613/01/83RH47AG00014JB5.htm>, last visited : 24 March 2013.

③ “Both Sides of Taiwan Strait Executed Investment Protection and Promotion Agreement, in Which Mediation Is Chosen as An Important Way to Dispute Resolution in Cross-Strait Investments,” published on the website of *CCPIT/China Chamber of International Commerce Mediation Center* at <http://adr.ccpit.org/newsInfo.aspx?t1=21&t2=0&t3=0&id=803>, last visited: 24 March 2013.

④ “Cross-strait Investment Dispute Mediation Seminar Held in Tianjin,” published on the website of *CCPIT/China Chamber of International Commerce Mediation Center* at <http://adr.ccpit.org/newsInfo.aspx?t1=21&t2=0&t3=0&id=867>, last visited: 24 March 2013.

mediation center in respect of case transfer, information exchange and other specific work regime.^①

In sum, the Beijing Arbitration Commission Mediation Center, the CCPIT Mediation Center, the Shanghai Commercial Mediation Center, the Mediation Center of Internet Society of China and other institutions took an active role in commercial mediation conferences and seminars in both China and abroad. Dispute resolution communications between both sides of Taiwan Strait and between Hong Kong and Mainland China are reinforced constantly while Chinese commercial mediation institutions also extensively involve in world-wide commercial mediation forums. These are helpful for the integration of world mediation trend, commercial mediation frontier and China's commercial mediation and for the internationalization of China's commercial mediation services.

5. Conclusion

In 2012, China's commercial mediation witnessed great development and progress.

More and more mediation rule templates have been issued and the reform of dispute resolution system is on its way. The amendment of Civil Procedure Law, the issuance of the Overall Plan for the Pilot of Reform of Dispute Resolution Mechanism which Links the Litigation and Non-litigation Practice and the Circular on Pilot of Linkage of Litigation and Mediation for Insurance Disputes in Certain Regions outlined future development of diversified dispute resolution mechanism in China. The issuance of industrial mediation rules in securities, maritime and other sectors gives a good example of the conversion of the institutional mediation of China.

Commercial mediation organizations experienced a rapid development, and various industrial commercial mediation organizations have been established. The Securities Association of China issued the Administrative Measures for Securities Dispute Mediation (trial), the Rules of Securities Dispute Mediation (trial) and Administrative Measures of Mediators and established a mediation network which combines the mediation-first procedure led by local counterparts of the Securities Association of China and the mediation procedure led by the Securities Dispute Mediation Center. The efforts by of the Securities Association of China ensured further development of the mediation in China's securities industry. A maritime dispute resolution network was also established, and the commercial mediation in Internet, movie and television, construction and other sectors also witnessed rapid development.

In the last year, Beijing Arbitration Commission has made various efforts in diversified

① "The Mediation Center Held 'Lecture on Commercial Mediation- A New Way to Resolve Bilateral Trade Disputes, i.e. Seminar among Divisions of Commerce of Embassies of Certain Countries to China,'" published on the website of *CCPIT/China Chamber of International Commerce Mediation Center* at <http://adr.ccpit.org/newsInfo.aspx?t1=21&t2=0&t3=0&id=757>, last visited: 24 March 2013.

dispute resolution mechanisms, which include various training sessions on mediation by its mediation center. In addition, the industrial commercial mediation training was also held in other industries, for example, the Securities Association of China held two mediator training in Beijing and Xiamen.

In addition, China's commercial mediation organizations had close cooperation and exchanges among them. For instance, in February, the Mediation Centre of Beijing Arbitration Commission, Beijing TV Artist Association and Beijing Lawyers Association entered into the Legal Service Cooperation Agreement to establish a mediation platform for dispute settlement in movie and TV industry. The scope of the cooperation covers the settlement of disputes over copyright, investment, design, production, management, issuance and broadcast of movie and TV works. In June 28, CCPIT Mediation Centre and Beijing Xicheng District People's Court jointly issued the Implementing Rules on Cooperation in Commercial Dispute Resolution to further define the form of cooperation and the scope of business of the parties^①. The cooperation and exchanges among the dispute resolution organizations and with other organizations will be helpful to the integration of dispute resolution resources and the improvement of efficient dispute resolution.

Based on the analysis and summary above, the potential and the bottleneck development of China's commercial mediation become clear. Firstly, some commercial mediation organizations are incorporated under the Interim Administrative Rules on the Registration of Privately-Owned Non-Enterprise Units, and some are incorporated as an internal body of an existing organization. In the absence of applicable law on mediation organization, the form of organization and nature of mediation organizations are unclear; as a result, some mediation organizations lack the credibility and their continued operation becomes difficult. Secondly, there are no applicable rules on the incorporation of mediation organizations, qualification of mediators and judicial affirmation of mediation agreement; mediation organizations generally need to communicate with local courts to obtain the judicial affirmation of their mediation agreements. Thirdly, judicial and administrative organs in some areas have no interest or confidence in social (commercial) mediation organizations. Fourthly, most of industrial organizations are not typical for mediation organizations. Fifthly, the administrative approval seriously impedes the development of commercial mediation organizations,^② and the development of the paid commercial mediation service based on the market rules becomes difficult.

Dispute resolution is a part of social governance and social autonomy, it relates to the right

① At http://www.ccpit.org/Contents/Channel_64/2011/0629/300716/content_300716.htm

② According the Ministry of Justice, "Except for law firms, notary offices, grass-root legal service office and other social legal advisory entities approved by judicial and administrative organs, no other unit or individual may, without approval of judicial and administrative organs, provide paid legal services." See the "Official Reply of the Ministry of Justice on Prohibition of Provision of Legal Services without Permission by Individual Citizens" (Si Fa Han No. 340 [1993]).

relief, order maintenance, law enforcement and social standard. In general, China's commercial mediation is still in its initial stage, which requires further improvement and introduction of the experiences from other countries in terms of macro policy, commercial environment, mediation organization and rules of procedures. Chinese government should encourage the role of social dispute resolution mechanisms and set out the conditions and procedures for the establishment of further mediation organizations. The industrial autonomy organizations should effectively exercise their functions of industrial autonomy and all other social mediation organizations (including commercial mediation organizations) should operate in accordance with applicable laws and their own mediation rules; only this way can China's diversified dispute resolution ensure a sustainable and healthy development.

Annual Review on Construction Project Dispute Resolution

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Abstract: Recent years have seen continued rapid development in the fields of infrastructure and investment in China, while the mode of management of the construction projects and the industry are undergoing some changes. In the booming market, the legal relationship between investors and contractors are becoming increasingly complicated, and the conflict of interest between them is closely connected with the contradictions found in the development of market economy. In circumstances where the settlement of a dispute goes beyond the control of interested parties, reconciliation, dispute review, mediation, and even arbitration and litigation are all effective ways for proper settlement of economic and social conflict of interest, and the last recourse is definitely the legal action.

Owing to the particularity of China's legal system and their connection with economic laws, the legal issues in the field of construction projects in China, unlike foreign construction and engineering disputes, have a hierarchy and some peculiarities. Therefore, although China does not boast a long history of legislation on construction projects, laws have played a very active guiding role for the development of engineering construction for quite some time. Considering the complexity of disputes over construction projects in the new era, the existing laws and previous disputes on engineering are reviewed in early 2013 with the purpose of better understanding and solving such problems, and providing more effective legal support for engineering construction.

Key words: bidding and bid, engineering cost, contract text, construction and engineering dispute, dispute review, mediation

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Part 1 Trend of Development of Laws on Engineering

I. Trend of development of laws on bidding and bid

1. The promulgation and implementation of the *Regulations on the Implementation of the Bidding and Bid Law* has caused a significant impact on the contracting awarding and contracting of engineering construction.

The biggest change in the engineering-related laws and regulations in 2012 is definitely the promulgation of the Regulations on the Implementation of the Bidding and Bid Law of the People's Republic of China (hereinafter referred to as the "Regulations").

Differing from the bidding and procurement laws and codes adopted in Western countries, the Chinese laws governing the bidding and procurement in the field of engineering construction include the *Bidding and Bid Law*, the *Government Procurement Law* and relevant laws and codes. Among them, the *Bidding and Bid Law* applies to all bidding and bid activities within the territory of China, and includes explicit and detailed provisions on procedures, thus having a great influence on domestic engineering construction. However, with the rapid development of engineering practice, some provisions in the *Bidding and Bid Law* are relatively rigid and show lack of enforceability. With the promulgation of the *Regulations*, the deficiencies in the *Bidding and Bid Law* are made up and supplements thereto are made to the maximum extent; full consideration is given to the features of new types of bidding and procurement businesses, and exploration and innovation are made in the legal system on bidding and bid accordingly. For instance, the requirements for different project bidding types, two-stage bidding and the early settling of objections are specified in details, specifically:

(i) Biddings are regulated in different manners for different projects to pursue value in both efficiency and order. Bidding and bid activities that shall be governed by the *Bidding and Bid Law* are regulated with respect to three types of projects. The sternest regulations are applicable to projects that are held or dominated by state-owned capitals and for which bidding is required; for such projects, if public bidding is required, the bidder that ranks first shall be selected as the successful bidder. Projects of the second type are those held or dominated by non-state-owned capitals and for which bidding is required, and that of the third type are those for which bidding is optional.

At the same time, in order to boost the efficiency in the promotion of special projects, with consideration given to the principles of fairness and justness, the *Regulations* also stipulate a bidding-free shortcut, commonly known as the "fast track", which is mainly applicable to projects for which irreplaceable patents or proprietary technologies are required, those can be constructed by the purchaser by itself, and those with franchisee investors that are determined by bidding and

possess construction qualifications.

(ii) The contradictions in administrative functions are coordinated and regulated. The *Regulations* strengthen the guiding, coordination and supervision functions of the state development and reform authorities, regulates scientifically and reasonably the supervisory responsibilities of all regulatory authorities, including the local people's government, financial department and monitoring department, and straightens up the supervisory functions of the financial department and the authority in charge of the industry in which the bidding activities are involved.

(iii) The two-stage bidding system is made clear. To solve the problems in the bidding for projects involving complex technology, a two-stage bidding system is made clear in the *Regulations* by referring to the *UNCITRAL Model Law on Procurement of Goods, Construction and Services*, the bidding and procurement modes of other countries, and the *Interim Measures for the Management of Bidding for Science and Technology Projects* of China. The system offers a flexible efficiency-targeted bidding mode to the purchasing activities in high and new technology and professional fields. With regard to complex projects for which technical standards or specifications cannot be determined at an early stage, it is basically impossible to determine the bidding conditions, while the bid inviter can invite bids in two stages. In the first stage, by evaluating the bidder's technical proposal without quotations, the bid inviter determines the technical standards and requirements for the project so that bidding document can be formulated; in the second stage, problems in technical implementation plan and bid quotation are settled.

(iv) Specific conditions and procedures for filing objections and complaints are provided. As some objections may evolve into disputes, the legislators define in the *Regulations* the conditions and procedures on the basis of which objections and complaints are established, and put forward the system of early settling of objections for important events, which has played a very good supplementary role in the improvement of bidding efficiency and the reduction of flaws and violations of laws in bidding and major disputes. This is also a reflection of the many remedies for the legitimate rights of bidders and their stakeholders, and a system guarantee for timely and quick corrections of flaws and defects in the bidding activities and reduction of losses to parties involved.

(v) The effectiveness of bidding and bid is determined, which provides a clear and effective legal basis for the judgment of disputes over bidding and bid. In accordance with Article 82 of the *Regulations*, where the bidding activities of any project for which bidding is required in accordance with the law are in violation of the *Bidding and Bid Law* or *these Regulations*, which cause substantial influence on the bidding result, and no remedies are available for making corrections, the bidding, the bids and the bidding result will be invalid, bidding or evaluation of bids shall be conducted again in line with the law. This article is of great value and significance. Most important of all, it has stipulated directly on effectiveness and has provided solutions therefor. With respect to the assumption of corresponding legal consequences, the article provides for three progressive

conditions: first, there is violation of law in the project for which bidding is required; second, such violation has caused substantial influence on the bidding result, namely such substantive contents as the successful bidder, the successful bid price and the duration of project; third, under the said circumstances, no remedies are available for making corrections. Such legal consequence as the invalidity of the bidding, the bids and the bidding may be caused only when the three conditions are met. Finally, the solution is to conduct bidding or evaluation of bids again.

(vi) Other issues in the *Bidding and Bid Law* are addressed in detail. To ensure the smooth implementation of the *Bidding and Bid Law*, the *Regulations* address in detail a number of other issues that arise during the economic development, such as the deadline for the clarification and amendment of pre-qualification documents or bidding document, the ceiling amount and term of validity of bid bond, bidding for projects with a provisionally estimated price, circumstances of rejection of bids and legal liabilities.

2. With the publication of the *Measures for Electronic Bidding and Bid*, the forms of bidding and bid are greatly changed, and the Measures serve as an important means and platform for eliminating illegal bidding and bid activities.

Electronic bidding and bid activities are all or part of the bidding and bid trade, public service and administrative supervision activities conducted in the form of data message on the basis of an electronic bidding and bid system. The Measures for Electronic Bidding and Bid and related appendixes thereto were promulgated by the National Development and Reform Commission jointly with eight ministries and commissions on February 4, 2013, and will be implemented as of May 1, 2013.

The implementation of electronic bidding and bid will be an intangible reform in the field of bidding and bid; complete fairness, openness, justness and good faith can be attained by means of advanced information technology. With the implementation of the *Measures for Electronic Bidding and Bid*, information will be made completely public, bid collusion arising from unsymmetrical “information sources” will be eliminated; by canceling the bid sign-up formalities, the information link between the bid inviter and the bidder are cut off; by automatically selecting and notifying bid evaluation experts through the electronic system, the mutual influence between the bid evaluation expert and the bidder are thoroughly precluded. Through the adoption of electronic bidding and bid, operations in violation of rules, collusions and unfair bid evaluation can be restricted and prevented to the greatest extent possible, because everything is present on the Internet and traceable. Therefore, electronic bidding and bid will without doubt be a reform in both form and substance.

II. Development of laws on engineering cost

1. To Conduct early-stage legislation reasoning for the promulgation of the Regulations on the Management of Construction Engineering Costs to provide legal grounds for engineering cost and cost management.

With respect to the determination and control of engineering cost, quite a few domestic scholars and experts think that the cost issue which involves the consideration and economic interest of the parties to the project contract shall be a matter of autonomy of the will; therefore, the administrative organ shall not interfere with such issue, otherwise it will be under the suspicion of excessive administration.

Unlike the philosophy of the laws on engineering of the Western countries, China's laws concerning construction engineering are on the whole based on some administrative supervision and regulation, and are compatible with China's general political and economic development systems, rather than merely about cost management. Therefore, China's laws on engineering, including economic laws and department laws in the field of real estate development, reflect to a greater extent the purpose of safeguarding national interest and social and public interest through proper administrative regulation. It also reflects China's national conditions, under which, however, policies and regulations must be made "proper", in that only by doing so can "excessive administration" which may influence the independence of market players and the freedom of economic activities be avoided.

Besides, since there are many problems, in particular disordered competition and default on payment in the field of engineering cost, laws and regulations are urgently needed for regulation and to establish market order and realize reasonable interest distribution in the field of engineering construction.

In 2012, in view of the above, the Ministry of Housing and Urban-Rural Development ("MOHURD") commissioned the China Engineering Cost Association to organize the experts and scholars from various circles to form a research group, with the purpose of demonstrating the necessity for enacting the *Regulations on the Management of the Construction Engineering Cost* at the level of administrative regulation. According to the preliminary conclusions reached up to now, the *Regulations on the Management of the Construction Engineering Cost*, as an administrative regulation to be enacted by the State Council, will adapt to the long-term development of the engineering construction market, complement the legal system in the field of engineering cost, unify local provisions, and will, in the future, be a milestone in the development of the field of engineering cost in China.

The objectives of the *Regulations on the Management of the Construction Engineering Cost* under study include:

- (i) To improve the legal system for engineering cost, and cure the disease in engineering cost

management with effective legislations. In the legal system concerning engineering cost in effect, the laws mainly include the *Price Law*, the *Bidding and Bid Law* and the *Audit Law*; with respect to administrative regulations, only some clauses in the *Regulations* are involved, and there is no specific norm; most of the other legislations are departmental rules or regulatory documents, such as the *Measures for the Administration of Valuation in Architectural Engineering Construction Contract Awarding and Contracting*, and the *Interim Measures for the Settlement of Construction Engineering Payments*. It can be seen that the legal norms of the highest level that can directly restrict and influence engineering cost are departmental rules which have relatively low effect. Local legislations keep up with the practice, but the lack of superior laws severely hinders local legislation work and engineering construction practice.

(ii) To prevent engineering cost management from being influenced by improper administration. Being at odds with the viewpoint of the economics of contracts, some local governments haven't developed the economic thinking and means of adjusting the market in a moderate manner. There is a two-pole trend in the management of engineering costs, namely, being either too tight or too loose, which results in the right imbalance between market conduct and management conduct, and influences to a certain extent not only the authority of the administrative activities, but also the correctness of means of market regulation.

(iii) To prevent the employer from forcing prices down, and to control quality and safety risks. To save cost, some employers excessively pursue low price bid, which finally leads to the imbalanced engineering costs of many projects. As there is an oversupply in the construction market, in order to reduce construction investment, a few project owners even force the bidders to reduce prices and make advance. In consequence, some bidders are awarded with contracts with unreasonable bid prices or even bid prices below cost, leaving behind serious hidden danger in engineering quality and safety.

(iv) To encourage contractors to improve engineering cost management and increase project management income. People who are familiar with engineering cost know that engineering cost involves not merely estimation, and it is a complex comprehensive management process that is related to many factors, including technical proposal, implementation conditions, climates and associated resources. Most enterprises can barely establish a complete internal estimation and cost system due to their poor cost management and technical strength in construction. In addition, since the construction engineering market develops rapidly and new materials and processes emerge one after another, failure to keep pace with times and improve the system will result in a loss of control of engineering cost. Further, most construction enterprises "value construction but undervalue cost", and their inputs in engineering cost management are too little; they can hardly manage costs and maintain cost information on a comprehensive basis, and cannot correctly identify engineering cost risks consequently.

2. The amendment to the *Measures for the Administration of Valuation in Architectural Engineering Construction Contract Awarding and Contracting* will adapt to the development of the laws on engineering valuation and make engineering valuation activities more scientific and reasonable.

The existing *Measures for the Administration of Valuation in Architectural Engineering Construction Contract Awarding and Contracting* were put into force in 2001. With the development of valuation practice and the update of laws and contract texts concerning engineering, some provisions in the *Measures*, such as those on valuation method and the form of contract price, are out of step with the times, and many issues that arise in practice, such as the ceiling bid price, the payment of advance and progress payment, the adjustment of contract price and quality appraisal, are not covered in such *Measures*. Therefore, MOHURD started comprehensive amendment in the recent two years, and will put forward drafts for soliciting opinions from all sectors of society. The amendment to the *Measures for the Administration of Valuation in Architectural Engineering Construction Contract Awarding and Contracting* will adapt to the needs of the development of valuation in construction contract awarding and contracting, which will make the *Measures* more practical. In addition, the *Measures* are departmental rules governing engineering cost activities with a relatively high level of effect on practices in the field of special engineering cost. Therefore, the amendment thereto will serve as a good example and guidance for local legislation.

3. *The 2013 Standards for Valuation with Bill of Quantities* was released as a national standard to further standardize engineering valuation and reduce conflicts and disputes in contract fulfillment.

Considering the importance of the determination and management of engineering cost in engineering contract fulfillment, MOHURD issued the No.1567 announcement on December 25, 2012, announcing that the new version of the *Standards for Valuation with Bill of Quantities* (GB50500-2013) would officially come into force on April 1, 2013. As a national standard, some provisions thereof are compulsory provisions, and shall be strictly followed in construction projects funded with state-owned capital.

The 2013 version of the *Standards for Valuation with Bill of Quantities* is the fourth version thereof. Some applicable provisions in the 2008 version are changed to compulsory provisions in the 2013 version, and explanations to the division of responsibilities are added. The principles for the division of responsibilities between the employer and the contractor and their responsibilities are made clear to the greatest extent possible, so as to reduce disputes in later stages. This requires that the employer and the contractor do a good job within the scope of their respective responsibilities and pay special attention to issues which might give rise to disputes to avoid mistakes.

The 2013 Standards pose a higher demand for expertise in engineering cost management,

and provides clearer and more enforceable dispute settlement solutions. It is not only an important means to align engineering valuation with international practice, but also an effective approach for the government to strengthen macro control and achieve functional changes. Meanwhile, it is conducive to creating an open, fair and impartial market competition environment to facilitate the development of the engineering cost sector to a new level.

4. The *Procedures for the Appraisal of Construction Engineering Cost* was promulgated to play a significant role in standardizing procedures for the appraisal of engineering conflicts and cause significant impact on all appraisal participants.

In view of the fact that the settlement of engineering construction disputes often involves engineering cost appraisal, the appraisal period is usually very long and the appraisal means and procedures are complicated; immediately following the promulgation of the revised *Civil Procedure Law*, China Engineering Cost Association issued the *Procedures for the Appraisal of Construction Engineering Cost* (CECA/GC 8–2012), which was put into practice on December 1, 2012 on a trial basis.

Although the *Procedures for the Appraisal of Construction Engineering Cost* are designed for industrial self-regulation purpose, the grounds on which its provisions on developing and carrying out appraisal activities are based are compulsory provisions of laws and regulations. Therefore, anyone who conducts appraisal activities in violation of such *Procedures* shall bear legal consequences. The *Procedures* provide standards for the carrying out of cost appraisal activities by engineering cost consultation enterprises and their consultants and appraisal process, thus ensuring the quality of appraisal results.

III. Trend of development of laws on engineering quality

The *Standards for the Acceptance of Roofing Project Quality* was promulgated to serve as strict national standards for the standardization of roofing project quality.

Given that disputes over engineering contract and infringement are very likely to occur in roofing projects due to quality defects such as waterproof defects and uneven settlement, and to unify standards for appraising the quality of roofing projects, the *Standards for the Acceptance of Roofing Project Quality* (GB 50207–2012) was promulgated as national standards and came into force on October 1, 2012. Some clauses thereof are compulsory provisions and shall be strictly followed. The *Standards* attach importance to the procedures and organization of the acceptance of construction quality, project acceptance documents and records, acceptance of hidden works, and other important contents. The compulsory clauses mainly include stricter requirements for

waterproof and thermal isolating materials, and compulsive requirements for the inspection of the visual effect of waterproof work upon its completion and the securing and strengthening measures under special circumstances. Therefore, implementation of the *Standards* can surely serve as a guarantee for the quality of roofing projects, and therefore an important guarantee for the personal and property safety of the people.

IV. Trend of development of engineering contract text

1. The successive issuance of standard text helps China realize the great leap forward in the overall quality of engineering contracts.

The earliest model text of construction contract in China (the “1999 version contract”) was issued by the former Ministry of Construction and the State Administration for Industry and Commerce in December, 1999, which is more than 13 years ago. During all these years, big changes have taken place in many fields, such as project management, market environment, resource conditions and contract concepts. The original contract can no longer meet the requirements of project construction in the new age and is unable to prevent risks in contract establishment and fulfillment. In view of this, nine ministries or commissions, including the National Development and Reform Committee, invited a great number of scholars and experts to compile a series of standard contract texts. By 2012, four standard texts had been issued, namely the *Standard Construction Bidding Prequalification Document (2007)*, *Standard Construction Bidding Document (2007)*, *Concise Standard Construction Bidding Document (2012)* and *Standard Design-Build General Contracting Bidding Document (2012)*. In addition, many ministries and commissions have issued their own versions of standard texts in regard to their industries, such as the *Housing Construction and Municipal Engineering Standard Construction Bidding Document* of MOHURD to elaborate on and supplement to the standard texts. These standard texts have basically formed the project bidding document standard text system of China with distinctive Chinese characteristics. These bidding documents are compiled based on internationally accepted FIDIC contracts, JCT contracts, AIA contracts and other similar model texts. As the legal system in construction engineering and the legal grounds for contract performance of China are different from that of foreign countries, the contract management concepts and arrangements of rights and obligations in China are surely different from that in foreign countries. Therefore, the *Standard Text* is of great significance.

In particular, in view of the fact that the design-build general contracting mode is still at the initial stage in China, which is especially true in the building construction filed, where there are only a few projects in which the mode is applied tentatively, to improve the engineering bidding contract, avoid the long-existing management defects in the engineering construction

field, as well as to boost the development of design–build general contracting mode in China, the National Development and Reform Committee and other eight ministries or commissions jointly promulgated the *Standard Design–Build General Contracting Bidding Document* on February 1, 2012, which came into force on May 1, 2012. The promulgation and implementation of this document will play a regulatory and guiding role for design–build general contracting activities, help the employer and the contractor understand the core project management concept and promote the healthy development of such contracting mode.

2. The newly revised Model Text of Project Construction Contract will further improve contract management in the engineering construction field.

With the development and change of the market, many problems with the *Project Construction Contract (model text)* (namely the 1999 version contract) jointly promulgated by the former Ministry of Construction and the former State Administration for Industry and Commerce gradually emerge during its actual application, which affect its further application in the engineering construction field. Therefore, in recent years, MOHURD launched an effort, together with the government, experts and scholars, etc., to amend and improve this contract.

The amendment was carried out based on the general pattern of construction projects, with a focus on the improvement of project management patterns and contract management concepts, and revision of provisions concerning components of contract documents, contractor personnel management, authority of supervisor, sub–contracting management and variations, contract price, measurement and payment, completion acceptance, completion settlement, dispute review, contract filing and the like, in order to solve long–standing issues in construction engineering, such as assignment, affiliation, unlawful novation, default on construction payment, inconsistency between the actually executed contract and filed contract. Therefore, this amendment is of great significance in standardizing the project construction contract management and instructing parties of the contract to avoid contract disputes.

In addition, with respect to the controversial issue of whether to introduce the “cost consultant” hired by the employer into the contract, based on the actual situations of project management in China and according to the requirement of contract relativity, in order to avoid agent authority and apparent agency issues generated from cost consultant during contract performance, and in consideration of the timeliness of contract performance and complexity of resource combinations, eventually cost consultant was not included in the new project construction contract.

Additionally, differing from the aforesaid standard texts, the range of application of the contract amended by MOHURD this time is not restricted to projects for which bidding is required in accordance with the law; instead, it is applicable to all construction projects. It should be said that the amendment to this contract is a great contribution to the promotion of

the contract concept in the whole engineering construction industry and the improvement of contract content.

3. The promulgation of the *2012 Construction Project Supervision Contract* (model text) is of great significance in giving play to the investment benefits and promoting the healthy development of the supervision industry.

The *2012 Supervision Contract for Construction Project (model text)* was compiled based on the *2000* version contract (model text), in strict accordance with existing laws, regulations and rules and by referring to experience of contract management for international projects. The new version contract expressly stipulates that it is applicable to 14 kinds of construction projects, including projects in building construction and municipal engineering, etc., and specifies in the general conditions the basic work of project supervisor. It will play a positive role in regulating the contract establishment and contract performance of the parties concerned, preventing the interest imbalance between the parties, avoiding or reducing contract disputes, safeguarding the legitimate rights and interests of the parties and maintaining the order of the project supervision market.^①

V. Trend of development of other laws on engineering

1. The new version of the Civil Procedure Law provides for a more objective and real position for engineering cost appraisal documents.

Given the fact that during the trial of an engineering case, the parties to the dispute often apply to the people's court or the arbitration court for engineering cost appraisal, the new version of the *Civil Procedure Law* provides for a more reasonable position for results issued by the engineering cost appraisal agency based on the nature and characteristics of such results.

According to the second amendment to the Decision of the Standing Committee of the 11th National People's Congress on the *Amendment to the Civil Procedure Law of the People's Republic of China* at its 28th Meeting on August 31, 2012, the new *Civil Procedure Law* came into force as of January 1, 2013.

With respect to the engineering construction field, the direct influence of the new *Civil Procedure Law* is that the term "appraisal results" is changed to "appraisal opinions". This is not just about the change of the name of evidence; it is the change of litigation concept and evidence concept. According to the new *Civil Procedure Law*, where any party involved has objection to the

① The National Meeting on the Publicity and Implementation of the Supervision Contract for Construction Project is Held, Wang Ting, published in *China Construction News*, April 24, 2012, page 1.

appraisal opinions or the people's court considers that it is necessary for the appraiser to appear in court, the appraiser shall appear in court to give testimony. Where the appraiser refuses to do so upon receiving the notice of the people's court, the appraisal opinions shall not be used as evidence to ascertain the facts, and the party who paid the appraisal fee may request the appraiser to return the fee. In addition, any party involved may apply to the people's court for inviting anyone with professional knowledge to appear in court to offer opinions about the appraisal opinions given by the appraiser or professional issues. Therefore, by changing the "appraisal results" which were used as conclusive evidence to "appraisal opinions" which now serve as reference, the new *Civil Procedure Law* clarifies the position of the evidence provided by the appraisal agency as an independent third-party professional agency, and makes the application of evidence by the court and the arbitration agency more objective and real.

2. The promulgation of the *Judicial Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts* will play an effective guiding role in straightening out issues relating to engineering procurement contracts.

The *Judicial Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts* was promulgated by the Supreme People's Court on May 10, 2012 and came into force on July 1, 2012.

The materials procurement contracts generated in engineering contract awarding and contracting are typical sales contracts in nature, but they have their own characteristics in terms of, for example, the provisions concerning price, liquidated damages, framework agreement and order, delivery by installment and the like in steel sales contracts. The aforesaid judicial interpretation covers some of the issues, and plays a regulatory and guiding role for the engineering procurement activities in the market.

3. The *Explanations to Several Difficult Issues Concerning the Trial of Cases of Disputes over Project Construction Contracts* issued by the Higher People's Court of Beijing provide an important basis for addressing difficult issues concerning construction and engineering disputes.

The Higher People's Court of Beijing promulgated on August 6, 2012 the *Explanations of the Higher People's Court of Beijing to Several Issues Concerning the Trial of Cases of Disputes over Project Construction Contracts* (hereinafter referred to as the "*Explanations*").

With respect to the difficult issues and new problems that arise in construction engineering, the provisions in the 2004 *Judicial Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Project Construction Contracts* (hereinafter referred to as the "*Judicial Interpretation*") are too general and some issues

are not stipulated. As new problems emerge one after another and get more and more serious, the Higher People's Court of Beijing and that of other cities all formulated judicial documents of their own. The *Explanations* of the Higher People's Court of Beijing, based on the summarization of related tricky cases, provides detailed regulations concerning the determination of the validity of construction contract, the determination and payment of project cost, the determination of construction period and quality liability, cost appraisal, the assumption of civil liability and other difficult issues in practice, playing a strong guiding role for practical operation.

Part II Trend of Development of Cases Involving Engineering Disputes

I. The value of claims in construction and engineering disputes filed by labor sub-contractors has increased dramatically.

The statistics provided by Beijing Arbitration Commission show that, in 2010, there were 12 cases involving engineering disputes for which applications were filed by labor sub-contractors with the Commission for arbitration, with the value of claims totaling RMB 18,975,629.12 *Yuan*; in 2011, there were 14 cases, with the value of claims totaling RMB 14,640,611.27 *Yuan*; in 2012, there were 17 cases, with the value of claims totaling RMB 111,888,782.34 *Yuan*. It can be seen that the number of cases involving disputes over labor sub-contracting has been on a stable increase, and the sums involved went up dramatically in 2012. The reason behind the dramatic increase is that more and more unlawful novations are conducted under the disguise of labor sub-contracting. In these circumstances, the account settlement would be based on the total value of the main contract or of the sub-contract(s), thereby driving up the value of claims in labor sub-contracting disputes.

Meanwhile, the number of cases for which application is filed by professional sub-contractors for arbitration and the value of the claims involved decreased. The statistics provided by Beijing Arbitration Commission show that in 2010, there were 42 cases involving engineering disputes for which applications were filed by professional sub-contractors for arbitration, with the value of claims totaling RMB 47,217,941.48 *Yuan*; in 2011, there were 51 cases, with the value of claims totaling RMB 223,890,539.83 *Yuan*; in 2012, there were 37 cases, with the value of claims totaling RMB 184,954,074.28 *Yuan*.

II. The legal relationship between unlawful novation and sub-contracting gets more and more complicated.

In the field of construction and engineering, unlawful novation and affiliation have been rampant despite long-term and resolute efforts by state laws and regulations and administrative supervision authorities to clamp down on them. In practice, unlawful novation is often conducted under the disguise of joint cooperation and expansion of labor sub-contracting.

Currently the most difficult issue to cope with in practice is multiple novation. As many parties are involved, the legal relationship is very complicated. It may also trigger social problems, in that once the intermediary has absconded the immigrant worker will have no way of claiming back his salary; nor will the victim have any means of pursuing a complaint following an accident.

Besides, in relation to how to determine the “actual contractor” in cases of multiple novation, the Higher People’s Court of Beijing specified in the *Explanations* that “the actual contractor shall be the legal person, unincorporated enterprise, individual partnership, labor contractor or other civil subjects who actually invested the capital, materials and labor into the construction project”^①. However, there is no specific provision in the *Explanations* as to how to determine the “actual contractor” in cases of multi-level sub-contracting, for example, among the second-level sub-contractors or the third-level sub-contractors, or how to determine the person who has the right to claim the project payment, which remains to be a hard nut to crack in practice.

III. Cases involving construction management (“CM”) and financing keep increasing

In the past few years, the State Council has been promoting the use of CM in many not-for-profit government-funded projects and many provinces have formed their distinctive CM systems. However, with the wider use of the CM system, issues such as unjustified termination of arrangements between

① *Explanations of the Higher People’s Court of Beijing on Several Difficult Issues Concerning the Determination of Disputes over Construction Project Contracts*: “18. How to determine the ‘actual constructor’ in the Interpretation? The ‘actual constructor’ in the Interpretation refers to the contractor under invalid construction projects contracts, namely the contractor, subcontractor, constructor using others’ qualification (affiliated constructor) under illegal professional project or labor service subcontracts; in cases of multiple novation, the actual contractor shall be the legal person, unincorporated enterprise, individual partnership, labor contractor or other civil subjects who actually invested the capital, materials and labor in construction projects. The people’s court shall strictly abide by the standards for the determination of actual constructor, and shall not arbitrarily expand the application of Paragraph 2, Article 26 of the Interpretation.”

the client and the agent, the addition of new parties to litigation and the allocation of the parties' repair and maintenance obligations in construction projects etc., have emerged.

BT projects have also been developing rapidly during the past decade. Nearly all local governments have adopted this construction mode for urban infrastructure construction. With the completion of construction and delivery, most BT projects have entered into the middle phase for payment. Where delay of payment occurs, a series of disputes involving guarantee honoring and legal issues will be triggered. To sum up, disputes involving BT project contracts mainly concern: the validity of the BT contract as a result of issues in the bidding process, the validity of the guarantee contract in BT projects, changes in the construction of the BT projects and the scope of the guarantee contract, and the consistency of dispute settlement provisions across a suite of BT project contracts.

To regulate the local governments' borrowing through buy-backs, the Ministry of Finance, the Development and Reform Commission, the People's Bank of China and the China Banking Regulatory Commission jointly issued the *Notice on Prohibiting Local Governments from Illegally Financing* on December 24, 2012. According to the Notice, unless otherwise provided by laws or by statements from the State Council, local governments at all levels including all state entities, institutions and public organizations affiliated thereto are prohibited from borrowing money through commissioning a construction unit to construct a project and buying back the project year by year (BT). With respect to such projects as social housing and public roads that are required by law or by regulations of the State Council, where it is necessary to adopt the CM system and buy back the project with fiscal funds year by year (BT), the construction scale must be determined and yearly repayment plan implemented according to the project construction plan and debt paying capability. At present, the state is making efforts to keep the use of the CM system and the financing pattern in future government-invested projects under control.

IV. The quality of home decorations becomes the focus of complaints on March 15.

With the general improvement of people's living standards, people have increasing demands of various aspects of home decoration. Although the amount of money spent on home decoration is not as high as that in construction projects and the quality problem is less serious, the parties involved cover nearly every household and therefore the disputes concerning home decoration are also becoming increasingly important.

With the gradual improvement of people's living standard, property owners have raised more new requirements in respect of decoration projects and standards. It can be seen from the complaints filed on March 15 and their trends and developments that the quality problems in home

decoration are mainly associated with hidden works, environmental protection, noise pollution, radiation pollution, security call and all kinds of alarm systems.

V. The jurisdiction of the courts has been expanded.

In recent years, with the rapid development of economy and constant increase of the values of claims, the Supreme People's Court has adjusted its function in trying cases. The higher people courts have also adjusted the value thresholds of cases to be tried by the lower people's courts. Take Beijing and Inner Mongolia for example, the upper limit on the value of claims that can be tried by the basic people's court of Beijing has increased to RMB 100,000,000 *Yuan*. There was once a case involving nearly RMB 100,000,000 *Yuan* tried in the basic people's court of Beijing. The Higher Court of Inner Mongolia just revised the jurisdictional scope of the people's courts in the autonomous region in January 2013, such that only cases involving sums above RMB 200,000,000 *Yuan* can be tried by the Higher Court of Inner Mongolia.

The adjustment of the courts' jurisdictional scopes allows those basic people's courts on the frontline to play a bigger role in social life while posing higher requirements on their case management capability. With respect to construction and engineering disputes, it is a big challenge for the basic people's courts to try cases of high values.

Dealing with construction and engineering disputes is challenging. While old problems have not yet been solved, new problems keep emerging. This requires us to resolutely pursue the spirit of the law in practice and appropriately apply our knowledge to reach a reasonable and lawful solution, so as to protect the legitimate rights and interests of all parties involved to the greatest extent.

Part III Selected Cases of Engineering Dispute in Recent Years

Case I: Assumption of losses caused by rebidding due to faults of the bid winner

[Case Briefing]

X Group Company in Fujian (the plaintiff) issued bid invitation and bidding documents to three bidders, including X Construction Company (the defendant) on November 3, 2007. The defendant submitted the Bid Letter on November 20, 2007. The plaintiff issued the Engineering Construction Letter of Acceptance to the defendant on November 26, 2007

to confirm that the defendant is the bid winner at a bid price of RMB 198,660,000 *Yuan*. Both parties executed the Project Construction Contract, and the defendant submitted RMB 2,000,000 *Yuan* to the plaintiff as bid bond. Later, the defendant organized personnel to conduct manual hole digging. The plaintiff notified the defendant to terminate the above Project Construction Contract in February 2008. Upon receiving the notice on the next day, the defendant exited the construction site successively. The plaintiff conducted rebidding on February 18, 2008 and determined another company as the bid winner at a bid price of RMB 202,860,000 *Yuan*, and both parties executed the Project Construction Contract. Then the bid winner entered the construction site on February 28, 2008, 13 days after the defendant exited the site. The plaintiff deems that the defendant's failure to carry out construction according to the construction contract caused the plaintiff to conduct rebidding, which directly led to a cost increase of RMB 4200,000 *Yuan* and a delay of 43 days in project completion. The number of days of delay is calculated based on the fact that the completion date in the later construction contract is 43 days later than that in the former construction contract. Eventually, the plaintiff filed a lawsuit with the court.

[Opinions of the Court]

1. The Project Construction Contract executed by both parties on December 5, 2007 is legal and valid.

According to provisions concerning the validity of contract in the *Interpretation of the Supreme People's Court to Project Construction Contracts*^①, the defendant has corresponding qualification for construction enterprises; both parties are qualified; their intentions are genuine; and the contents of the contract are legal, therefore the contract is deemed valid.

2. The plaintiff is entitled to terminate the contract.

The expert testimony and other documents indicate that there are indeed quality problems in manual hole digging by the defendant in its construction work, and these papers were signed by the defendant, who had not raised any objection with respect thereto. Therefore, there is evidence that the defendant was notified to terminate the contract because of quality problems in construction work.

① Article 1 of the *Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Project Construction Contracts*: "the contraction contract shall be deemed invalid according to Paragraph 5, Article 52 of the *Contract Law* under any of the following circumstances (I) the contractor has not acquired the qualification for construction enterprises or the qualification level is low; (II) the actual contractor who has not acquired the qualification carried out construction under the name of a qualified construction enterprise; (III) bidding is required for the construction engineering whereas no bidding is conducted or the successful bid is invalid."

3. Actual losses were caused by rebidding and construction delays.

As the defendant failed to carry out construction according to the contract, the plaintiff had to conduct rebidding, the bid price was RMB 4,200,000 *Yuan* more than the original bid price, and the final date of completion of works was delayed for 43 days. According to Article 107 of the *Contract Law*, if either party failed to perform its obligation under the contract or rendered non-conforming performance, it shall bear the liability for breach of contract by continuing to perform its obligation, taking remedial actions or making compensation for the losses, etc. Therefore, the defendant shall make compensation for the price difference of RMB 4,200,000 *Yuan* to the plaintiff. As the plaintiff had detained the bid bond submitted by the defendant, the damage finally determined by the court is the total amount payable minus the bid bond detained.

The claim of the plaintiff that the defendant shall compensate for the delay of 43 days was not supported by the court on the grounds of lacking of evidence, as the method for calculating the days delayed was incorrect. With respect to the interval of 13 days between the exiting of the defendant and the entry of another construction unit, the court deems that it is caused by the termination of contract due to default of the defendant, therefore it is ruled that the calculation of losses shall be based on the number of days delayed in entering the site for commencement of construction.

[Dispute Observation]

Since 2012, disputes arising from rebidding and the claim that the contract awarded is invalid due to various illegal practices have been on the increase, which brought about the issue of the losses caused by the difference between the original and the later bid prices. In practice, the fault leading to the invalidity of the bid and the composition of losses are preferentially considered. Given that the invalidity of the bidding or the bid is caused by the illegal practice of the bid inviter, for instance, the bid inviter negotiated the price before the determination of the bidding result in violation of bidding procedures, the difference between bid prices shall be borne by the bid inviter on its own; if however the invalidity is caused by the bid winner, for example, the bid winner requested to modify the bid contract or refused to submit the performance bond, the bid winner shall be responsible for making compensation for the losses.

Case II: Assumption of responsibilities arising from nominal sub-contracts

[Case Briefing].

On December 8, 2009, X Engineering Company (the applicant) executed a Sub-contract with X

Sub-contractor (the respondent) with respect to a road construction project (hereinafter referred to as this "Project"). According to the sub-contract, the construction shall be commenced under the instruction of the supervisor; the time limit for the Project is 910 calendar days; the quality of the project shall meet the standard of "excellent"; and the contract price is RMB 100,000,000 Yuan. After the commencement of the Project, the applicant performed its obligations under the sub-contract. However, the respondent failed to complete corresponding work as agreed in the contract and just finished part of the agreed work. Till the date on which the application for arbitration was filed, the applicant had made all payments to the defendant as agreed in the contract, totaling RMB 20,000,000 Yuan. The respondent arbitrarily suspended construction many times, and the quality management during construction was loose. The supervisor ordered the respondent to start over again many times. These caused great economic losses to the applicant and bad social influence. Negotiations have been conducted for many times but all failed. So far, the respondent has not resumed the construction. Therefore, the applicant claims that the respondent shall bear all liabilities for the breach of contract and pay RMB 10,000,000 Yuan as liquidated damages and the cost of taking measures to meet the time limit of the project.

As the hearing of this case has not been concluded, the following analyses will be restricted to the focus of dispute between both parties only.

[ISSUES]

1. Whether the *Sub-contract* in this case is valid or not.

According to provisions of the *Contract Law* that "the contractor may not assign in whole to others the construction project contracted by it, or divide the same into several parts and separately assign each part to a third person under the guise of sub-contracting, and the main structure of the construction project must be constructed by the contractor by itself", relevant provisions of the *Construction Law* and the *Regulations on the Management of the Quality of Construction Projects*^① as well as the content and actual performance of the sub-contract in this case, although the contract is nominally a sub-contract, in effect the general contractor did not carry out any management of the joint operation project and there is no evidence showing that it has done so. Therefore, the contract shall be deemed as a sub-contract. Based on the

① Article 28 of the *Construction Law*: "the contractor may not subcontract in whole to others the construction project contracted by it, or divide the same into several parts and separately assign each part to a third person under the guise of sub-contracting."

Article 25 of the *Regulations on the Management of the Quality of Construction Projects*: "The construction unit shall acquire qualifications of the corresponding level according to law and engage in construction within the scope as allowed by their level of qualification. The construction unit is prohibited from contracting projects beyond the scope of their qualification or in the name of other construction unit. It is prohibited from allowing other units or individuals to contract projects in its name. And it shall not assign or illegally subcontract projects."

aforesaid compulsory provisions of laws and administrative rules and regulations, the sub-contract is invalid.

2. Basis for settlement after the Sub-contract becomes invalid

The settlement of the Sub-contract after it becomes invalid shall be conducted, based on relevant provisions of the *Interpretation to Construction Contracts*^①, by referring to the *Sub-contract*, and the appraisal of project cost is not required. Here, “referring to” shall be different from “according to”. The court or the arbitration tribunal will determine the specific difference during the hearing of the case based on the faults of both parties.

3. Assumption of liabilities for unpaid fines for quality problems

The respondent, as the actual constructor, fully understood and directly signed the penalty decision made by the owner or the supervisor with respect to engineering quality defects, and had worked out corresponding solutions. Therefore, it shall bear the liability for quality problems caused by it and shall carry out construction according to requirements of the owner and the supervisor. As the fine caused by its unavailability of personnel and failure to carry out construction according to the instructions of the owner and the supervisor shall be borne by it, it shall bear the liabilities for unpaid fines.

[Dispute Observation]

In recent years, the practice of executing a nominal *Sub-contract* to cover unlawful novation and affiliation has become more and more common. The disputes it triggered are often called disputes over joint operation projects. The main issue involved in such disputes is the division of responsibilities after the contract becomes null and void. Mr. Feng Xiaoguang, a senior judge of the Supreme People’s Court holds that the general contractor shall bear the main responsibility as it knows that the project contracted by it is not allowed to be assigned to others; the sub-contractor shall bear the partial (secondary) responsibility as it should know, as a professional construction enterprise, that engineering sub-contracting is prohibited by the mandatory provisions of laws and regulations.

① Article 2 of the *Interpretation of the Supreme People’s Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Project Construction Contracts*: “Where the project construction contract is invalid, while the project is found to be qualified upon completion inspection and acceptance, the contractor’s claim for the payment of project cost shall be supported.”

Case III: Assumption of joint liability of owners and guarantors in BT projects

[Case Briefing]

X Construction Company (the claimant) executed a Build and Transfer Contract for Building a Sewage Treatment Plant (hereinafter referred to as the “Contract”) with X Municipal Government (the first respondent) in 2005. After the execution of the Contract, the applicant completed the project as scheduled and according to the quality requirement set forth in the contract and delivered the project to the respondent. The applicant executed a settlement statement with the municipal government in June, 2010, in which the project price is determined as RMB 300,000,000 *Yuan*. According to the Contract, the municipal government shall pay the buy-back fund of RMB 20,000,000 *Yuan* on June 15, 2012. However, the municipal government has failed to pay such fund after the applicant has demanded for the payment many times.

X Bank (the second respondent) executed a Performance Guarantee with the applicant in March, 2007, under which the bank undertakes the joint and several liability to the applicant for the performance of the obligations of the first respondent under the Contract. According to the Performance Guarantee, (i) the principal creditor’s right guaranteed by the respondent and the scope of guarantee shall be all obligations which shall be performed by the respondent according to the Contract, with the guarantee sum being not exceeding RMB 200,000,000 *Yuan*; (ii) the guarantee period shall be two years after the time limit for the respondent to perform all obligations under the Contract expires. According to the Performance Guarantee, the applicant issued a letter to the respondent on July 2012, requesting the respondent to assume its guarantee liability; however, the respondent had failed to perform its obligation till the day on which the applicant filed the application for arbitration.

As the hearing of this case has not yet been concluded, the following analyses will be restricted to the focus of dispute.

[Focus of Dispute]

1. Determination of debt amount in joint guarantee

According to Article 20 of the *Interpretation of the Supreme People’s Court to Several Issues Concerning the Application of the Guarantee Law of the People’s Republic of China* (hereinafter referred to as the “*Interpretation*”), where the debtor under a joint guarantee fails to perform its obligations under the master contract after the debt performance period expires, the creditor has the right to request the debtor to perform its obligation or request any of guarantors to assume all

guarantee liabilities^①. Therefore, in this case, the applicant may directly ask the bank to assume the debt repayment liability.

The subject matter of the Contract (namely the Build and Transfer Contract, hereinafter referred to as the “BT Contract”) in this case is a construction project accomplished through financing. Changes of the construction contract are inevitable during the contract performance period. Whether it is necessary to inform the guarantor of such changes is crucial in ensuring the performance of the guarantee contract. In this case, it is clearly specified in the guarantee contract that the provisions concerning change notification are excluded in the contract. Besides, the changes did not lead to the increment of the principal creditor’s right or the obligations within the scope of guarantee, therefore, the guarantor shall still be liable for assuming its liabilities within the scope of guarantee promised by it.

2. Lawsuit qualification of the guarantor in this case

According to relevant judicial interpretations to the *Civil Procedure Law* and the *Reply of the People’s Bank of China on the Civil Liability of Branches of Commercial Bank* (Y. T. F. [1995] No. 37 August 7, 1995)^②, branches of specialized banks (commercial banks) and insurance companies in all localities do not have the status of a legal person but belong to “other organizations”, so they have lawsuit qualification and may participate in the proceedings. Therefore, in this case, the guarantor possesses the lawsuit qualification.

[Dispute Observation]

Following their booming development over the past decade, a great number of BT projects have entered into the peak period for repayment. If the local governments are unable to raise enough funds, disputes over the joint responsibility of the guarantor are likely to occur. In addition, since many guarantee institutions engaged in BT projects are branches of commercial banks which do

① Article 20 of the *Interpretation of the Supreme People’s Court to Several Issues Concerning the Application of the Guarantee Law of the People’s Republic of China*: “where the debtor under a joint guarantee fails to perform its obligations under the master contract after the debt performance period expires, the creditor has the right to request the debtor to perform its obligation or request any of the guarantor to assume all guarantee liabilities. The part which cannot be recovered from the debtor, after the guarantors have assumed their guarantee liabilities, shall be borne by all joint guarantors according to the proportions as agreed among them. Where there are no such agreements, the part shall be evenly borne by all joint guarantors.”

② The *Reply of the People’s Bank of China on Civil Liability of Branches of Commercial Bank*: “1. According to Article 49 of the *Civil Procedure Law of the People’s Republic of China* and Article 40 of the *Interpretation of the Supreme People’s Court to Several Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China*, branches of specialized banks (commercial banks) and insurance companies in all localities do not have the status of a legal person but belong to ‘other organizations’, so they have lawsuit qualification and may participate in the proceedings. When the branches of commercial banks carry out business within the scope authorized by the parent bank, if a civil lawsuit is filed due to their disputes with other citizens, legal persons or other organizations, the subject of lawsuit shall be the branch involved rather than the parent bank.”

not have the status of a legal person, to determine whether the guarantor has the capacity is one of the tough issues to be dealt with in solving legal disputes.

Case IV: Disputes over the default on project payment under the CM system

[Case Briefing]

In 2006, X City Investment Company (the owner) executed a Project Construction Contract with X Real Estate Company (the employer). The contract stipulated that the real estate company shall complete the sub-contracting of a central project as an employer on behalf of the city investment company. Later, the real estate company executed in the name of an “employer” a General Construction Contract (hereinafter referred to as the “Construction Contract”) with a construction company. It is stipulated in the Construction Contract that the construction company shall complete the construction of the central project according to the Contract and the employer shall pay the project cost to the company as agreed in the Contract. The payment method is: making the mid-term project payment once every month based on 70% cost for qualified work after such work has been reviewed by the employer or a unit authorized by the employer; paying 80% cost for actually completed work after such work has been inspected and accepted as qualified; paying 95% of the agreed price after the project files have been examined and filed and the settlement has been completed; pay 1/2 of the retention 12 months after the owner has officially issued the certificate of completion and the audit has been completed (whichever is later); and paying the remaining retention after the 24-month guarantee period has expired and no project defects have been found.

After the execution of the Construction Contract, the construction company completed all works under the Contract. In September 2008, the project was completed, inspected and accepted as qualified. At the end of 2008, the project was filed and both parties completed the project settlement procedures, with the contract price being RMB 500,000,000 *Yuan*. Till April 2012, however, the owner and the employer had only paid RMB 300,000,000 *Yuan*, and the remaining RMB 20,000,000 *Yuan* has remained unpaid, so the employer applied for arbitration over the overdue project payment.

[Focus of Dispute]

1. Litigation status of principals in named agency

According to Article 402 of the *Contract Law* concerning the intervention right of the principal,

where the agent, acting within the scope of authority granted by the principal, enters into a contract in its own name with a third person who was aware of the agency relationship between the principal and the agent, the contract is directly binding upon the principal and such third person^①. Therefore, although the contract in this case was executed between the agent and the contractor, according to the law, it is still binding upon the principal. Therefore, the construction company may directly file a lawsuit against the principal, requesting the latter to pay the project funds for which payment is delayed.

2. Determination of arbitration institution in this case

An arbitration clause was included in the General Contract executed between the construction company and the employer, which stipulates that any dispute relating to the contract shall, if both parties agree, be submitted to the arbitration commission in the place where the project is located for arbitration; if either party disagrees to choose this arbitration commission, the dispute shall be submitted to X Arbitration Commission for arbitration. According to Article 18 of the *Arbitration Law of the Republic of China*, “if the arbitration item or the arbitration commission is not agreed upon by the parties in the arbitration agreement, or if the relevant provisions are not clear, the parties may make a supplementary agreement. If the parties fail to agree upon the supplementary agreement, the arbitration agreement shall be invalid.” As in this case, both parties reached a consensus that the dispute shall be settled by the arbitration commission in the place where the project is located, but later they reached another agreement that if they failed to choose this arbitration commission, X Arbitration Commission shall be chosen. These provisions are valid arbitration provisions as they have stipulated a specific arbitration commission.

[Dispute Observation]

Recent years have seen increasing disputes over the default on project payment triggered by the project CM system, which are mainly reflected in the consistency between the Project CM Contract and the General Construction Contract, and the intervention of the principal (the owner) in the General Construction Contract that breaks the contract relativity, etc. To provide effective guidance for local governments to use the financial fund correctly in the future, the Ministry of Finance, the National Development and Reform Commission, the People’s Bank and the China Banking Regulatory Commission jointly issued documents at the end of 2012, calling for an effective control over the practice of borrowing money through introducing the CM system and other financing means in projects invested by the government.

① Article 402 of the *Contract Law*: “where the agent, acting within the scope of authority granted by the principal, entered into a contract in its own name with a third person who was aware of the agency relationship between the principal and the agent, the contract is directly binding upon the principal and such third person.”

Case V: Determination of the validity of documents by the cost consulting agency hired by the owner

[Case Briefing]

X Construction Company (the plaintiff) was contracted to construct x decoration project of the defendant through bidding. Both parties entered into a Construction Contract in August 2007. The plaintiff officially entered into the site on September 1, 2007 and delivered the completed project to the defendant for use on April 8, 2008. According to the Construction Contract, the quantity surveyor refers to the agent hired by the owner for project cost management and the cost of changes of the project on site is a tentative value; all works completed shall be measured and evaluated by the quantity surveyor. However, it is not specified in the settlement clause of the contract that the settlement document compiled by the quantity surveyor shall be confirmed by the defendant before being used as the basis for settlement. In this case, the cost consulting agency delivered the report on the verification of the progress payments to both parties via email. The plaintiff requests the defendant to pay the outstanding project cost and interests that has been verified. The defendant claims that the projects under dispute have not been confirmed by the owner, namely the final settlement has not been completed, and that the project payment claimed by the plaintiff is based on the temporary verification documents issued by the quantity surveyor, whereas such documents are not binding upon the owner and can only serve as the basis for settlement after being confirmed by the owner.

[Opinions of the Court]

1. Right of verification of progress payment

According to Section 17.3.3 “certificate of progress payment and payment time” of the *Standard Construction Bidding Document* jointly issued by nine ministries and commissions in 2007, “the supervisor shall complete verification within 14 days upon receiving the progress payment application and corresponding supporting documents from the contractor, and provide the amount payable by the employer to the contractor and corresponding supporting materials; upon the confirmation and agreement of the employer, the supervisor shall issue the certificate of progress payment signed by the employer to the contractor”, and Section 17.3.4 “certificate of progress payment and payment time” of the *Standard Design and Construction General Bidding Document* jointly issued by nine ministries and commissions in 2012, “the supervisor shall complete verification within 14 days upon receiving the progress payment application and corresponding supporting documents from the contractor, and provide the amount payable by the employer to the contractor and corresponding supporting materials; upon the confirmation and agreement of the

employer, the supervisor shall issue the certificate of progress payment signed by the employer to the contractor”. These two documents play a guiding role in the construction field in China and reflect the national industrial practices in project payment verification in engineering construction. Even though the cost consulting agency verified the progress payment, the validity of its opinions shall be subject to the provisions of the contract. If the validity of its opinions is specified in the contract, the provisions of the contract shall be complied with. In case there are no such explicit provisions in the contract, the industrial practices shall apply.

2. Legal procedures and forms are required in final settlement.

The compilation and inspection of the final settlement is an important part in project contract fulfillment. According to Item 1, Paragraph 2, Article 14 of the *Interim Measures for Construction Project Settlement* (C. J. [2004] No. 369) jointly issued by MOHRUD and the Ministry of Finance^①, “1. The project final settlement shall be compiled by the contractor and inspected by the employer; with respect to general contracting projects, the final settlement shall be compiled by the specific contractor and inspected by the general contractor, then the employer; 2. The settlement of individual projects or final settlement shall be compiled by the general (contractor)···, and the individual project or final project settlement shall become valid after being affixed with the signature and seal of the employer and the contractor”. In view of the above, the final settlement of this project shall be compiled and submitted by the contractor and be inspected by the employer and become valid only after being affixed with the signature and seal of the employer and the contractor. Therefore, as long as it is not expressly specified in the contract that the settlement shall be conducted by a third party authorized by the owner or there is no contract fulfillment practice leading to such consequence, the process inspection conducted by the cost consulting agency hired by the owner, including inspection upon settlement, cannot replace the inspection by the employer.

① Paragraph 2, Article 14 of the *Interim Measures for Construction Project Settlement* stipulates: “following the completion of a project, both parties shall make the final settlement based on the contract price mutually agreed, the adjusted prices as well as claims. (II) Compilation of project final settlement 1. The project final settlement shall be compiled by the contractor and inspected by the employer; with respect to general contracting projects, the final settlement shall be compiled by the specific contractor and inspected by the general contractor, then the employer. 2. The settlement of individual projects or final settlement shall be compiled by the general (contractor), and directly inspected by the employer, or a project cost consulting agency authorized by the employer with corresponding qualifications. With respect to projects invested by governments, the settlement shall be inspected by the financial department at the same level, and the individual project or final project settlement shall become valid after being affixed with the signature and seal of the employer and the contractor. The contractor shall complete compilation of the final settlement within the agreed time period in the contract and shall bear the responsibility on its own if it fails to do so within the time limit without just cause for delay.”

[Dispute Observation]

The ambiguous settlement clauses in project construction contracts have constantly given rise to disputes over the years. Due to long construction period and frequent changes during construction, the final settlement price is usually quite different from the price agreed in the contract. Therefore, disputes are likely to occur with respect to the content of the contract at the time of final settlement. This case is an example. Both parties have different understanding with respect to whether the verification report issued by the third party can serve as the settlement document without the confirmation of the owner. The ruling of such kind of disputes is often based on the contract per se or other industrial practices.

Case VI: New problems with the basis for settlement for labor sub-contract

[Case Briefing]

X Construction Labor Company (the applicant) executed a *Construction Project Labor Sub-contract* (hereinafter referred to as the “Original Labor Contract”) with X Construction Company (the respondent) on November 10, 2008, with respect to the construction of a R&D building of x entrepreneurship center. The project was commenced in October 2008. Both parties entered into a Complementary Agreement to the Construction Project Labor Sub-contract (hereinafter referred to as the “Complementary Agreement”) on April 20, 2009, which is very close to the actual completion date, July 30, 2009. The execution of such agreement at this time, in which new principles for settlement is determined, means that both parties agree to conduct settlement for the project according to the principles for settlement set forth therein. The applicant claims that the project has been completed in July 2009; however, the respondent refuses to pay the delayed project cost of RMB 2,390,000 Yuan with the excuse that the employer has not made such payment in full.

The respondent raises a counterclaim that the applicant shall return the over-paid project cost of RMB 120,000 *Yuan* as well as the loss incurred due to the postponement of the project completion date in the amount of RMB 510,000 *Yuan*.

As the hearing of this case has not yet been concluded, the following analyses will be restricted to the focus of dispute.

[Focus of Dispute]

1. Whether the Supplementary Agreement executed on April 20, 2009 really exists or not.

The sub-contracting manner specified in the Original Labor Contract is different from the actual sub-contracting manner; while that specified in the Complementary Agreement is identical therewith.

The actual sub-contracting manner of the applicant is expanded labor sub-contracting, namely, labor plus materials, same with that specified in the Complementary Agreement, while the contracting manner specified in the Original Labor Contract involves labor only.

2. Basis for settlement for the project involved

The project involved does not belong to projects for which bidding is required according to laws and administrative regulations, and the Original Labor Contract was not executed in accordance with the legal bidding and bid procedures. According to Article 21 of the *Interpretation of the Supreme People's Court to the Construction Contract*, "if the substantive contents of the construction contract concluded separately by the parties with respect to the same project are different from that in the contract awarded that has been filed, the latter shall serve as the basis for project settlement". Here, the "contract awarded that has been filed" shall refer to the contract awarded that is executed by the parties after going through legal bidding and bid procedures. In this case, although the original contract has been filed, the parties have not gone through the bidding and bid procedures, and the contract is not the contract awarded, therefore Article 21 of the *Judicial Interpretation to the Construction Contract* is not applicable to and the Original Labor Contract shall not be used as the basis for the settlement for this project.

According to Article 15 of the *Explanations of the Higher People's Court of Beijing to Construction Contract*^①, if a construction project is not subject to bidding as required by laws and

① The *Explanations of the Higher People's Court of Beijing to Several Issues Concerning the Trial of Cases of Disputes over Project Construction Contracts*: "15. How to settle the project payment in Black and White Contracts? With respect to projects for which bidding is required by laws and administrative regulations or projects that for which bidding is not required but is conducted according to law and placed on file, if the substantive contents of the construction contract which has been performed by the parties are different from that of the contract awarded that has been filed, the settlement shall be conducted based on the contract that has been filed; with respect to projects for which bidding is not required by laws and administrative regulations, bidding is not conducted according to law, and the parties have filed the contract awarded with the local construction administrative body, but the substantive contents of the contract that has been filed are different from that of the actually performed contract, the settlement shall be conducted based on the contract that has been actually performed. If the contract that has been filed and the contract that has been actually performed are deemed invalid for breach of the compulsory provisions of laws and administrative regulations, the settlement may be made by referring to the contract that has been actually performed."

administrative regulations, in fact the parties involved did not do so according to law, and the construction contract is filed with the local construction administrative body, but the substantial contents thereof are different from that of the contract actually performed, the contract which have been actually performed shall serve as the basis for project settlement.

[Dispute Observation]

In practice, the inconsistency between the contract that has been filed and the contract that has been actually performed also occurs in construction project labor sub-contracts, and thus giving rise to disputes as to which contract shall be used as the basis for settlement. As this kind of disputes are not arising from projects for which bidding is required according to the law and the bidding and bid procedures are not applied, the settlement cannot be conducted based on the contract that has been filed as specified in the *Judicial Interpretation of the Supreme People's Court to the Construction Contract*; therefore, disputes over the issue of which contract shall be used as the basis for settlement emerge. With the changes of dispute forms, the Higher People's Court of Beijing issued the *Explanations to Construction Contracts* in 2012, which has provided basis for ruling this kind of disputes, and is of great practical significance in determining the function of the contract that has been filed and the contract that has been actually performed and whether a project must be subject to bidding according to the law.

Case VII: Determination of settlement price under changed circumstances caused by rise in the price of building materials

[Case Briefing]

X Company in Jinan (the defendant) executed a construction contract with X Construction Company in April 4, 2008 with respect to the construction of workshops and office buildings. According to the contract, the construction shall be conducted at a fixed cost, totaling RMB 19,660,000 *Yuan*. Later, the construction company delivered the project to Ms. Li (the plaintiff). The two parties agreed to complete the project together, with a condition that "Party A being responsible for the project management and Party B (Ms. Li) being responsible for project construction, settlement with the employer, work coordination and financing. The profit or loss of the project shall be borne by Party B alone."

In April 2008, Ms. Li entered the site for construction. Work of the first few months was conducted smoothly; however, starting from July 2008, the price of building materials surged up dramatically. For example, the bid price of the steel bar was about RMB 3,000 *Yuan* per ton, till

July, the price increased to as high as RMB 6,800 *Yuan* per ton. Till the suspension of construction in December 2008, the actual cost of the project had reached to about RMB 30,000,000 *Yuan*. Although the employer had been allocating fund according to the project progress, the fund was far from enough. Ms. Li had to use her own money to cover the deficiency, totaling several million. The construction had to be shut down in December 2008, when the project had been basically completed, with only winding up projects left, such as roads and greening.

During such period, Ms. Li had negotiated many times with the employer and X Construction Company to request price adjustment. On July 16, 2008, X Construction Company issued a “work contract list” to the employer, listing the prices of some major building materials. At the end of November 2008, the construction party calculated the actual cost of the project, “the actual cost price of this project is RMB 29,860,000 *Yuan*”. X Construction Company thus requests the employer to change the price of building materials specified in the original contract.

Considering the risks caused by abnormal price fluctuations of building materials, the Jinan Construction Committee issued [2008] No. 4 Document on April 30, 2008. According to the Document, with respect to projects that are completed after January 1, 2008 and contracted at a fixed cost, if both parties have not agreed upon the range of price risks of major building materials, such as steels, to be undertaken by the contractor, and if the falling or rising range of prices of major building materials is within 5%, the price difference shall be borne or benefited by the contractor. If the falling or rising range of prices exceeds 5%, the price difference (the part in excess of 5%) “shall be borne or benefited by the employer if the construction contract does not include provisions concerning the coefficient of risks to be borne by the contractor.” Ms. Li claimed that the variation range stipulated by Jinan Construction Committee is just 5%, however, the price variation range in the second half of last year was far more than the figure. To carry out construction at a fixed cost is very risky, Ms. Li said she had considered the risks at the beginning and proposed to settle the project according to the market price. The person assigned by X Construction Company to the site promised her that the settlement will be conducted based on the actual cost. But this is just an oral guarantee. Later the employer agreed to adjust the price, but the price has not been adjusted.

Therefore, Ms. Li filed a lawsuit against X Company in Jinan, claiming for the money she advanced and the profits she deserves.

The case was finally concluded through mediation and the claim of the plaintiff was satisfied.

[Opinions of the Court]

1. Change of circumstances in this case due to rise in the price of building materials

Commercial risks are inherent risks of commercial activities. The parties involved could

foresee or should have foreseen the change of circumstances but are usually at fault; however, the basis for the contract has not been changed. The change of circumstances is an unexpected risk, which cannot be foreseen by the parties at the time of executing the contract and no party is at fault subjectively, while the consequence may fundamentally shake the basis for and purpose of the contract. Force majeure means after the execution of the contract, events which are not attributable to faults or negligence of either party and cannot be foreseen, prevented, avoided or controlled by the parties to the contract occur, making it impossible to fulfill the contract or fulfill it on schedule. In this case, the party, to which the accident occurs, may be exempted from the liability for contract fulfillment or delay in the fulfillment of contract.

In this case, the sharp rise of more than 5% in the price of building materials is driven by the financial crisis and the Olympic Games, etc., and shall not be seen as inherent commercial risks which can be foreseen by the parties; however force majeure usually refers to natural disasters or abnormal social events. Events in this case cannot constitute force majeure. Therefore, it is more appropriate to include such events into change of circumstances.

2. Actual prices in the market shall be considered in project settlement in this case.

The *Interpretation of the Supreme People's Court to Several Issues Concerning the Application of the Contract Law of the People's Republic of China (II)* (hereinafter referred to as *Interpretation to Contract Law (II)*) was implemented on May 13, 2008. The "Principle of Change of Circumstances" was officially acknowledged in the Interpretation. According to Article 26 thereof, if a material change in objective circumstances occurs after the execution of a contract and such change cannot be foreseen at the time of executing the contract, is caused by non-force majeure event, and shall not be deemed as commercial risks, and if continuing to perform such contract is obviously unfair to either party or as a result thereof the purpose of the contract cannot be achieved, and the parties applied to the people's court for change or termination of the contract, the people's court shall determine whether to change or terminate the contract based on the principle of fairness and the actual situations of the case.

The promulgation of the *Interpretation* provides legal basis for the application of the principle of change of circumstances. According to the Interpretation, in order to ensure fairness, the project payment may be changed upon request by the plaintiff. Therefore, the settlement of the project may be conducted based on the actual market price.

[Dispute Observation]

The principle of change of circumstances exerts tremendous influence upon the settlement of project payment, and as a result many disputes are caused. It is tough to appropriately apply

this principle in judicial practice, as on the one hand, the stable order of the market shall be maintained and the declaration of will of the parties to the contract shall be respected; and on the other hand, fairness and justness in real sense shall be pursued to prevent the violent economic fluctuations from breaking the original interests balance of the contract. Therefore, the Supreme People's Court issued the *Notice on Properly Applying the Interpretation to Several Issues Concerning the Application of the Contract Law of the People's Republic of China (II) to Serve the Party and the Country* (F. [2009] No. 165, April 27, 2009), which stipulates that "we shall aim at settling the contract disputes fundamentally by stressing on conciliation, settling the case according to law based on the free will of the parties and resolving the sources of conflicts to create a good judicial environment for the steady and sound development of economy". With respect to the application of the Interpretation to the Contract Law (II), the notice stipulates that "in case of special circumstances under which it should be applied, its application shall be reviewed the Higher People's Court, and the Supreme People's Court where necessary". This shows that the legislator, on the one hand, introduced the principle of change of circumstances and, on the other hand, wants to prevent the principle from being excessively used and thus making the original contract inapplicable. Therefore, most judges are very careful on applying this principle in case trial.

Part IV Appendixes

Appendix I: Selected focus issues in China's laws concerning engineering and disputes

1. Effective time of bid-winning notice and contract

There have been controversies over the effective time of contract during the bidding and bid process. Article 46 of the *Law of the People's Republic of China on Bidding and Bid* provides that the bid inviter and the bid winner shall, within 30 days beginning from the date when the bid-winning notice is issued, execute a written contract on the basis of bidding documents and bid documents of the bid winner.

It is considered under normal conditions that the provisions concerning offer and acceptance in the *Contract Law* shall apply. In case that there are no explicit provisions concerning the effective time of the contract concluded through the bidding process in the *Law of the People's Republic of China on Bidding and Bid*, the principle concerning the conclusion and effectiveness of contract in the *Contract Law* shall apply, namely the contract is established once the acceptance becomes effective. Under the premise that the statutory enter-into-force conditions and the agreed

enter-into-force conditions are met, the contract becomes effective. Therefore, it is deduced that the bid winning notice is the acceptance and once the bid winner receives it, the contract is established. If the bid inviter and the bid winner have not agreed upon the enter-into-force conditions of the contract, as long as the statutory enter-into-force conditions are met, the contract will become effective at the time of establishment.

Some scholars introduced the concept of “pre-contract” and deem that the bid-winning notice is the pre-contract and the contract concluded within 30 days beginning from the date the bid-winning notice is issued is the real contract. If the bid inviter or the bid winner fails to perform its obligations after the issuance of the bid-winning notice, it shall be investigated for legal responsibilities according to the provisions of the contract on breach of contract.

2. Whether the court or the arbitration institution has the right to determine that the bidding result is invalid.

The bidding and bid activities in nature belong to civil acts subject to administrative supervision and management. As they are subject to public laws to some extent, it is not appropriate to determine the validity of such activities totally based on the criteria for the determination of civil juristic acts, and connection between the *Law of the People's Republic of China on Bidding and Bid and the Construction Law*, etc., has to be considered. However, when disputes over the invalidity of bidding or bidding result between both parties occur, whether the people's court or the arbitration institution has the right to determine that the bidding result is invalid?

There have been fierce controversies over this issue. Some judges think that relevant laws, administrative regulations and rules have set forth clear provisions concerning the issue and authorized some administrative bodies to exercise administrative management, therefore the court or the arbitration institution shall have no right to determine and judge its validity.

But more people think that although the bidding and bid activities are subject to administrative supervision and administration, because they are fundamentally a kind of civil contracting activities participated by the parties on a voluntary basis. Not only the issuance of bid invitation notice and bidding documents but also the bidding and bid winner selection processes conform to the features of contract establishment in the *Contract Law*. Therefore, when the parties claim to the court or the arbitration institution for determining that the bid or bidding result is invalid in accordance with the dispute settlement manner set out in the contract, the court or the arbitration institution shall have the right to determine its validity according to its functions and the arbitration agreement of the parties, that is to judge the validity of civil acts in the bidding and bid process, instead of making a ruling according the administrative power endowed by law.

3. Whether the construction project contract is valid without acquiring the land use permit for construction purpose or the planning permit for the construction project or other administrative approval procedures.

According to the *Opinions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes over Civil and Commercial Contracts under Current Situations*, the people's court shall determine that the contract is invalid if it violates compulsory provisions concerning validity, and shall determine its validity according to specific situations if it violates the administrative regulations.

It is expressly stipulated in the *Interpretation of the Higher People's Court of Beijing* that this kind of contract shall be determined as invalid; however, if the employer has acquired the corresponding approval procedures or been permitted to carry out construction by the competent department before completion of the court debate in the trial of first instance, the contract shall be deemed as valid. As the scope of application of the judicial normative documents of Beijing is limited, this issue has been under dispute nationwide.

4. The constitution of change of circumstances in the construction field

According to the *Opinions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes over Civil and Commercial Contracts under Current Situations*, in grasping the value orientation of adjustment under changed circumstances, the people's court shall still abide by the principle of favoring the observing party. The principle of change of circumstances does not mean to simply exempt the debtor from liability, and thus making the creditor bear the unfavorable consequence; it means attention shall be fully paid to keep the balance of interests by adjusting the interests of both parties on a fair and reasonable basis. During the litigation, the people's court shall provide active guidance for the parties to re-negotiate and modify the contract; if negotiation fails, they may resort to arbitration.

With respect to construction project contracts, the application of the principle of change of circumstances shall be based on such considerations as the influence of the rise in the price of building materials upon the composition of the general construction contract, including the price increase range and total price increment of such materials, the influence of the price increase upon the general contract and the resulting changes and whether such price increase constitutes commercial risks or makes it impossible to achieve the purpose of the contract. However, with respect to material procurement contracts, as the commercial risk factor is singular, and it is relatively simple to judge whether the purpose of the procurement contract is achieved, it is likely to determine whether the change of circumstances is constituted directly based on the huge price fluctuations that led to sharp increase in the unit price of building materials. With respect to the same project and factors causing the increase in the price of the same material, factors which are considered in the construction contract and the material procurement contract are different.

5. Validity of expanded labor sub-contracts

Expanded labor sub-contracting has been widely applied in our country; however, some issues concerning the validity of such sub-contracts have not yet been regulated by law. The expanded labor sub-contract, as its name suggests means a lot of contents are added to the original pure labor contract, generally including turnover frames, some supplementary materials and construction equipment. While it is provided by some administrative organs that the turnover frames and construction equipment shall not be provided under sub-contracts, otherwise, it is very likely to constitute illegal labor sub-contracting, or even invalidity of such labor sub-contract.

It is generally believed that legally expanded labor sub-contracting just means the work scope of such contract is expanded on a legal and reasonable basis, and shall not break through the limit of legal labor sub-contracting, for example, some small-scale construction equipment and supplementary materials may be provided under such contract, however, large construction equipment and principle materials shall not be provided, and the percentage of the labor expense shall not be less than 50% of the total contract price. Of course if the law or administrative regulations has expressly stipulated the percentage of large construction equipment and supplementary materials in total price, such law or administrative regulations shall play a guiding role in determining the validity of a labor sub-contract.

Appendix II: Major engineering laws and regulations in China

I. Laws

1. Bidding and Bid Law
2. Government Procurement Law
3. Contract Law
4. Construction Law

II. Administrative regulations

1. Regulations on the Implementation of Bidding and Bid
2. Regulations on the Administration of the Quality of Construction Projects
3. Regulations on the Administration of Survey and Design of Construction Projects
4. Administrative Regulations on the Work Safety of Construction Projects

III. Departmental rules

1. Provisions on the Scope and Scale of Bidding of Construction Projects

2. Measures for Electric Bidding and Bid
3. Interim Measures for the Administration of Bid Evaluation Experts and Experts Database
4. Measures for the Administration of the Qualification of Bidding Agency of Central Government-Invested Projects
5. Standard Prequalification Document for the Bidding of Construction Projects and Trial Regulations on Standard Bidding Documents for Construction Projects
6. Regulations on the Administration of the Qualification of Construction Enterprises
7. Measures for the Administration of Design, Bidding and Bid of Construction Projects
8. Regulations on the Scope and Scale of Supervision of Construction Projects (Former Ministry of Construction, Decree No. 86, 2000)

Appendix III: Main approaches and institutions for solving construction and engineering disputes in China

With respect to the settlement of construction disputes, there are four approaches frequently mentioned in standard texts and model contracts lately issued by the state.

I. Dispute review mechanism

The advantages of the dispute review mechanism lie in such aspects as dispute control throughout the process, expert review mechanism, and flexible review manner. Beijing Arbitration Commission is the biggest and most influential arbitration commission for settling disputes in the construction field. In March 2009, it first introduced *Rules of Beijing Arbitration Commission for the Review of Construction Disputes* in China, as part of its initiatives to promote the review mechanism and has achieved favorable results. At present, it has 77 review experts who have strong industrial influence, sophisticated professional skills and integrity.

Later in May, 2010, China International Economic and Trade Arbitration Commission introduced *Rules for the Review of Construction Dispute (for Trial Implementation)* and Exemplary Dispute Settlement Provisions, among others, to promote the adoption of the review mechanism in construction and engineering dispute settlement.

In terms of academic research, the Law School of Xiangtan University, the University of Massachusetts and Massachusetts Justice Association of America jointly held a Sino-America ADR International Training Course in October 2011. This course will boost China's ADR theoretical research and working practices, and will be conducive to the establishment of a professional team participated by government, judicial organs and social forces.

II. Mediation

At present, the mediation of construction and engineering disputes in China is mainly conducted by the following institutions.

1. Mediation Center of Beijing Arbitration Commission

The Mediation Center of Beijing Arbitration Commission, established in August, 2011 by Beijing Arbitration Commission is a non-profit organization committed to the provision of high-level mediation service for commercial disputes. It encourages people to solve commercial disputes through mediation so as to promote the industrial autonomy and social harmony. It has 129 mediators at present. Disputes over contracts or involving property rights between natural persons, legal persons and other organizations may be submitted to the mediation center for mediation.

If both parties agree to resort to the mediation center of Beijing Arbitration Commission for dispute settlement, when entering into the contract, relevant clause may be stated as: “Any or all disputes arising from or relating to the contract shall be submitted to the Mediation Center of Beijing Arbitration Commission for mediation in accordance with its mediation rules. If either party is unwilling to resort to mediation or mediation is proved unsuccessful, the dispute may be submitted to Beijing Arbitration Committee for arbitration in accordance with its arbitration rules in force.”

2. Mediation Center of China Chamber of International Commerce (former name: Beijing Mediation Center)

The Mediation Center of China Chamber of International Commerce is a mediation institution jointly established by China Council for the Promotion of International Trade and International Chamber of Commerce. It mainly deals with disputes in real estate industry, including (I) international or foreign-related disputes; (II) disputes involving Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan; and (III) domestic disputes.

3. Mediation Center of China Architecture Industry Association

One of the major tasks of China Chamber of International Commerce in 2012 is to win the support of the department in charge of the industry in establishing a nation-wide construction and engineering dispute mediation center. It has established “mediation center”, “expert recommendation” and other sectors on its website, aiming at bringing full play of its role as the first defense line in solving disputes arising from construction contracts and better supporting the healthy development of construction enterprises.

III. Arbitration

At present, arbitration in China is restricted to institutional arbitration only. The relatively mature arbitration institutions in the construction field currently include Beijing Arbitration Commission, China International Economic and Trade Arbitration Commission, Shanghai Arbitration Commission and Wuhan Arbitration Commission, etc.

IV. Litigation

Disputes arising from construction projects often involve subject matter of high value and exert big social influence, therefore in most cases courts that have jurisdiction over such cases are those at relatively high level. However, in recent years, the monetary limit of cases tried by basic people's courts have been raised, therefore disputes over construction projects are often tried at basic people's courts too.

Annual Review on Financial Dispute Resolution

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Abstract: This report summarizes the research and practical developments in financial dispute resolution in China in 2012, including financial litigation, arbitration, mediation, and the consumer financial complaint resolution mechanism. Through analyzing the current system and relevant cases and introducing the research on domestic and foreign theory and practice by Chinese scholars, this report reveals the major substantive questions and solutions in financial dispute resolution in China in 2012. This report also reviewed suggestions for improving the diversified financial dispute resolution system.

Key words: Financial dispute, litigation, arbitration, mediation, financial consumers

Along with the development of Chinese financial markets, and due to the financial crisis, the number of financial disputes^① in China is increasing in recent years. In order to match the growing demands on financial dispute resolution, we need to keep expanding and improving the current financial dispute resolution system. Xiaoming Song, the President of the Second Civil Tribunal of the Supreme People's Court of China, believes that there are three important features of financial disputes nowadays: (1) diversification of case types; (2) complexity of legal relationships; and (3) diversification of stakeholders.^② In addition, financial dispute resolution is also a highly specialized area and there is a lack of applicable law. Especially for disputes on complicated,

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① Huang Xiaoyun, "Give full play to the function of trial, comprehensive support of financial trial reform: president Song Xiaoming of the second people's court of Supreme People's Court talking about the financial dispute cases", *China Trial Monthly News*, June 2012, pp.13-14.

innovative financial products, the expertise of the dispute arbiter is crucial because there may be no applicable laws or regulations. It is a challenge for the financial dispute resolution system in China to effectively resolve complex financial disputes and protect the legal rights of the parties.

Through years of system building, the current dispute resolution system in China is “mediation–arbitration–litigation”, which is also applicable to financial dispute resolution. However, it is still a challenge to provide an effective dispute resolution system for new types of financial disputes. We need to not only improve the current dispute resolution system, but also creatively find new methods for dispute resolution. Innovation on dispute resolution is a fundamental necessity for the development of innovative financial products markets.^① In 2012, to resolve the frequent occurrence of financial disputes,^② practitioners and academics strived to innovatively improve the current financial dispute resolution system. This report analyzes and summarizes the theoretical and practical development in financial dispute resolution in 2012, especially the development of litigation, arbitration, and mediation. This report also introduces the scholars’ suggestions on establishing a consumer financial dispute system, especially a consumer financial dispute complaint system, in order to resolve consumer financial disputes.

I. The current status of the financial dispute litigation system and its improvement

Litigation is a common method to resolve disputes between parties, as well as the last shield to protect the legal right of the parties, financial disputes are no different. The court’s attitude toward financial disputes litigation, which was once negative, even rejecting the cases, became positive and there has been an effort to improve the whole system. In 2012, in order to resolve financial disputes, the PRC court system made efforts to set up new institutions and build the system.

A. The development of the financial dispute litigation system

In order to address financial disputes through litigation, China has been gradually improving and developing the financial dispute litigation system through various laws, regulations, and judicial interpretations, making substantial progress in 2012.

On February 10, 2012, the Supreme People’s Court promulgated *Guidance to the People’s Court on How to Provide Judicial Support to Avoid and Resolve Financial Risk and Promote*

① Ding Huamei, “Development of innovative financial products market and innovation of dispute settlement mechanism,” *Property Rights Guide*, January 2012, p. 66.

② There is no statistical data for the amount of financial disputes. However, based on unpublished data, the disputes involving all major banks in China, particularly Bank of China reached a peak in 2008. It started to decline in 2010, however, the number of 2012 is slightly higher than that of 2011.

the Finance Reformation and Development, which requires People's Courts to conduct more investigation, provide more advice, extend judicial activity, establish a specialized trial system, expand resources on financial dispute resolution and improve financial trials.

This judicial interpretation reaffirmed the experimental efforts and successes of creating special trial systems for financial cases carried out by some local people's courts in recent years. In November 2008, the People's Court of Pudong New Area, Shanghai set up a financial tribunal, "the 6th Civil Tribunal of the People's Court of Pudong New Area". The subject matter jurisdiction of the tribunal includes cases related to securities, banking, funds, trusts, etc. On December 30, 2008, the People's Court of Huangpu District, Shanghai, also established a financial tribunal (the formal name is "the 5th Civil Tribunal of the People's Court of Huangpu District"). By the end of June, 2009, the Intermediate People's Court and the High People's Court of Shanghai both announced the establishment of financial tribunals, which means the formation of a three-level financial trial system within the courts in Shanghai.^① Compared with Shanghai, where the courts set up financial tribunals which could only hear civil cases, Chongqing took a further step in reformation. On July 1, 2010, the People's Court of Yuzhong District set up the first financial tribunal in Western China, which can hear civil, administrative and criminal cases.^② On March 1, 2011, the first financial tribunal in Henan Province was set up in Zhengzhou Intermediate People's Court, in 2012, all 18 intermediate people's courts and 56 county courts in Henan established financial tribunals. Henan is the first province in China establishing a specialized financial trial and enforcement system to cover the whole province.^③ Furthermore, some people's courts in Beijing, Shenyang, Shandong and Guizhou have also established financial tribunals for resolving financial disputes in order to ensure specialization and effectiveness of the trial process.

As of today, financial tribunals are a popular idea among Chinese courts. With the implementation of the *Guidance to the People's Courts on How to Provide Judicial Support to Avoid and Resolve Financial Risk and Promote the Finance Reformation and Development*, more and more courts will establish financial tribunals. The establishment of specialized tribunals not only provides a more professional and effective way to resolve financial disputes, but also enriches the form of financial dispute resolution in China.

Moreover, China revised its *Civil Procedure Law*, passed on August 31, 2012. Article 55 of the revised *Civil Procedure Law* provides that: "relevant organs and organizations prescribed by law may initiate lawsuits at competent courts against conduct jeopardizing the public interests, such as causing environment pollution or damaging the interests of a large number of consumers." This

① See http://www.court.gov.cn/xwzx/fyxw/dfyxw_1/gdfyxw/sh/201006/t20100630_6670.htm. Last visited on January 21, 2013.

② See *People's Court Daily*, July 6, 2012.

③ Huang Xiaoyun, "Strengthen rule of law in financial industry, guarantee of economic development", *China Trial Monthly News*, June 5, 2012, p. 20.

is the first time that Chinese law has recognized public interest litigation. Although the system on public interest litigation is still immature, lacks relevant practice experience, the article still provides a cornerstone for public interest litigation for financial dispute resolution. Financial disputes, especially mass securities false representation, often involves lots of people and has a great negative social impact, and public interest litigation by relevant investor's rights protection organizations will be conducive to the prompt and effective resolution of such cases. In May 2012, the leader of the Chinese Securities Regulation Commission (CSRC) also stated that the CSRC will urge the legislators to revise the *Securities Law* in order to establish a public interest litigation system for civil cases on securities and futures.^①

B. Common Issues in financial dispute litigation and relevant cases

As mentioned above, the relevant law is lagging behind for financial dispute cases. Therefore, financial dispute cases are often resolved even though the law is lacking or ambiguous. Take banking disputes as an example, in practice, disputes may occur in the following situations because the laws and regulations are incomplete: pledge of security deposit, pledge of receivables, pledge of financial products, pledge of insurance interests, and the independence and duration of domestic letters of guarantees. According to the decisions published by a Chinese court in 2012, the following cases are typical financial dispute cases.

The Haikou Intermediate People's Court heard a case on the pledge of security deposits for a mortgage loan.^② In the case, the Yangpu Branch of Industrial and Commercial Bank of China (ICBC) ("Yangpu Branch") and Yongsheng Company signed a cooperation agreement on August 31, 2007 regarding mortgage loans for the development and sale of Jinshan Square and Huanhai Commercial and Residential Building. The parties agreed as follows: (1) Yongsheng Company agreed to be the joint guarantor for borrowers (purchasers) to repay the principal and interest; (2) Yongsheng Company agreed to pledge its account as a security deposit account to Yangpu Branch, which has a priority claim on the account; and (3) Yongsheng Company promised that it will transfer the security deposits in the account to Yangpu Branch on the signature date of the agreement. After the parties signed the agreement, Yongsheng Company pledged the security deposit account to Yangpu Branch.

On March 7, 2011, the trial court, according to the request of Yanbin Zhang, the applicant for enforcement, issued an enforcement order (2011 Longzhizi No. 133), ordering the freezing and transferring of RMB 43,468 deposited by Yongsheng Company in ICBC's Haikou World Trade

① See http://www.legaldaily.com.cn/index_article/content/2012-05/09/content_3557749.htm?node=5955. Last visited in February 2013.

② See Haizhongfaminerzhongzi No. 66. Available at http://www.hicourt.gov.cn/juanzong/detail_new_ws.asp?N_LSBH=16939&N_DWDM=2901&C_AH=%A3%A82012%A3%A9%BA%A3%D6%D0%B7%A8%C3%F1%B6%FE%D6%D5%D7%D6%B5%DA66%BA%C5&C_SJDCSJ=2012-6-6&C_BMMC=%C3%F1%B6%FE%CD%A5. Last visited in February 2013.

Center Sub-branch. The Yangpu Branch raised an objection on the enforcement order. On May 30, 2011, the trial court entered into another enforcement order (2011 Longzhiyizi No. 33), rejecting the objection of Yangpu Branch. On July 14, 2011, Yangpu Branch filed a lawsuit, requiring the court to (1) stop enforcing the enforcement order (2011 Longzhizi No. 133) and (2) reaffirm the validity of the Cooperation Agreement dated on August 31, 2007 so that Yangpu Branch has a priority claim on the RMB 43,648 transferred from the security deposit account.

The Haikou Intermediate People's Court issued an appellate judgment on the case on May 16, 2012. Although the Yangpu Branch had deposited all the security deposit paid by Yongsheng Company guaranteeing the repayment of loans to the security deposit account, and the account is used and administered only for this special purpose with no outflow from the account, the Haikou Intermediate People's Court still ruled that the security deposit is not specified, and that there is no priority claim on the security deposit because the money in the security deposit account is unspecified, and sometimes there is even no money in the account.

The case of "Wu v. Bank A regarding a financial asset management contract dispute",^① ruled by Shanghai 1st Intermediate People's Court in 2012, is a typical case regarding the liability of banks selling fund products. On June 17, 2011, Wu came to Bank A to deposit some money. Shen, an investment consultant at Bank A, recommended an asset management product to Wu. After Wu agreed to purchase the asset management product, Shen used the computer of Bank A to purchase China Merchants Bank (CMB) Shenzheng TMT50ETF Feed funds of RMB 90,000 on behalf of Wu. Wu also input the password of his CMB debit card to help Shen finish the transaction. During the process, Bank A and Wu did not sign any written documents, nor did Bank A disclose the risk related to the financial product. In October 2011, a dispute occurred when Wu realized that there was a loss on the financial product and he went to Bank A to withdraw money invested in the product. On July 26, 2012, after failed mediation, Wu sold all his investment in the financial product and lost RMB 24,324.07.

The trial court determined that when Bank A, through its investment consultant, promoted asset management products to its client, it should understand the risk preference, risk cognition, and assumption capability of the client, evaluate the investment condition of the client and provide appropriate financial products for clients to choose. In addition, the bank also needs to explain the market and the operation of the product as well as the related risks. Because Bank A failed to perform such obligations, it should be 70% liable for Wu's loss. Wu, as an adult with complete civil capacity, should also be responsible to understand and pay attention to the financial product he purchased. Therefore, Wu is 30% liable for his loss.

After the trial court made the decision, both Wu and Bank A filed an appeal. The Shanghai 1st Intermediate Court ruled that the major rule to determine if asset management exists is that if

^① <http://www.hshfy.sh.cn:8081/flws/text.jsp?pa=ad3N4aD0xJnRhaD2jqDIwMTKjqbum0rvW0MPxwfkoycwp1tXX1rXaMTY0usUmd3o9z>. Last visited in February 2013.

the trustee manages the assets of the trustor, in other words, if the trustor authorizes the trustee to decide the selection and the method of financial products like securities or funds. The CMB Shengzhen TMT50ETF Feeder Funds can be purchased either in the bank or through the internet by the trustor. Bank A did not have the right to decide whether or not to purchase the product. Therefore, there was no infringement on Wu's property rights. In this case, Wu, as an adult with complete civil capacity, should fully understand his civil action. Therefore, Wu had fault for the damages. The Shanghai 1st Intermediate Court revoked the trial court judgment and decided that Wu is 70% responsible for the damages and Bank A is 30% responsible for the damages.

The issue in this case is the liability of the parties during the sale of financial products, which is a common question for financial consumers when purchasing financial products. After the parties failed in the mediation, the courts resolved the dispute through trial and appellate procedure, which also showed the authority of judicial power in resolving disputes.

C. Suggestions on improving the financial dispute litigation system

Zhu Daqi and Wei Langping, based on the judicial supervision of finance, from the prospective of feasibility, necessity, and practicality, discussed the role of courts in the financial legal system. They believed that judicial involvement in the financial administration system will help maintain smooth operation of the financial system, protect the rights of the parties, and promote fair competition within the financial industry. For the issue of specialized financial tribunals, they believed that China had established the basic institutional structures for judicial supervision of finance: trained judicial staffs that were capable of understanding financial cases, and had gained experience on judicial supervision of finance. However, there are still problems like the incomplete state of the judicial institutes, the inflexible application of law, and the abuse of discretion by judges. Therefore, the two authors suggested that China should continue to reform the financial judicial system, regulate judicial involvement, and ensure financial reformation is in accordance with the law, in order to achieve a positive interaction to “improve the financial legal system along with the development of finance, and ensure financial security through the financial legal system”^①.

Huang Tao analyzed the theory and practice of specialized judicial institutions for financial cases. After reviewing the establishment of specialized institutions in China and foreign countries in recent years, he conclude that the establishment of financial tribunals or financial courts will enhance specialization during the trial of financial cases, and help to reach a fair judgment in an efficient way. Moreover, it will overcome local protectionism, which affects sometime the fairness of the trial. Furthermore, the author demonstrated possible problems from the prospective of specialization or independence if a financial tribunal or financial courts are established in China.

① Zhu Daqi, Wei Lang Ping, “The overall thinking on financial judicial supervision: from the perspective of promoting financial rule of Law”, *Gansu Social Science*, September 2012, pp. 103-106.

Meanwhile, the author suggested China may refer to the expert witness system in the adversarial judicial systems to improve the professionalism of courts when hearing financial disputes.^①

Luo Bin observed that many financial disputes are group disputes, especially in the field of securities law, like the “Daqinglianyi case”, the “Yinguangsha case” and the “Oriental Electronic case”^②, which were very influential in public opinion. After comparing group litigation, class action, and test cases, and considering the situation in China, Luo provided a solution for group disputes: going back to current Chinese laws to take advantage of present representative action institution. Wu Zeyong believed that we should encourage comprehensive research on each kind of group disputes in China. For financial disputes, we should conduct an empirical study on financial disputes and analyze the normative questions involved through legal construction, and provide a cautious future solution from a legal policy prospective.^③

II. The Current Status of Financial Dispute Arbitration and Its Improvement

Arbitration is the most important alternative dispute resolution method in modern society. Arbitration awards, once made, are final and not appealable. Arbitration is favored by the participants of modern market economics because it is independent and widely recognized across the world. The fast turnover of capital in the market requires a fast and convenient arbitration mechanism to resolve disputes among market participants. Although the arbitration system in China has only been established for a short period of time, China has already established a comprehensive arbitration system and satisfied the demand of the market gradually. In practice, many financial disputes are resolved by arbitration. However, the financial arbitration system in China still needs further development due to the greater complexity of financial disputes. Practical experiences and academic research both provide useful inputs on the improvement of the system.

A. The Development of Financial Dispute Arbitration System in China

1. The Establishment of Financial Arbitration Institutions

Through years of development, some major arbitration commissions in China have established

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- ① Huang Tao, “Theoretical analysis of professional financial trial organization”, *Shanghai finance*, January 2012, pp. 88-91.
 - ② Luo Bin, “Theoretical analysis of China securities group litigation practice: comparison among ‘Daqing Lianyi case’, ‘Yinguangxia case’, ‘Oriental electronic case’”, *Law Journal*, May 2010.
 - ③ Wu Zeyong, “The construction of China’s collective litigation procedure: review and prospect”, *Contemporary Law*, May 2012, pp. 115-116.

special financial arbitration institutions, issued special financial arbitration rules and formed a relatively complete financial dispute arbitration system for financial disputes. China International Economic and Trade Arbitration Commission (CIETAC) is one of the major permanent commercial arbitration institutions in the world. In 2008, CIETAC launched the CIETAC Tianjin International Economic and Financial Arbitration Center (“CIETAC–Tianjin”), and issued the CIETAC Financial Disputes Arbitration Rules. CIETAC–Tianjin is specialized in financial disputes. The Guangzhou Arbitration Commission established a financial arbitration court and issued the Financial Disputes Arbitration Rules of the Guangzhou Arbitration Commission. The Shanghai Arbitration Commission established the Shanghai Court of Financial Arbitration. The Wuhan Arbitration Commission established a financial arbitration court in its permanent establishments. Meanwhile, it also set up an insurance dispute arbitration center among its special dispute arbitration centers. Both institutions focus on financial dispute resolution.

In 2012, the Wenzhou Court of Financial Arbitration opened in July, as a solution to the increasing number of disputes on private loans in Wenzhou. On September 14, the Chengdu Court of Financial Arbitration was established, which listed 147 highly qualified arbitrators. On October 19, the insurance arbitration office of Xi’an Arbitration Commission was established within the Shanxi Insurance Association. The office was established jointly by the Xi’an Arbitration Commission and the Shanxi Insurance Association, whose aim is to protect the legal rights of insurance consumers in Shanxi, promote rational consumption attitudes and resolve insurance disputes by non-litigation means. In November, the Huizhou Arbitration Commission established its financial arbitration court. On November 20, the Securities Arbitration Center of Dalian Arbitration Commission opened in the Dalian Securities Association.

2. The Number and Type of Financial Dispute Arbitration Cases

The number of cases accepted by major arbitration institutions in China in 2012 is basically stable with a mild increase. For example, the Beijing Arbitration Commission (BAC), a leading arbitration institution in China, played an important role in financial dispute settlements even if it has not established a special financial arbitration court. Financial dispute resolution is an important practice area of the Commission. In 2012, the Commission received 1473 cases with a total disputed amount of RMB 6.3 billion, including 128 cases on investment and financial contracts, which amounts 8.69% of all the cases and ranks 5th among causes of action.^① In addition, in 2012 the BAC received 56 cases on loan contracts and 15 cases on guarantee contracts. Therefore, the total number of financial dispute cases received by BAC in 2012 reached 199. From the information released by the BAC, from 1995 to 2012, the number of financial disputes cases increased continuously. From 2004 to 2007, due to the impact of government policy and economic

^① See *Annual Report of Beijing Arbitration Commission*, available at: <http://www.bjac.org.cn/introduce/2012zj.html>. Last visited in February 2013.

conditions, the Commission received lots of cases in mortgage loans and car loans. In 2006, the Commission received 1047 cases related to financial disputes. After excluding the abnormal data, from its establishment, the number of financial disputes, especially investment contract disputes accepted by the Commission has been increasing steadily. In 2012, the number is 199, which is nearly the same as the number of 2011, 195.

As to the type of the cases, taking the BAC as an example, the cases received by the BAC can be classified as one of the following three types: investment financial contract, loan contract, and guarantee contract. According to the data of the BAC, loan contract disputes are the most common type of case from 2004 to 2008. Since 2009, the number of investment financial cases has been increasing and become the biggest source of financial disputes. In 2012, the BAC received 128 cases on investment financial contracts, 56 cases on loan contracts, and 15 cases on guarantee contracts. For the disputed amount of the case, the types of cases with the highest disputed amount are: loan contract cases (11.2%), insurance contract cases (4.6%) and repayment agreement cases (3.3%).

3. The Features and Advantages of a Financial Dispute Arbitration Mechanism

To take the securities disputes accepted by the BAC as an example, after analyzing the practice experience, we can find that financial arbitration has the following features: (1) Confidentiality, the principle of confidentiality ensures that the filing, hearing and deciding of the cases are all confidential, which protects the information of the parties of the dispute and the stability of stock prices and assets. (2) Professionalism, the parties can choose arbitrators who are experts in the industry and familiar with the industry practices and the latest industry developments. Their judgment on the facts of the case will be more professional. (3) Flexibility, arbitration gives the parties more choice on procedure and the arbitration panel has more discretion in applying relevant laws. (4) Efficiency, the procedure and finality of arbitration awards guarantees that the parties can realize their rights in a timely manner. (5) Internationality, the percentage of international disputes among the securities disputes accepted by the BAC is higher than the percentage of international disputes among all cases accepted by the BAC. The BAC received 323 international cases, which is 2.3% of all cases accepted. For securities cases, the percentage is 6.7%.

B. Common Issues in Financial Dispute Arbitration and Relevant Cases

As mentioned above, according to the data of the cases received by arbitration institutions, the most common types of financial disputes include investment financial contracts, loan contracts, guarantee contracts and insurance contracts, etc. We will now discuss common issues and procedures on financial dispute arbitration using the information provided by the BAC.

1. Investment Financial Contracts Disputes

On April 20, 2011, Yang signed a contract with an investment company to entrust the investment company to invest on Yang's behalf. The parties agreed that the loss on the investment cannot exceed 10% within the duration of the contract. If the loss on the investment exceeds 10% of the contract amount, the investment company shall refund the account within three business days. The duration of the contract was one year. After signing the contract, Yang paid RMB 200,000 in service fees to the investment company and transferred RMB 350,000 to his margin account. In addition, the parties also signed supplemental agreements on further investment, return amount and time. Later, because the investment did not repay the invested money in full, Yang filed for arbitration claiming repayment of the invested money, damages for breaching the contract and attorney's fees. The investment company, in its reply, claimed that the supplemental agreement on repayment of the money had expired, that Yang's return was too high under the supplement agreement and that the investment company did not have the qualifications to provide investment consulting services under law. Therefore, the agreement in this case should be void.

After reviewing the evidence and opinions of the parties, the arbitration panel, consisting of financial experts, considering industry practice and the requirements of the market and without violating the law, rejected the objections raised by the investment company. To encourage transactions, the arbitration panel ruled that the contract and its supplement are true, valid and binding on the parties. It supported Yang's claim for the company to repay the invested money. Furthermore, because the contracts did not address damages for breach, Yang's request for damages was not supported. In this case, the panel confirmed the validity of the contract, and respected the true intent of the parties while respecting the requirements of law. It only took 35 days from the constitution of the arbitral tribunal to the issuing of the final award, and 51 days from filing the arbitration application to the issuing of the final award, which demonstrated the professionalism and effectiveness of arbitration.

2. Loan Contracts Dispute

a. Real Estate Trust Loan Contract Dispute

A Trust Company signed a loan contract with a Real Estate Company, which stated that the Trust Company would lend RMB 300 million to the Real Estate Company in order to build a landmark building in the city. The Real Estate Company pledged the building under construction as collateral under the contract. At the same time, the trust company signed an Equity Pledge Agreement with the shareholder of the Real Estate Company, under which Zhang, the shareholder of the Real Estate Company, pledged his equity in the Real Estate Company to the Trust Company.

The Trust Company also signed a Guarantee Contract with the builder of the building, which stated that the builder should be jointly liable for the debt of the Real Estate Company. The duration of the loan was 24 months and the Real Estate Company should pay principal and interests in accordance with the contract.

After the parties signed the contract, the Real Estate Company failed to register the pledge on the building under construction, and made a suspicious asset transfer. The Trust Company filed for arbitration to confirm an early termination of the Loan Agreement and require the Real Estate Company to repay all the outstanding loans, as well as interests, compounding interests, and punitive interests for principals overdue, the expected interests for the principals under the Loan Agreement and the compounding interests and punitive interests and damages for breaching the contract. Real Estate Company contested that the interest rate and the punitive interest rate in the Loan Agreement were excessively high, the request of damages was duplicate, and the claim for compounding interests and punitive interests lacked factual and legal grounds. The Real Estate Company requested the arbitral tribunal, *according to the judicial interpretations of the Contract Law*, to reduce the interests, punitive damages, compounding interests and the damages for breaching the contract by the amount which exceeded the actual damages of the Trust Company. For the expected interests and its compounding interests, Real Estate Company believed that it should not be calculated when the Loan Agreement was terminated early.

After reviewing the parties evidences and agreements, pursuant to Article 207 of the PRC Contract Law, “*When the borrower failed to repay the loan in accordance with the agreement, the borrower should pay overdue interest according to the agreement or relevant laws.*”, the arbitral tribunal analyzed the characteristics of interests, compounding interests, and punitive interests, and determined that such payments shared the same characteristics with overdue interests under the Contract Law, which is a form of liability for the borrower who failed to repay the loan in accordance with the contract and breached the contract. In addition, according to *the Notice on Adjusting the Depositing and Lending Interest Rate of Financial Institutions by People’s Bank of China*, the People’s Bank of China will no longer set a ceiling on the interest rate of loans by financial institutions (except for urban and rural credit unions). The arbitral tribunal believed that as a non-bank financial institution, the Trust Company could set up an interest rate by negotiation with the borrowers. Generally speaking, it is harder to obtain a loan from the bank so the law and policy permit other lenders to set up interest rates by negotiation. Therefore, the arbitral tribunal decided that the interest rate in the Loan Agreement is legal and valid. Finally, as to whether the compounding interest and punitive interest were too high, the arbitral tribunal found that they were part of the liabilities for breaching the contract. Although the Real Estate Company thought they were higher than the actual loss of the Trust Company and requested a reduction, the arbitral tribunal believed that because the Trust Company was a non-bank financial institution, its cost of finance and default risk was higher than a commercial bank. Therefore, without evidence showing that the liabilities under the Loan Agreement are obviously higher than the actual damages of the

Trust Company, the arbitral tribunal would reaffirm the computation of compounding interests and punitive interests. The arbitration panel finally supported all the claims of the Trust Company.

This case showed the advantages of financial dispute arbitration. The professionalism of the arbitral tribunal ensured that it would not apply the law mechanically. Fully respecting the facts of the case, the arbitration award also considered the industry practice of trust industry and maximally reduced the default risk of trust companies. Meanwhile, it was only five months from the filing to the decision of the case. Due to the finality of the award, the Trust Company initiated the enforcement procedure from the award date. The dispute will be settled before the payment date of the trust product. Comparing to litigation in the courts, where the appellate decision is final, financial arbitration proved much more efficient.

b. Bank Loan Contract Dispute

Between 2009 and 2010, the Claimant (Beijing branch of a foreign bank) signed 15 contracts and supplement contracts with three Respondents (state-owned companies). The 15 contracts include a loan agreement and three supplement agreements, an equipment mortgage agreement and its supplement agreement, a guarantee contract and its supplement contract, a equity pledge agreement and supplements. Later, because Respondent A failed to repay the loan to the Claimant on time, the Claimant filed for arbitration, requesting (1) Respondent A repay the principal, interests, and punitive interests under the loan agreement, and pay the attorney fees for the Claimant; (2) enforcement on the Claimant's right on the pledged property of all Respondents, and a priority claim on the proceedings; and (3) Respondent B assume joint liability for Respondent A's debt. After reviewing, the arbitral tribunal supported the Claimant's claim. Although Respondent A had trouble in operation and was in short of funds, the award confirmed the Claimant's mortgage right and pledge right, and the joint liability of Respondent B. The right of the Claimant was protected.

This case involved four parties, 15 contracts and supplements and various legal relationships like loans, mortgages, pledges, and guarantees, with a huge disputed amount and complex legal relationships. By solving all the disputes in one case through arbitration, the time and money of the parties was greatly saved and the rights of the parties were maximally protected while realizing the Claimant's right. The Claimant applied to the arbitration for a preservation of the property, and the arbitral tribunal sent the notice for response with the longest period permitted by the arbitration rules, which provided abundant time for the preservation. The arbitral tribunal fully considered the agreement of the parties and industry practice, and confirmed the interest rate in the Loan Agreement, which was 150% of the benchmark interest rate for similar loans published by the People's Bank of China and the calculation method for the punitive interests. The award supported the Claimant's claim for attorney fees in full amount, greatly reducing the cost for the Claimant to realize its right. The disputed amount of this case was RMB 222, 619, 596.3, and the arbitration

fee was RMB 978, 028.39. The cost for arbitration was less than comparable litigation cost would have been in the trial court, which was RMB 1, 154, 897.98, not to mention the cost for appellate court.

3. Guaranty Contract Dispute

Pawn Company signed a Personal Property Pledge Contract with Mr. Wang, which stated that Wang would borrow RMB 6.5 million from Pawn Company to purchase antiques. The collateral was three piece set of jade antique and the loan would be due in one month, on May 17, 2008. Wang should repay the principal and interests on time, otherwise, he had to pay a punitive interest of 0.5% per day. After signing the contract, Wang delivered the collateral to Pawn Company and Pawn Company issued three pawn tickets to Wang, as well as RMB 6,250,000 (RMB 6.5 million minus RMB 250,000 of total expenses). Wang failed to repay the principal and interest on time, and the parties revised the pawn tickets after negotiation, extending the due date to November 17, 2008 and the interest rate and the comprehensive expense remained the same. After Wang failed to repay the loan on the new due date, Pawn Company filed for arbitration, requesting Wang to repay the principal, interests and total expenses. Wang replied that (1) because the due date on the pawn tickets was November 17, 2008, the two-year statute of limitations had passed when the Pawn Company filed for arbitration in December, 2010; (2) the Contract provided that Pawn Company may auction the collateral if Wang did not repay the loan, therefore, it has no claim to Wang on the expenses; and (3) even if Wang should repay the loan and pay the expenses, the total expenses are only payable up to November 17, 2008, rather than December 17, 2010.

After reviewing the evidence and arguments of the parties, the arbitration panel found: (1) the actual payment to Wang by Pawn Company was RMB 6,250,000, where the total expenses for the first month has already been deducted in advance; (2) the pawn tickets reflected the true intent of the parties and confirmed the loan amount and the amount actually paid, which was agreed by Wang at the time; and (3) Chinese laws and regulations did not prohibit the withholding of total expenses. Therefore, the arbitration will defer to the intent of the parties and find that the amount of the loan was RMB 6.5 million. Pawn Company fulfilled its obligation under the agreement by providing all the loans to Wang. After November 17, 2008, Wang failed to extend the pawn tickets or repurchase the collaterals, which constituted a breach of the contract for which Wang should be liable. Pawn Company was a lender as well as a pledgee under the contract and therefore had rights on both the loans and the collateral. The clause on the disposal of the collateral only regulated when and how Pawn Company could realize its right as a pledgee and did not affect the loan relationship between the parties. Therefore, the arbitral tribunal could not reach the conclusion that Pawn Company no longer had a claim for the loan. In addition, according to Article 43 of *Measures for the Administration of Pawning* issued by the Ministry of Commerce and the Ministry of Public Security, the pawn company still has a claim to the pledger if the proceedings

from the auction cannot fully satisfy the debt. The regulation also proved that the pawn company's right on the loan is not terminated because it disposes of the collateral. Finally, the arbitral tribunal rejected Wang's arguments and decided that Wang should repay the principal, interests, and adjusted total expenses.

This case indicated the advantages of financial arbitration. The professionalism of the arbitral tribunal ensured that the decision would survive review in the specialized field. Without violating the law, the arbitral tribunal respected industry practice and made a professional judgment on the facts of the case.

4. Insurance Contract Dispute

a. Outbound Investment (Debt) Insurance Dispute

Claimant, a company in Zhejiang, entered into an Outbound Investment (Debt) Insurance Contract with an insurance company. The Claimant purchased insurance for its loan to a foreign project company abroad. The insurance liability included losses to Claimant caused by failure of the project company to repay the principal and interests due to expropriation by a foreign state. In March 2007, the project company's assets were frozen and attached by the host country government, breaking the capital chain of the project company. Finally, the project company was forced into bankruptcy by the local court because it failed to pay due taxes. The Claimant was not able to realize its right to the project company. The Claimant contested that the method used by the foreign government to deprive the project company of its property right and operations lacked factual and legal grounds and violated due procedure therefore constituting an indirect expropriation, which fell into the insurance liability under the contract and the Respondent should reimburse the losses of the Claimant.

The Claimant filed for arbitration on February 8, 2012 to the BAC. The BAC accepted the case on February 13, 2012, applying its general domestic arbitration procedure. After BAC sent the notice for response and other arbitral documents to the Respondent, it raised the objection to BAC that the case should be handled under international commercial arbitration procedure. The Claimant therefore withdrew the case and filed it again under the BAC arbitration rules for international cases. During the hearing of the case, the Claimant withdrew the case at BAC in the end. Nevertheless, this case is a dispute on outbound investment insurance contract and involved a new area of law, required special knowledge, and had a great disputed amount. Only the arbitrators with abundant experiences and related expertise and the arbitral institutions with international perspective and experiences could handle a case of this type.

b. Financial Leasing Insurance Dispute

The Claimant and a Financial Leasing Company, applied for insurance with an Insurance Company (the “Respondent”). The Respondent issued a Financial Leasing Equipment Policy, naming the Claimant and the Financial Leasing Company as the insured parties and the excavator as the insured subject. The insurance period was three years, and the policy was for “direct economic damages or losses caused by natural hazards or accidents on insured subject listed in the policy schedule”. In July 2010, the excavator rolled over during operation, causing damage. The Claimant filed a claim to the Respondent. After on-site investigation, the Respondent issued a “Rejecting Claim Notice”. The reason was “after the on-site investigation and follow-up investigation, we found that the Special Operation Equipment Personnel Certificate” held by the driver of the excavator was invalid. Therefore, the insurer did not have any liability under the insurance contract”. The Claimant contested that the excavator was not a “Special Operation Equipment” under Chinese laws and regulations and it was unnecessary for the operator of the excavator to obtain the Special Operation Equipment Personnel Certificate. Therefore, the reason for rejecting the claim cannot hold. The Claimant filed for arbitration with BAC. The arbitral tribunal found that the issues in this case were (1) the standing of the Claimant; and (2) if the Respondent should assume insurance liability for the accident.

The main reason for the Respondent to believe the Claimant had no standing in this case was that although the Claimant was one of the insured parties in this case, the first beneficiary under the contract was the Financial Leasing Company. Therefore, the Claimant had no insurable interest in the insured subject when the accident occurred. The arbitration panel found that the insured party’s right to the insurance money was a legal right. Pursuant to Article 12 of the Insurance Law, the insured is the person whose property or body is protected by the insurance contract and has the right to the insurance money. Although the Contract stipulated that the Financial Leasing Company was the first beneficiary, it did not change the legal status of the Claimant as an insured. Therefore, the Claimant had the standing in the arbitration. Moreover, pursuant to Article 12 of the Insurance Law, “[i]nsurable interest is the legitimate interest of policy holder or the insured on the insured subject.” Because the Financial Leasing Agreement stipulated that the Claimant should assume all the risks of the damage or loss of the equipment for any reason to the leased subject, and the accident occurred during the leasing period, the Claimant had insurable interest on the leased subject. Therefore, the Respondent’s defense that the Claimant had no insurable interest on the insured subject cannot be accepted by the arbitral tribunal.

The main reason the Respondent believed it should not be responsible for the accident was the insured and its representative committed intentional misconduct or gross negligence, which had a causal relationship with the accident. According to the Respondent, the personnel operating special operation equipment should pass the exam and obtain the Special Operation Equipment Personnel Certificate before he or she could operate the equipment. The Claimant believed that

the Special Operation Equipment Personnel Certificate was irrelevant in this case. Pursuant to relevant laws and regulations, the excavator is not special operation equipment and it was unnecessary for the operator to obtain the Special Operation Equipment Personnel Certificate. The arbitral tribunal found that after the regulations revoked the requirement for Special Operation Equipment Personnel Certificate for excavator operators, there was no legal or contractual ground for the Respondent to reject the insurance claim because the operator did not obtain the Special Operation Equipment Personnel Certificate or the Special Operation Equipment Personnel Certificate expired. Therefore, the Respondent's defense was denied. There was no legal or contractual ground for the statement that "it was the precondition of the contract for the insured to obtain the Special Operation Equipment Personnel Certificate and the operator's license". The Respondent should reimburse the losses caused by the insured accident.

c. Exportation Credit Insurance Dispute

On October 18, 2010, the Claimant and the Respondent, an Insurance Company, entered into a Short-Term Exportation Credit Comprehensive Insurance Policy, agreeing that the policy consisted of Policy Schedule, Short-Term Exportation Credit Comprehensive Insurance Terms, (the "Insurance Terms"), Short-Term Exportation Credit Comprehensive Insurance Application, Credit Limit Application, Credit Limit Approval, Exportation Filing Form, Approval Form and other forms. Based on the Policy, the Claimant and a US company signed a purchase agreement with an amount of USD 447,930. The agreed payment method was sight L/C. The Claimant applied for a credit limit with the Respondent, with a US bank as the issuing bank. The Respondent approved a credit limit with the US bank as the issuing bank, stating "Payment method: L/C. Credit Period: 30 days: Amount: USD500,000.00". On August 10, 2011, the Claimant delivered the goods to the US, and submitted the bill of lading to the issuing bank. The issuing bank denied the payment because the L/C was not in strict compliance. The Claimant filed a claim to the Respondent but the claim was rejected. The Claimant filed for arbitration with BAC according to the arbitration clause in the Policy, requesting the Respondent pay short-term exportation insurance money of USD 403,137.

The arbitral tribunal found that, pursuant to Article 30 of the Insurance Law, "[i]f a dispute arises between the insurer and the policy holder, the insured or the beneficiary over the insurance contract terms of the standard terms of the insurer, such terms shall be construed based on the usual understanding; if there are two or more constructions of the terms, the people's court or the arbitration institution shall interpret the terms in favor of the insured or the beneficiary". The arbitral tribunal decided that since the Respondent cannot provide more evidence, the insurance coverage in this case should be determined by the Policy Schedule and the Insurance Terms. Therefore, it supported the Respondent's argument that the insurance did not cover the rejection of payment due to the non-compliance of the bill of lading and the L/C. The arbitration also ruled

that, pursuant to Article 15 of the Insurance Terms, when the disposal of goods is required, the insurer has the right to refuse to estimate the loss or make the payment before the policy holder disposes of the goods. Therefore, before the Claimant could prove the occurrence of the accident and the loss in accordance with the procedure set up in Insurance Law and the Policy, the Respondent had the right to refuse to estimate the loss or make the payment.

C. Suggestions on improving the Financial Dispute Arbitration System

In 2012, theoretical research continued analyzing the status of the financial dispute arbitration system in China. Problems of the existing system were raised, and improvement suggestions were proposed for perfecting the financial dispute arbitration mechanism, particularly for disputes like securities and financial leasing.

Regarding securities disputes, Zhu Weiyi, through analyzing case law in the US and the arbitration practice of Financial Industry Regulatory Authority (FINRA) and comparing the practice in China, illustrated the necessity of securities arbitration. Securities disputes often involve several jurisdictions, and the courts are reluctant to hear the disputes. Arbitration is not only a method to resolve disputes, but also an industry and one important feature of financial centers in the world. A lot of countries are competing for the financial arbitration industry. The Netherlands is a pioneer and established a special financial arbitration court in January 2012. The government of the Netherlands set out the ambition to make the financial arbitration court a leading arbitration institution in the world. As a country with substantial securities, financial and capital activities, China should have a platform for financial dispute resolution and strive to make a strong position. Companies and financial institutions have the power to require arbitration in China for disputes involving multiple jurisdictions. Although arbitration within the financial industry still needs further development, such disputes can be arbitrated by CIETAC or the Beijing Arbitration Commission.^①

Compared to the advanced and developed securities arbitration mechanism in the US, the system in China is still developing. Huang Aixue, through analyzing the securities arbitration mechanism in the US, its development and major issues in the system and comparing the Securities Law and Arbitration Law of PRC, provided legislative suggestions. Under the framework of the Arbitration Law, we should take advantage of the current arbitration institutions and cooperate with industry associations and securities exchanges in order to develop financial product arbitration. The arbitration commissions should provide institutional support, system support and establish procedures while the industry associations and securities exchanges provide professionals. The financial product transaction arbitration procedure should be industry-based and self-disciplined, satisfying the requirement of efficiency and fairness. In addition, the

① Zhu Weiyi, "Certain problems of financial disputes arbitration", *Chinese Law*, March, 2012, pp. 27-31.

procedure should use a combination of arbitration and mediation to solve disputes.^①

Zang Songsong, from the prospective of banking disputes, demonstrated the role of financial arbitration mechanisms in resolving such disputes. He believed financial arbitration has the advantages of efficiency, finality, fairness and flexibility. However, there are still problems in developing a financial arbitration industry in China: (1) lack of professionalism and institutions; (2) lack of connection with the banks (3) lack of awareness in public. Most clients do not know of arbitration institutions, its mechanism, and how to file for arbitration; (4) lack of legal authority. Therefore, he suggested: (1) develop professional financial arbitration institutions and establish multi-layers and high standard financial arbitration system; (2) regulate the internal controls of the banks; (3) enhance legal support from the court; and (4) increase public awareness of arbitration and actively introduce the roles and advantages of arbitration systems in resolving financial disputes.^②

For financial leasing disputes, Wen Huang, based on his practical experiences and comparing the financial leasing cases heard at CIETAC Shanghai Branch from 2009 to 2011, summarized the following legal issues for financial leasing contracts: (1) the title of the contract and the content, the roles of the parties of the financial leasing is different in different financial leasing models, and the rights and obligations of the parties are also different; (2) all the disputes arise because the lessee failed to pay the rent, which means the lessee is the only party that breaches the contract. It is very uncommon in other legal disputes. To address these issues, he provided suggestions on resolving financial leasing problems: (1) accelerate efforts in enacting Financial Leasing Law, which should consider both domestic and international transactions so that it can both regulate domestic and international financial leasing business. It should focus on industry supervision rather than financial leasing contract relationships; (2) expand the definition of financial lease. The PRC Contract Law has a narrow definition for financial lease and there are different models in practice. Future legislation should consider both common financial leases and its varieties and include them in the definition of financial lease; (3) protect the freedom of contract and reduce interference; (4) respect the intent of the parties in foreign-related financial leasing disputes. The parties should be able to choose the applicable laws for the contract; (5) develop the credit reporting system for financial lease industry. For example, we can make reference to the credit reporting system for the financial industry and even use the unified credit reporting system for the financial industry. Companies lacking credit may be restricted from relevant financial services in order to maintain the market order in financial leasing markets.^③

① Huang Aixue, “The United States of America’s securities arbitration system and its legislative reference”, *Journal of Henan University of Science and Technology (Social Science Edition)*, June 2012, pp.111-112.

② Zang Songsong, “Analysis of financial arbitration mechanism”, *Financial in North China*, June 2012, pp. 47-48.

③ Huang Wen, “Issues in financing lease disputes arbitration”, *Legal science*, July 2012, pp. 37-40.

III. The Current Status of Financial Dispute Mediation and Its Improvement

Mediation as a dispute resolution method has a long history. This is known as “oriental experience”, which shows the solution has an important position in the mechanism of disputes resolution in China. According to different practitioners, mediation can be divided into judicial mediation and non-judicial mediation. Judicial mediation refers to mediation of disputes by the people’s court under the principle of willingness of the parties; non-judicial mediation refers to those mediation activities which are presided over by specific organization or personnel other than judicial organs. In 2012, the mediation mechanism of financial disputes in China has achieved great development.

A. The status and development of financial dispute mediation

Under China’s current judicial policy guidance of “giving priority to mediation”, once the judicial organs are involved and judicial procedures applied and the parties agree to mediation, financial disputes will face judicial mediation procedures presided over by judges of the people’s court. In view of the risk of high cost, long delays, and laboriousness of the judicial procedure, mediation becomes an important method of financial dispute resolution. In addition, in judicial practice, the civil case mediation withdrawal rate (referred to as the “mediation withdrawal rate”) is over fifty percent, or even as high as sixty or seventy percent, thus it seems we can infer that over half of the financial disputes in judicial procedures are solved through judicial mediation. The people’s court authorized industry association mediation system is a new type of authorized mediation effort under the background of building a diversified dispute settlement mechanism. The system is a financial disputes resolution model with the virtue of industry knowledge. It can promote the further integration of private mediation and judicial mediation and fully mobilize social forces to resolve disputes.

China’s non-judicial mediation of financial disputes is mainly concentrated in arbitration institutions and financial industry associations. The Mediation Center of the China Council for the Promotion of International Trade and China Chamber of International Commerce has played an important role in financial dispute mediation. In August 2011, the Beijing Arbitration Commission established its mediation center and promulgated and implemented new rules of mediation. In September 2011, the mediation committee of the China Securities Industry Association was formally established, marking a step forward for financial professional mediation systems in the securities industry.

In 2012, China’s financial dispute mediation mechanism has made great development with regard to institutional set up and system construction.

Regarding the securities industry, the China Securities Industry Association established the securities dispute mediation center in February 2012 and promulgated three rules in June ("Measures for work management of securities dispute mediation (Trial)", "The securities dispute mediation rules (Trial)", and " Management measures for mediators (Trial)". In July, the Association set up a securities dispute mediation zone on its official website, announced to the public the securities dispute mediation rules, compiled mediation work related data, assembled a panel of mediators, and compiled mediation work trends and other relevant data and information. Securities dispute litigants can apply for mediation through the online platform provided by the securities dispute mediation zone, which marks the formal start of the Association's securities dispute mediation work and further integrates the securities dispute mediation organizational system.

A securities investor dispute mediation system is an important aspect of protecting the legitimate rights and interests of investors. In March 2012, the head of the China Securities Investor Protection Fund said that the company has developed a securities dispute resolution proposal and rules based on investigation and research. The head also said that the proper establishment of securities dispute resolution channels would help to resolve social conflicts and save social cost. It is a concrete implementation of measures to protect the legitimate interests of investors.^① China Securities Investor Protection Fund carries on long-term research on diversified securities dispute resolution mechanisms and draws lessons from international experience. It designated the public welfare security professional mediation pilot program as a key task in 2012.^② The head of the Securities Investor Protection Bureau for China Security Regulatory Commission (CSRC) also pointed out, "in addition to judicial relief channels, the Commission also actively guides the self-regulatory institutions and operating institutions to establish complaint processing platforms, guides and establishes public interest litigation, arbitration, mediation, and other alternative dispute resolution mechanisms, and has achieved initial results"^③. The Securities Association of China also held two securities dispute mediator trainings in Beijing and Xiamen, and also held the securities dispute mediation experience exchange conference for the first time in December 2012 after the establishment of a securities disputes mediation mechanism. The conference had a full exchange of relevant knowledge and the process of mediation work, the meeting also discussed the "rules for the implementation of securities dispute mediation work of China's Securities Industry Association (Draft)"^④.

① http://epaper.stcn.com/paper/zqsb/html/2012-03/13/content_348287.html
"Securities Times", March 13, 2012. Last visited in February 2013.

② <http://finance.sina.com.cn/stock/y/20120302/004811494419.shtml>, last visited in February 2013.

③ http://www.csrc.gov.cn/pub/newsite/tzzbh/tzzfw/tzzbhtzwd/201205/t20120502_209454.html, last visited in February 2013.

④ Liu Lu, "Promote the adjustable docking, efforts to resolve securities disputes", *Securities Times*, December 14, 2012.

Regarding the Insurance industry, on 18 December 2012, the Supreme People's Court and the China Insurance Regulatory Commission jointly issued the "Notice on carrying out a pilot project of insurance dispute litigation and mediation docketing mechanism in some areas of the country" (Fa 2012, No. 307), decided to carry out pilot work to establish insurance litigation and mediation docketing mechanisms in parts of the country, in order to implement the people's court's working principle of "giving priority to mediation; combining mediation and litigation", they gave full play to the positive role of insurance regulators and insurance industry organizations in preventing and resolving disputes in the society and in resolving insurance disputes fairly, efficiently and in accordance with law. Pilot district courts may establish special mediation organization rosters and specially invited mediators according to the spirit of "the Supreme People's Court pilot scheme on the expansion of reform for litigation and non-litigation dispute resolution mechanism" (Fa 2012, No. 116). The notification requires the pilot courts to improve the roster management system, to provide accurate and complete information on mediation organizations and mediators to the parties of insurance disputes for the parties to choose voluntarily; to make full use of court litigation and mediation docketing platform. Courts may also provide specialized room for insurance disputes mediation for special mediation organizations and specially invited mediators.

In addition, the Financial Dispute Resolution Centre—dispute mediation institution of the Hong Kong SAR government—was established on June 19, 2012. The Resolution Centre uses the method of "mediation first, arbitration second" to help solve money disputes between members of financial institutions and individual customers under the financial dispute mediation mechanism.

Finally, there are also many seminars and other activities with the theme of mediation in 2012, discussions during these activities will also play a good role in promoting China's financial mediation development. In June 2012, the International Arbitration and Mediation Summit was held in Hong Kong; in November, the China Conference for International Arbitration and Alternative Dispute Settlement was held in Beijing; the China Chamber of International Commerce Mediation Center participated the 2012 the Asia-Pacific Mediation Conference; and the Seminar on Cross-strait Investment Dispute Mediation Work was held in Tianjin.

In the process of establishing financial dispute mediation mechanisms, the BAC and China Securities Industry Association carried out in-depth cooperation. They respectively held two series of trainings for association mediators regarding "modern commercial mediation concept and skills", giving in-depth analysis of the flexible options and effective use of mediation methods under the concept of modern business mediation. The training deepened securities dispute mediators' understanding of the basic knowledge, significance, and the legal environment of mediation, and improved the mediators' business skills.

B. Cases of financial dispute mediation

The Supreme People's Court issued the *Notice for issuing excellent mediation cases of the people's courts* on March 31, 2012. Under the guidance of the principle of "giving priority to mediation; combining mediation and litigation", people's courts at all levels have achieved remarkable results and a large number of excellent mediation cases have emerged. Among the "ten leading mediation cases of the people's courts", "Yan Jun Chen and others v. Zhejiang Hang Xiao Steel Structure Co., Ltd. Re: compensation dispute of false representation in the securities market"^① is a typical financial dispute mediation case.

In this case, Chen Yanjun and 126 other plaintiffs sued Zhejiang Hang Xiao Steel Structure Co., Ltd. (hereinafter referred to as "Hang Xiao Steel") at the Zhejiang City Intermediate People's court, claiming Hang Xiao Steel violated laws and regulations in its information disclosure and misled investors with regard to the Angola residential construction project with China International Fund Limited, and requesting an order for Hang Xiao Steel to compensate plaintiffs' investment losses, commissions, and interest. On April 30, 2007, the China Securities Regulatory Commission issued an administrative punishment decision to Hang Xiao Steel recognizing Hang Xiao Steel's violation of information disclosure provisions and misleading statements and other illegal behavior. The Hangzhou intermediate people's court made a general and integrated consideration on all 127 cases, did repeated mediation work, and interpreted laws and principles for both parties, eventually enabling Hang Xiao Steel to fully understand the legal consequences and legal liabilities of its behavior. The court finally convinced Hang Xiao Steel that only through honest mediation and active compensation could it repair its credit as a listed corporation. The court made the plaintiffs fully understand the risk of stock investments and the systematic risk of the stock market, and gradually guided the plaintiffs to adjust their high expectations in the litigation and accept mediation to resolve the disputes. Full play was given to the role of lawyers in the mediation work and the court acquired understanding and support from the 127 plaintiffs' attorneys. Finally, a mediation resolution was reached for 118 cases and the plaintiffs won cash compensation of 82% of the amount they claimed for. Then, the remaining 9 cases were also smoothly closed through mediation.

The case was triggered by the listed Corporation's misleading statements in disclosed information and it damaged a large number of shareholders and involved a large amount of compensation amid the gradually emerging negative impact of the international financial crisis and intensified capital market turmoil. By actively using mediation to resolve financial disputes, the court not only protected the legitimate rights and interests of the parties of the case, but also played a positive role in maintaining social stability, and achieved a mutually beneficial effect; therefore it was praised by the local government and community in all walks of life.

^① "Hangzhou City Intermediate People's Court of Zhejiang province (2007), Decision no. 133". See http://www.legaldaily.com.cn/index/content/2012-03/09/content_3417528.htm. Last visited in February 2013.

C. Suggestions on improving financial dispute mediation system

Mediation runs through the whole dispute resolution process, especially for financial disputes which involve much specialty and complexity. Voluntary mediation by both parties has become an important way to solve this kind of dispute. However, the mediation system is not perfect in the current system and has many defects; scholars therefore have put forward proposals from different angles for improving the financial mediation mechanism.

After observing and studying Chinese and foreign securities dispute resolution mechanisms and considering the characteristics of securities disputes, He Min suggests to give full play to the advantages of mediation and to establish securities dispute mediation mechanisms at multiple levels: set up dispute resolution forums within industry associations; perfect the legislation and authorize stock exchanges to handle mediation; set up mediation organizations within the China Securities Regulatory Commission and give its agencies mediation functions, giving full play to the advantage of securities supervision administration and resolve securities disputes on site; set up a special department in securities companies or to form professional staff in customer service departments to deal with securities disputes.^①

Zhang Huadong puts forward that it has important practical significance to establish securities dispute resolution mechanisms within the industry. It is not only in line with the focus on mediation in China's tradition, but also has great significance towards the construction of harmonious society, the strengthening of social management, and the stable, sustained, healthy development of the stock market. As to details, he proposed: establishing perfect securities mediation system; articulating security mediation scope; specific securities mediation procedures (from the start of procedures, the application submission, the choice of mediator to the termination of procedure); strengthening the execution of mediation, and learning from the experience of overseas mediation forums; exploring the possibility of giving quasi-judicial power to securities dispute resolution institutions, which would mean the results of mediation may be carried out through compulsory execution.^②

As a new mediation system, the people's court commissioned industry association mediation plays a positive role in promoting the realization of judicial resource intensity, enhancing the credibility of dispute resolution, and rectifying the imbalance of litigants' lawsuit capacity and etc. However, Zhou Quan, the Shanghai second intermediate people's court judge, found that this system in reality has encountered many dilemmas, such as low use rate, narrowed applicable scope, and low mediation success rate. Therefore, Zhou Quan suggested to improve the system as follows: (1) clarify the system scope—set up boundaries for mediation cases; (2) procedures

① He Min, "The securities dispute resolution mechanism—analysis of the mediation system", *China Securities and futures*, October 2012, p.42.

② Zhang Huadong, "Perfect securities mediation mechanism to resolve securities conflicts and disputes", *Reform and opening*, February 2012, p.15.

standardization— apply an auxiliary system of combining facts and distinguish judicial review; (3) operation normalization— strengthen training and increase incentives.^①

IV. The Current Status of Financial Consumer Dispute Resolution System and Its Improvement

Financial consumer disputes refers to those disputes about financial products or services between consumers and financial institutions, which includes deposit and loan, bank financial products, credit cards, insurance, securities investments, trusts, financial leasing, pawning, etc. In recent years, financial consumer protection issues have become of great importance and have been the subject of many state legislatures, financial supervision departments, and academics. In addition to several characteristics in common with general financial disputes, financial consumer disputes also have some unique characteristics: the subject of disputes are more extensive and the number of consumers of financial products are often large; the parties usually have asymmetric information, consumers are often unable to understand the inner mechanism and mode of operation of those complex structured financial products which are created by sophisticated professionals of financial institutions; disputes are often caused by form contracts and boilerplate terms, consumers normally will not discuss each term with financial institutions before signing a contract, and this is also the reason why many financial consumer disputes arise. Therefore, as the vulnerable party in financial consumer disputes, the consumers' interests need more protection. Although these disputes can be solved through traditional dispute resolution mechanisms, such as litigation, arbitration, and mediation, other special dispute resolution mechanisms may be necessary to effectively protect the rights and interests of consumers.

A. Overview of China's current financial consumer dispute resolution system

The term “financial consumer” originated from the 2000 UK Financial Services and Markets Act. Then, the United States, Japan, Taiwan, and other countries and regions issued similar laws and established the concept of “financial consumer” or similar concepts. In China, there are so far no specific laws and regulations about financial consumer protection, and those relating provisions of financial consumer dispute resolution are scattered in different laws and regulations, such as Civil Procedure Law, Arbitration Law, Consumer Protection Law, Securities Law, and Insurance Law etc. Therefore, China's financial consumer disputes are still resolved through traditional ways, such as litigation or arbitration. Of course,

^① Zhou Quan, “Practice and regulation of financial disputes mediation of Industry Association entrusted by the people's court”, *Journal of Tianjin University of Finance Economics*, January 2012, pp. 79-85.

financial consumer rights also include those consumer rights which are protected by the Consumer Protection Law.

However, financial consumer products are not a commodity in the traditional sense, but consumption goods of a higher level which requires high specialty and efficiency. In addition, with the recent financial crisis, financial consumer disputes in China are increasing. Due to lack of professionalism, low efficiency and other reasons, traditional litigation, arbitration, and other dispute resolution methods are unable to meet the needs of financial consumer protection, and internal dispute settlement mechanisms in relevant industries are not perfect yet. Therefore, how to effectively protect the legitimate rights and interests of financial consumers and how to promptly solve financial consumer disputes is worth our consideration.

Although China at present does not recognize the concept of “financial consumers” in the legislation, yet China’s legislature has already begun the lawmaking process for financial consumer protection. In 2012, the Shanghai Municipal People’s Congress and the National People’s Congress (NPC) both included the recommendation of developing specific financial consumer protection laws and regulations in the motion of formal bills for that year. The NPC Standing Committee also included this issue as one of the twelve key tasks of 2012.^① The legislative focus on financial consumer protection will definitely continue to improve financial consumer dispute resolution mechanisms in China.

B. Introduce and borrow from foreign financial consumer dispute resolution mechanisms

Since the United Kingdom promulgated the Financial Services and Markets Act in 2000, many countries and regions have shown concerns for the “financial consumer” concept and developed corresponding laws and regulations. In recent years, financial consumer protection legislations have become more frequent in the world.

From a global perspective, the legislative and regulatory reform of financial consumer protection has become one of the core areas of financial legislation in recent years. In July 2010, the United States of America’s largest financial legislation since World War II—the “Wall Street Reform and Consumer Protection Act”—was passed and became effective. Although consumer protection is only one part of the legislation, the law still bears this name which shows the importance of financial consumer protection. In January 2012, the British government submitted to congress a large-scale financial regulatory reform bill—the “Financial Services Act”—the Treasury also announced the report of a “new method of financial supervision: the maintenance of financial stability, the protection of consumers”, and advocated that one of the three core contents of the bill and report is the establishment of an independent professional financial

① Gu Xiaorong, Chen Ling, “The basic law on financial consumer protection standards and procedures”, *Politics and law*, June 2012, p.19.

consumer protection agency. Additionally, major international organizations have also taken measures frequently in recent years in the field of constructing financial consumer protection systems. In October 2011, the OECD (Organization for Economic Co-operation and Development) issued the “*High level principles for financial consumer protection*” ; in October of the same year, the Financial Stability Board (FSB) published “*The financial consumer protection in the credit as a core*” ; in March 2011 and March 2012, the World Bank (WB) published twice “*Suggestions for good experiences of financial consumer protection (Draft)*” to solicit opinions regarding rules on consumer financial protection from all sides.^①

After investigating financial consumer protection legislation in other countries, it can be found that special institutions for handling financial consumer dispute complaints have been set up in many places. Although the name and function for financial consumer dispute resolution institutions are different in every country, a unified mode of using specialized agencies to handle the disputes has been taken by all, such as the Unified Financial Ombudsman Service (FOS) in UK, the financial consumer protection agency in the United States, and the unified financial supervision institution of the financial department in Japan. Wang Tingting pointed out that, in the procedure for handling complaints of financial consumption disputes, different procedures in each country showed the following common characteristics: one was at the initiation of procedure, all emphasize the positive initiative of consumers and the passive initiative of financial institutions; two was to emphasize the prior negotiations between financial consumers and financial institutions; three was to emphasize the unilateral constraint and executive force of resolution results, in order to reflect a tilt toward protection of the financial consumer; four was to emphasize the low operating cost of the system; five was to emphasize the convenience for dispute resolution.^②

The practice in the Taiwan region of China is also worthy of reference. In June 2011, Taiwan adopted the “Financial consumer protection law”, which provides a legal basis for the protection of the island’s financial consumers. The act defines financial consumer, gives full protection of financial consumer’s right to know, and set the provisions requiring financial goods or services, and providers are obligated to only provide appropriate goods or services to consumers. Particularly, the law established a specialized agency for handling financial consumer complaints and dispute settlements, and makes financial consumer protection an independent function. The dispute settlement institution is established by the Taiwan Financial Management Committee as a consortium and as a legal person. Its internal structure includes a consumer financial services sector and an internal review committee, the former one is in charge of coordinating the dispute handling in financial services and assisting the review committee to

① Zhang Xiaodong, “The construction and explore of financial consumer protection system: financial supervision innovation”, *Finance and economics*, June 2012, p.45.

② Wang Tingting, “Research on mechanism for handling complaints of consumer disputes”, *Journal of Shanxi University of Finance and Economics*, November 2012, p. 74.

handle preparation works for all reviewing matters. The latter chooses 9 to 25 advisory committee members to review consumer disputes. The biggest characteristic of the dispute settlement institution is its function as judicial court, after reviewing and permission by the court of law. Thus as long as the consumer accepts, the results for handling consumer complaints of such institution has the same effect as a civil judgment, regardless of whether the financial goods or services providers accept or not. Additionally, it also set up a civil compensation mechanism for the fault of financial goods or services providers, in order to fully protect the rights of financial consumers. It set up an independent, impartial, and professional financial consumer dispute settlement institution, which is of great significance to promote the healthy development of the financial services industry.^①

C. The establishment and improvement of China's financial consumer dispute resolution system

After studying the system and content of the Taiwan region's Financial Consumer Protection Law, Tian Jingting provides suggestions for the improvement of China's financial consumer protection mechanism: to formulate special legislation and relevant supporting measures for the obligations of financial managers and the rights of financial consumers; regarding relative financial consumer dispute resolution methods, to make reference to the Taiwan region and international experience, set up an independent financial consumer protection agency, empower the Financial Consumer Protection Commission of the State Council to be responsible for the protection of domestic financial consumers, and also set up branches at provincial, municipal and county level. At the same time, in order to establish a set of complete, fair, and efficient financial consumer dispute resolution mechanisms, consumers may be allowed to complaint to the financial operating institutions, financial services first, and the institutions will handle those complaints and must give feedback about the resolution results to financial consumers within 30 days of receiving the complaint. If the mediation fails, financial consumers may appeal to the dispute settlement institution for review.^②

After clarifying the concept of "financial consumer" and comparing various consumer financial protection methods, Wang Rui puts forward a reform scheme for a future special financial consumer protection agency, that is to combine the existing China Banking Regulatory Committee (CBRC), China Securities Regulatory Committee (CSRC) and China Insurance Regulatory Commission (CIRC) and form a unified Financial Supervisory Commission. Then the financial

① Wang Haoyun, "Reference and Enlightenment of Taiwan financial consumer protection mechanism of the mainland", *Journal of Changchun Normal University (Humanities and Social Science Edition)*, October 2012, p.28.

② Tian Jingting, "On China's financial consumer law protection mechanism: in light of Taiwan region's 'financial consumer protection law'", *Journal of Northwestern University (Philosophy and Social Science Edition)*, September 2012, pp. 149-150.

consumer protection institute will be incorporated into the Financial Supervisory Commission, and a special financial consumer protection bureau will be set up under the Financial Supervisory Commission, a financial consumer dispute settlement agency will be included in the financial consumer protection bureau, and attention shall be given to maintain the agency's independence. Through such arrangements and under the unified coordination of the Financial Supervisory Commission, the division of responsibility and authority between financial consumer protection bureau and other departments can be better solved, and may also give full play to Financial Supervisory Commission's advantage of concentrated internal financial professionals and provide faster and better professional service for financial consumers.^①

After comparing and analyzing the advanced experiences of foreign financial consumer dispute settlement systems and the existing problems in the financial consumer dispute resolution systems in China, Chen Rongquan put forward suggestions for speeding up the establishment of multiple financial consumer dispute settlement mechanisms: (1) clarify the bases for responsibilities of financial supervisory services, and set up a relatively perfect consumer dispute resolution mechanism within the financial institutions; (2) establish a financial consumer administrative protection bureau in charge of the administrative work of protecting financial consumers, and effectively give consumers the administrative protection; (3) set up special financial consumption dispute resolution committees with Consumers Association at all levels; (4) let arbitration play an active role in the settlement of disputes; (5) the self-regulating organizations of the financial industry shall actively use their own advantages, set norms and constrain the behaviors of financial institutions, and take initiative to solve the existing problems in the financial industry; (6) establish special financial consumer dispute management departments within the people's court system, and enrich the court's ability to handle financial consumption cases.^②

V. Conclusions

Financial disputes accompany the emergence and development of China's financial industry. Different from traditional civil disputes, financial disputes generally have the characteristics of strong professionals, large amounts in dispute, complex legal relationships, etc. Traditional mechanisms of solving disputes, including litigation, arbitration, mediation, etc., may still be applied to financial disputes, but may face some adaptation problems. Therefore, it is necessary to improve and develop the traditional methods of dispute resolution according to the needs of the development of financial dispute resolution.

① Wang Rui, "Special legislation to protect the financial interests of consumers", *Search*, August 2012, p.10.

② Chen Rongquan, "The new idea of financial consumer disputes", *Special economic zone*, April 2012, p. 235.

In 2012, financial dispute resolution has become more and more diversified: financial trials in the people's court system have gradually become more common; financial arbitration institutions emerged in large numbers and financial arbitration mechanism was progressively improved; financial mediation mechanism became more regulated, especially in the securities and insurance industry. Facing the new topic of financial consumer protection, scholars proposed some detailed suggestions about financial consumer dispute resolution after comparative study of domestic and foreign systems, which are worthy of our attention. The improvement of financial disputes' diversified resolution mechanism will still take time, but those contributions made by scholars and practitioners will lay a solid foundation for the development of this system.

Annual Review on Intellectual Property Dispute Resolution

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Abstract: This essay is a summary of the overall development of China's intellectual property law in 2012. It includes data relating to copyright, patent and trade mark registrations, and examines the trends that have emerged in intellectual property litigation over the past year. The essay also summarises the progress made in copyright, patent and trade mark legislation. The significant intellectual property cases of the year are discussed, and the latest research and opinions from China's leading IP experts and scholars are analysed. Finally, the appendix contains useful materials for intellectual property law practitioners including: guidance on settling intellectual property disputes and the relevant institutions to use, a list of significant laws and regulations, a review of the year's major IP events and a review of key publications from academic organisations.

Keywords: 2012, Intellectual Property, Disputes, Legislation, Cases

Section One: The General Development of Intellectual Property Issues

The number of patent, copyright and trade mark registrations increased in 2012 and significant legislative measures were introduced by the government to improve the system for protecting IP rights. The number of IP disputes filed in China rose steadily in 2012 and the influence of the sector on national policy makers continued to increase throughout the year.

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1. Primary Data

Patent registration

In 2012, the number of patent applications in China increased by 26%, reaching a total of 2.05 million. This total consisted of 625,000 applications for invention patents, 740,000 applications for utility model patents and 658,000 applications for design patents. The majority of applications, 1.912 million, were from domestic applicants, but the number of foreign applications also rose to 138,000^①

Patent licensing

Patent licensing applications increased by 31% in 2012, with a total of 1.255 million applications filed. This total consisted of 217,000 licences for invention patents, 571,000 licences for utility model patents and 467,000 licences for design patents. In total 1.163 million licence applications came from the domestic market, while there were 92,000 foreign applications.^②

Trade mark applications

The number of trade mark registration applications rose by 16.3% year-on-year to 1.648 million, making China the world leader for trade mark applications in 2012. A total of 688,000 original works were registered, a new record figure, and software trade mark registrations also hit a new record high of 139,000. There were more than 10,000 applications for new botanical trade marks while forest plant applications came to 1,000 (placing China second in the world).^③

Copyright registration

The number of copyright registrations in 2012 was 687,651, up 49% year-on-year. A total of 139,228 software copyrights were registered in China over the past year, an increase of 27% on the 2011 figures. There were 146 registrations of copyright pledges of 2012. The total value of all copyright pledges registered in 2012 reached RMB 2.75 billion.

IP disputes:

The number of IP infringement claims heard by the courts was 87,419, an increase of 45.99%

① Zhao Jianguo Correspondent: Liu Lei & Liu Zenglei, More than 0.65 million applications for design patents received in China in 2012, http://www.sipo.gov.cn/yw/2013/201301/t20130123_783987.html; 24 March 2013

② Ibid.

③ Yu Yang, China intensifies efforts to increase protection of IP rights with 112,000 brand name cases investigated in 2012, http://www.legalinfo.com.cn/content/2013-03/21/content_4298529.htm?node=20908; 24 March 2013

year-on-year. A total of 2,928 administrative cases involving IP infringement were dealt with in 2012. A further 5,256 criminal cases involving IP infringement came to a conclusion in 2012, representing year-on-year growth of 20.3%. The number of criminal cases ongoing at the end of 2012 was 17,244, representing year-on-year growth in the number of cases still before the courts of 203.1%.

IP enforcement:

More than 15,000 batches of infringing goods were detained by Chinese customs officials in 2012, involving the seizure of more than 90 million individual items. The State Administration for Industry and Commerce (“SAIC”) investigated 124,000 cases of fake produce and patent infringement, with a total value estimated at RMB 85 billion. The authorities also handled 112,000 brand name infringement cases, worth RMB 2.74 billion. Customs officials brought 2,510 cases of patent infringement in 2012 and handled 6,512 fake patent cases. In the fight against online IP infringement, national copyright organisations investigated 282 cases and shut down 183 websites.^①

2. Legislative Changes

A series of proposals to modify Chinese IP law were put forward in 2012, and these proposals were accompanied by a publicity campaign outlining the government’s commitment to improving the framework for registering and enforcing IP rights. The government attempted to address historical problems in the enforcement of IP law and the competent authorities dealing with registration of trade mark, copyright and patent rights were given a leading role in shaping the legislation.

1) Copyright Disputes

The increased pace of information technology developments in recent years has led to a corresponding rise in the number of copyright disputes in China. In an effort to ensure claims are dealt with swiftly and accurately, the government introduced the following measures in 2012 to speed up the procedure for making breach of copyright claims:

A. New online rules on copyright

The number of online copyright disputes continued to rise at a much quicker rate than other copyright disputes in 2012. With the fast pace of technological developments creating problems

^① Zhao Jianguo Correspondent: Liu Lei & Liu Zenglei, More than 0.65 million applications for design patents received in China in 2012, http://www.sipo.gov.cn/yw/2013/201301/t20130123_783987.html; 24 March 2013

for the courts in interpreting outdated laws and complex fact patterns created by increasingly sophisticated forms of infringement, online copyright disputes often challenge the legal system on many fronts.

Several high profile online copyright infringement cases in 2012 centred on the legal position of Internet Service Providers (ISPs). In an attempt to clarify the limits of ISP's liability for online copyright infringement, the Supreme People's Court published its Regulations on the Application of Tort Law in Cases of Internet Information Transmission on 26 December 2012. The regulations came into force on 1 January 2013. Under the regulations the ISP will now be held jointly and severally liable along with the infringer for any damage caused to a claimant by online copyright infringement. The Supreme People's Court also issued guidance that the actions of each individual ISP should be taken into account when determining their level of liability.

A new draft revision to the Copyright Law of the People's Republic of China (the "Copyright Law") was also drawn up in 2012. The third amendment of the draft deals with the online IP rights of composers, transmitters and users. The draft legislation would entitle radio and TV stations to prohibit third parties from broadcasting or replaying their programmes without consent. The revised legislation also deals with online copyright protection of computer programmes. Under the revised Copyright Law, a legally authorised user of a computer programme would be permitted to copy or translate that programme for authorised use, but not for any other purposes.

B. Improved copyright protection for artists and performers

The rights of audiovisual performers have been poorly protected for some time, not just in China but also worldwide. On 26 June 2012, after nearly 20 years of negotiations, the Beijing Treaty on Audiovisual Performances was signed by 122 countries. The treaty entitles performers to authorise or prohibit parties from accessing their image, voice or any other aspect of their performance. As a result of the treaty, IP rights previously available only to authors and composers are now available to audiovisual performers.

The draft Copyright Law also extends new rights to audiovisual performers in accordance with other international treaties on artistic workers to which China is a signatory. An audiovisual performer's right to rent out their artistic works is included in the draft Copyright Law, which also provides clarity on how agreements as to the ownership of audiovisual works will be treated by the courts. In the absence of a contract the producer will own the audiovisual work, but the performer will still have the right to receive payment from the producer for his/her contribution.

2) Trade mark Disputes

A. Crackdown on trade mark infringement

The number of trade mark applications reached 10 million in 2012, evidence of the increasing

recognition of the value of trade mark registration in China by both foreign and domestic enterprises. The volume of trade mark disputes also increased in 2012 and the Chinese government made several moves throughout the year to crack down on infringement and improve protection.

A new draft revision of the Trade Mark Law of the People's Republic of China (the "Trade Mark Law") was drawn up in 2012. The draft legislation included punitive damages for cases involving wilful infringement, and provision for compensation awards to be three times higher than the current level for serious cases of infringement. In a shift of emphasis, the new draft would also see damages caused by wilful infringement being assessed based on the benefits the infringer has obtained rather than the damage caused to the claimant. Given the difficulty courts have in assessing the amount of loss suffered by the claimant, the compensation limit in cases which don't involve wilful infringement will also be raised from RMB 500,000 to RMB 1 million.

The problem of collecting sufficient evidence in trade mark cases is not just a barrier to succeeding in a claim; the issue often affects the amount of compensation paid to a successful claimant as financial gain from the infringement is hard to assess without access to the defendant's books. Taking a lead from foreign jurisdictions that have succeeded in tackling this issue, China's new draft legislation aims to tackle the problem by tightening the rules on evidence for determining quantum. Under the draft legislation, if the trade mark owner cannot produce evidence of the extent of the infringement because the infringing party refuses to hand over account books and other financial data under its control, or if the infringer provides false information on its finances, the court can make an order compelling the infringer to provide accurate account books and information. If the infringing party still fails to comply then the court can determine compensation based on the trade mark owner's estimate of loss.

B. Protection of well-known marks

The process of trade mark recognition for well-known marks in China is in something of a mess at present, and the new draft legislation aims deal with this by giving the authorities increased powers to carry out fact-finding at the request of a party applying to protect a well-known brand. To tackle the problem of infringing companies using other organisations' trade mark names as their own, the law will be tightened and a new cause of action will available to potential claimants under the draft legislation. Where any party uses a registered trade mark as its enterprise name resulting in the public being misled, that can constitute unfair competition and the infringing party may be liable under China's Anti Unfair Competition Law.

3) Patent Disputes

Compared to trade mark protection, the willingness of potential patentees to protect their rights has been limited, primarily owing to the barriers that have traditionally existed when safeguarding

patent rights in China. The difficulty of collecting evidence, the long wait for settlements and the high cost of enforcing rights have all contributed to the low number of patent actions being filed.

In an effort to tackle these problems, the fourth draft amendment to the Patent Law of the People's Republic of China ("the Amendment") was passed in 2012 and made the following significant changes:

- a) To improve the quality of evidence and help claimants prove patent infringement, judicial authorities are now entitled to investigate and collect evidence themselves. The amendment grants the court powers of investigation and gives administrative officers of the Intellectual Property Offices ("IPOs") the power to take part in evidence collection. Where a party refuses to cooperate with court orders on evidence or violently resists attempts by IPO investigators to collect evidence, that party may be held criminally liable for deliberately impeding law enforcement officials.
- b) To reduce the time it currently takes for patent disputes to be resolved, the Amendment provides for the relevant IPO to determine the compensation payable for patent infringements. The aim of the new system is to combine administrative, civil and criminal procedures (under the 3-in-1 trial model) to make the patent dispute process as efficient as possible.
- c) To make the courts more efficient in dealing with patent cases, the Amendment simplifies the procedure for processing requests and inspecting products for patent protection assessment. The People's Courts and administrative agencies will also be expected to make patent applicants aware of how long their application will take to process and to give them regular updates on the progress of the application.
- d) To address concerns about the small compensation payouts awarded in patent infringement cases, additional punitive damages for wilful infringement have been introduced by the Amendment. A claimant's loss of market position, as opposed to simple economic loss, will now be taken into account by the courts when assessing damages, so compensation awards are expected to increase. It is hoped the Amendment will help protect the legal rights of patentees more effectively, and encourage more companies to apply for patent protection.
- e) To solve the problem of high litigation costs and unsatisfied judgments, the amendment gives SIPO the power to investigate complaints of wilful patent infringement and take action to stop the infringement without the patentee having to go to court to secure a ruling.

3. Major IP case law in 2012

In 2012, the number of IP disputes maintained the rapid growth seen over the past five years, and the year-on-year increase was substantial. The amount of money being spent on IP disputes also increased, as did the amount paid out to successful claimants. IP litigation is becoming an increasingly significant area of Chinese law, with both policy makers and the public now recognising it as an important area. The nature of IP disputes continues to evolve, with complex and varied cases challenging the courts to interpret the law and consider innovative solutions.

1) Copyright cases

Kong Xiangjun, president of Civil Tribunal No. 3 of the Supreme People's Court, said recently that over half of the IP cases heard in China involve copyright claims and of those more than half stem from online infringement. Internet copyright cases often involve sites with large numbers of users, attracting media and public attention and leading to heated discussions among lawyers and policymakers about how to tackle online infringement.

In 2012, most online copyright cases focused on internet broadcasts of audiovisual material. Of these, several of the most high profile cases required the courts to consider the application of the so-called "safe harbour principle".

The following three key themes can be picked out from online copyright actions brought over the past year:

A. Cases involving online video players

With internet speeds increasing and a rise in user demand for online video content, internet video players are thriving. Unofficial figures suggest that by the end of 2012 there were more than 100,000 different types of video software available online.

There are two main types of video player provider in China. The first group of providers is the copyright owners (such as TV stations and film companies) who have developed their own online video players to promote their copyrighted material and attract new customers. This is clearly a legitimate use of online video players.

The second group of providers do not own copyrighted material themselves; instead they obtain material from the copyright holder and use their online video player to transmit that content to users. These providers usually try to make it appear to external observers as though they have no knowledge of the copyright infringement in order to use the "safe harbour" defence. This commonly takes one of two forms: either the video is uploaded by a user or the video is linked to the provider's video player through an external search. If the video is uploaded by "users" who are being organised by the provider, or the video was linked to the provider's site through a directed

search organised by the provider, then the safe harbour principle will not apply as the video content has effectively been generated by the provider and they will be liable for any copyright infringement. Furthermore if the content is clearly owned by someone other than the user who uploads it (for example a popular movie or TV series) the provider will not be able to rely on the safe harbour defence and will be held liable for any copyright infringement.

In some cases, defendants have tried to claim that they are not liable for internet video player copyright infringement as they are simply the software developers/manufacturers, and should not therefore be held liable for copyright infringements committed by users of that software. For this argument to succeed, the defendant company has to prove that it only developed the software, and that it is not operating a service to provide users with content or using the software for any other business purpose. However, if the defendant company is found to be using the internet video player to provide a content service to users, it will be liable for any infringements of copyright committed by those users.

B. Cases involving mobile internet providers

The online copyright battles which have traditionally been fought between producers and internet service providers moved to a new front in 2012 with a sharp rise in the number of cases involving mobile internet providers (“MIPs”).

One of the most significant cases in this area saw Encyclopaedia of China Publishing taking action against the Apple App Store for copyright infringement and winning a RMB 520,000 payout. The publisher claimed against several mobile app stores including those operated by Apple and Google (through its Android App Store). The claims totalled tens of millions of RMB and related to books, articles and other copyrighted material for sale through the app stores. The court found that the supplier of the infringing material in this case was the app store (rather than the internet pirates using the store to sell their infringing material) and held the operators of the app stores liable. This case suggests that MIPs and app stores will have to take a much stricter approach when allowing organisations to sell material through their devices or stores.

C. Cases involving end users

As protection of IP rights in China becomes easier, copyright holders are becoming increasingly bold and going to greater lengths to enforce their rights. Some of the largest companies are no longer confining themselves to cracking down on organisations making a living out of copyright infringement, but are also looking to take action against end users. Microsoft is at the forefront of this change of emphasis from some of the world’s largest businesses. Microsoft software such as Office, Visual Studio, Windows and Internet Explorer is hugely popular, but with numerous pirated versions available online many end users rely on infringing copies rather than a Microsoft original. It is almost impossible for Microsoft to rid the internet of all infringing versions of its software so

they have turned instead to enforcing their rights against powerful end users such as IT companies and large employers. This has so far proven to be an effective way of maintaining the company's interests without damaging the brand's image. Even though to date such actions have been aimed at large end user companies, the increasing strength of IP rights in China and the willingness of large corporations to enforce those rights could mean smaller end users are targeted in the future.

2) Patent Cases

The number of patent cases did not increase significantly year-on-year but a series of high profile cases in 2012 saw patent disputes assume a growing significance in the eyes of the public. Chinese companies increased their grip on the international markets in 2012 with major enterprises such as Huawei and ZTE or Midea and GREE becoming increasingly competitive with one another at home and abroad. With an increased awareness of the significance of IP rights among these domestic enterprises, the number of international patent disputes involving Chinese companies increased sharply in 2012. As they develop a greater understanding of the legal tools available to them, more Chinese companies have the courage to fight for their interests in the domestic and international courts.

The following patent cases had a significant impact in 2012:

A. *Neoplan Bus GmbH v Yancheng Zhongwei Passenger Coach Co Ltd and Beijing Zhongtong Xinhua Automobile Sales Company*. This appeal case involving German bus and coach manufacturer Neoplan and Chinese firms Zhongwei and Zhongtong finally reached its conclusion in October 2012. Zhongwei succeeded in an appeal against the first instance ruling which awarded RMB 21 million to Neoplan for infringement of the German firm's passenger coach patent rights. The substantial damages awarded and the fact the case pitted a foreign company against a large Chinese enterprise ensured this case caught the attention of the main players in the industry and, of course, patent lawyers. Zhongwei and Zhongtong succeeded on appeal by challenging the validity of Neoplan's patent. After the first instance case, Zhongwei applied to SIPO's Patent Re-examination Board to revoke Neoplan's design patent. Neoplan had failed in its first two patent applications on the grounds that the design was similar in appearance to a design published in *Today's Coach Magazine* and commonly used in China. In the first two patent applications Neoplan was found to have violated Article 23 of the Patent Law (2000) but at the third attempt a design patent was granted. Following Zhongwei's invalidation claim, the Patent Re-examination Board investigated and invalidated Neoplan's patent, a decision which was affirmed by the Beijing First Intermediate People's Court and Beijing Higher People's Court in the appeal hearing.

B. China is one of only three countries which produce lithium-ion batteries, making it a target for big foreign firms looking to secure patents to limit the market in China. Lithium-ion batteries rely on lithium iron phosphate, of which China has large reserves. The batteries are a key element in the manufacture of electric vehicles. From 2008 onwards Canadian firm Hydro-

Québec began to target the Chinese market, making frequent patent applications related to lithium-ion battery technology. In a bid to maintain the Chinese lithium-ion industry the China Battery Industry Association cooperated with the key domestic administrative organisations to apply for revocation of Hydro-Québec's patents. The Patent Re-examination Board launched an investigation and shortly before Chinese New Year announced that Hydro-Québec's lithium iron phosphate patents were invalid.

C. At the end of 2010, Nokia filed a claim against Shanghai Huaqin Communication Technology Co Ltd ("Huaqin") for RMB 9 million in damages alleging that the defendant had infringed eight of Nokia's patents. In addition, Nokia sent letters before action to more than 20 domestic Chinese mobile phone companies alleging infringement of the same patents. The case centred on basic patents widely used in the communications industry, making the verdict of huge potential significance to mobile phone companies across China. Huaqin applied to SIPO's Patent Re-examination Board to revoke Nokia's patents on the grounds that they were not novel. In April 2012 the Patent Re-examination Board revoked the patents and Nokia subsequently withdrew its claims against Huaqin.

D. In 2012 intellectual property offices in nine major provinces and cities including Beijing, Tianjin and Hebei signed a co-operation agreement on patent law enforcement which included the launch of an information exchange platform. This was just one of the ways in which the efficiency of the provincial IPOs improved in 2012. This improvement was illustrated by a case involving the Guangzhou IPO and a local businessman which attracted a lot of public attention. Chen Jiawen owned a canning company in Guangzhou. His company invested in researching and developing new canning equipment and after six years a machine was produced based on advanced foreign design knowledge and novel features developed by the Guangzhou-based company. Mr Chen was granted eight patents including an invention patent, six utility model patents and one design patent (with several other patents pending). In early 2012 Mr Chen discovered that two companies, Guangzhou Yuanxin Metal Processing and Machinery Plant Co Ltd ("Yuanxin Metal") and Yuanxin Equipment Co Ltd, were manufacturing and selling infringing canning machines. The infringing machines were being sold at a relatively low price and Mr Chen's market share was significantly reduced. On 24 February 2012, Mr Chen made a complaint to the Guangzhou IPO. After an initial investigation and verification procedure the authorities seized the infringing products. Mr Chen reached a mediation agreement with the two companies. They admitted to manufacturing, selling and permitting others to sell infringing products and agreed to pay damages of RMB 200,000. The case took the IPO just 59 days to close and created some positive publicity which may encourage more companies to register patents and enforce their rights.

3) Trade mark cases

Public awareness of the importance of trade mark protection improved in 2012, with high profile

infringement cases at home and abroad triggering a rush to register trade marks and a burgeoning industry looking to profit from trade mark registration. There was also a surge in trade mark infringement claims in China as foreign and domestic companies became more confident in the litigation system.

Among the most high profile cases involving trade mark infringement claims in 2012 were:

A. In February 2012, the American basketball legend Michael Jordan sued Qiaodan Sports Company Limited (“Qiaodan Sports”) for trade mark infringement. Jordan claimed Qiaodan Sports used a Chinese version of his name without his authorisation. Mr Jordan claimed that use of the word “Qiaodan” along with the use of the names of his sons Jeffrey and Marcus and other associated trade marks was an attempt by Qiaodan Sports to mislead consumers intentionally and profit from his name.

The claim was based on the argument that sports goods consumers would naturally associate the word Jordan or its Chinese equivalent with Michael Jordan rather than other individuals sharing the same name. Qiaodan Sports argued that Jordan is a common surname in England and America and that except for in the field of basketball merchandise the word Jordan is not automatically associated with Michael Jordan. The case is still ongoing and has attracted significant media coverage both in China and in the US.

B. One of the biggest IP cases of 2012 was between Hong Kong Jiaduobao Group (JDB) and Guangzhou Pharmaceutical Holdings Ltd (GPC). The dispute concerned trade marks, design patents and unfair competition in a complex case which was extensively covered by the media and analysed by experts as a classic battle between two large companies over IP rights.

The dispute can be traced back to 1997 when GPC entered into a licensing agreement with Hong Kong Hung To Group Ltd (“Hung To Group”). The WLK herbal tea trade mark owned by GPC was licensed to the Hung To Group, which further licensed the trade mark to its subsidiary JDB for herbal tea sales in mainland China. As the original licensing agreement expired, GPC and Hung To entered into a new agreement in 2000 to extend the licence to May 2010.

However, unbeknown to GPC, in August 2001 and August 2002 Li Yimin, former vice president of GPC, accepted HKD 1 million in bribes from Chan Hung To, president of the Hung To Group. This would lead to challenges regarding the validity of the licensing agreement entered into in 2000 and all subsequent agreements between the parties. In November 2002, Hung To Group and GPC entered into a supplementary licensing agreement, extending the deal until 2013. In June 2003, Li Yimin accepted another HKD 1 million bribe from Chan Hung To. Later that month the two companies signed a second supplementary agreement extending the licence to 2020.

The bribery and corruption involving Li Yimin and Chan Hung To was not discovered until April 2011. GPC had no option but to submit all of the agreements with Hung To Group to the China International Economic and Trade Arbitration Commission (CIETAC). On 11 May 2012 CIETAC ruled that both the licensing of the WLK trade mark to Hung To Group and the agreement for JDB to use the trade mark in mainland China were invalid. As a result, JDB was ordered to

cease using the WLK trade mark. JDB appealed to the Beijing First Intermediate People's Court to overrule the decision claiming that CIETAC had violated Article 58 of the Arbitration Law of the People's Republic of China. In July 2012 the court dismissed the appeal and affirmed CIETAC's decision, effectively ending the trade mark dispute between the two companies.

With the trade mark battle over, GPC and JDB moved to a new front in the war over the lucrative WLK brand: the packaging. Both parties recognised that it was the distinctive red can design rather than the WLK name that was attracting customers. GPC argued that since WLK was a well-known brand, the trade mark and the packaging of the product were inextricably linked. The WLK trade mark and the packaging (including the words, colours and patterns) should be treated as one inseparable whole by the courts and both therefore belonged to GPC without the need for separate registration of the design rights to the can. GPC therefore claimed the exclusive right to use the packaging design to sell herbal tea. JDB argued that the design rights to the red can had always belonged to them. In 2000, Chan Hung To, chairman of both Hung To Group and JDB at the time, had unsuccessfully applied for the design rights to the red can. Despite this failure, JDB argued that they had the exclusive right to design the packaging under the original licence with GPC. Therefore, they argued, it was JDB that had made the red can a well-known design in China, and the can's design rights were the intellectual property of JDB.

On 30 November 2012, GPC filed a claim at Guangzhou Intermediate Court for RMB 10 million against JDB and Chung (the owners of a store in Guangzhou which stocked JDB's products) claiming that the continued use of the red can constituted unfair competition. In addition to the damages, GPC also applied for an injunction to stop JDB using advertising slogans associated with the WLK trade mark. JDB was found by the court to be using slogans including "WLK has been changed to JDB" and "the red canned herbal tea has been changed to JDB". The court found that the herbal tea being sold by JDB had only been recently developed following its loss of the WLK licence; the drink had not existed prior to that and therefore could not have changed its name. WLK brand herbal tea had been popular for years and enjoyed a leading position in the market, whereas the herbal tea drink JDB was selling was new to the market. On the issue of unfair competition, the court found that a company offering "the popular red canned herbal tea drink" would lead the public to assume that they were selling WLK herbal tea. Therefore, the court found that JDB had been misleading consumers into believing that its products were the same as WLK. In January 2013, the court granted GPC an injunction prohibiting JDB from using advertising slogans linking their product to the WLK brand.

The unfair competition case is currently under appeal. The herbal tea dispute has been well publicised, and similarly complex disputes are likely to come before the courts as Trademark Law continues to evolve in China.

C. Apple's dispute with Proview Technology (Shenzhen) Co Ltd ("Proview Shenzhen") over the "iPad" trade mark made headlines all over the world in 2012. Proview (Taipei) became the first company to register the "Ipad" trade mark eight years before Apple designed its iconic tablet

computer. Proview (Taipei) gave up on its “Ipad” development, but kept the registered trade mark. Apple, through a subsidiary development company, entered into an agreement with Proview (Taipei) transferring the worldwide rights to the “iPad” trade mark to Apple for £35,000. However, a careless mistake in the contract meant that the trade mark rights to “iPad” in China were not included. In China, the “iPad” trade mark was owned by Proview Shenzhen and Proview (Taipei) was not entitled to sell it. Proview Shenzhen was in financial difficulties and only became aware that the transfer agreement with Apple did not cover China after it became insolvent.

Proview Shenzhen filed a lawsuit against Apple, claiming up to USD 400 million in compensation for infringement of its “iPad” trade mark in China. In June 2012 Apple reached a settlement with Proview Shenzhen for USD 60 million and the “iPad” trade mark was transferred to Apple on 27 July 2012. The case underlined the importance of having clear strategies in place for global IP rights and highlighted the huge potential costs of carelessness when drawing up trade mark agreements. It also shows how important it is for foreign firms doing business in China to appreciate the diversity of the laws governing different jurisdictions when drawing up contracts.

D. Other than the Michael Jordan case outlined at A above, several high profile celebrities have been involved in trade mark claims in 2012. Chinese basketball star Yao Ming, filed a lawsuit against Wuhan Yunhe Big Shark Sporting Goods Co Ltd (“Wuhan Yunhe”) claiming violation of his trade mark and image rights. Wuhan Yunhe produced and sold a line of sports products branded as “Yao Ming Generation” without the athlete’s authorisation. On 21 September 2012 Hubei Provincial Higher Court of Appeal ruled against Wuhan Yunhe and awarded damages of RMB 1 million for economic loss and legal expenses.

Former Olympic 110m hurdles champion Liu Xiang applied to register his name as a trade mark in 2012. However, the trade mark Liu Xiang had already been registered by Shanghai Liu Xiang Industrial Co Ltd some 26 years earlier so the famous sportsman’s application was dismissed. Nike International, acting on behalf of the athlete, has now filed a lawsuit against Shanghai Liu Xiang challenging the decision of the State Administration for Industry and Commerce (SAIC) Trade mark Review and Adjudication Board.

The success of Chinese athletes at the London 2012 Olympics led to a number of new applications for trade marks by companies and individuals keen to capitalise on merchandise sales. The names of many of China’s latest Olympic champions, including the new swimsuit brand “Ye Shiwen”, have already been registered as trade marks.

The trend of registering famous names in the hope of selling on the trade mark for a huge profit is not limited to sports stars’ names. In October 2012 Chinese author Mo Yan was awarded the Nobel Prize for Literature and received widespread media attention. His name was quickly registered as a trade mark for various goods. An engineer from Beijing registered Mo Yan as a liqueur trade mark and sold the rights on for a transfer fee of RMB 10 million, more than 10,000 times the registration fee.

E. The trade mark dispute over the “GELI” brand between Gree Electric Appliances, Inc of

Zhuhai (“Gree”) and Shenzhen Gelixing Technology Development Co Ltd (“Shenzhen Gelixing”) was another notable case in 2012.

The initial application for the registration of “GELI” as a trade mark was made by Peng in August 2004. It was accepted as a trade mark for use in refrigerators in February 2007. The trade mark rights were assigned to Shenzhen Gelixing, a company specialising in the technical development and sale of refrigerators, freezers and washing machines.

Gree, a well-established company with a strong reputation in the home appliance industry, applied to the Trade Mark Review Board for cancellation of the “GELI” trade mark in 2012. Gree presented their own trade mark “GREE” which was registered in October 1998 and images showing the use of the brand in refrigerators and other refrigeration equipment. Gree claimed that “GREE” had been a popular trade mark for many years and was associated with high quality goods. They claimed that “GELI” was a clear imitation of “GREE” designed to confuse customers as the two trade marks related to similar goods. Shenzhen Gelixing argued that there were obvious differences between the two marks and that “GELI” was not an imitation. SAIC found that the pronunciation of “GELI” and “GREE” was similar and that both trade marks related to similar goods, in this case refrigerators. The Trade Mark Review Board ruled that the “GELI” trade mark should be cancelled in terms of similar goods to “GREE”. On appeal Beijing First Intermediate People’s Court and Beijing Supreme People’s Court both affirmed the board’s decision.

4) Anti-monopoly cases

Other than the copyright, patent and trade mark cases outlined so far, there were a number of other significant IP cases in 2012 involving less common causes of action such as anti-monopoly, trade secrets and unfair competition.

Anti-monopoly legislation in China is governed by the Circular of the Supreme People’s Court on Promulgation of the Amended Regulations on Causes of Action in Civil Cases (“the Regulations”). Even though the number of anti-monopoly cases has been small, the Regulations have had a significant impact since they were introduced in April 2008, particularly on the relationship between foreign and domestic companies.

Johnson & Johnson Medical (Shanghai) Ltd and Johnson & Johnson Medical (China) Ltd (together “Johnson & Johnson”) control a significant share of the medical supplies market in China. In July 2008, without authorisation from the National Development and Reform Commission’s (NDRC) Department of Price Supervision, Johnson & Johnson significantly reduced the minimum price suppliers of its surgical sutures could charge the medical profession for their products in a bid to increase its market share. Johnson & Johnson had been operating through Rainbow Medical Equipment & Supplies Co (“Rainbow”), which paid a deposit to Johnson & Johnson in exchange for the right to sell its products. Johnson & Johnson suspended the agreement with Rainbow, took the deposit and cancelled the supply of surgical sutures. The company cited

Rainbow's failure to deliver goods to order as the grounds for suspending the agreement. Rainbow argued that Johnson & Johnson had no grounds for suspending the agreement and by significantly reducing the price of the sutures was acting with monopolistic intent. In the first anti-monopoly case since the introduction of the Regulations, Rainbow sued Johnson & Johnson claiming RMB 14 million in compensation.

Anti-monopoly cases often involve "vertical agreements" with the upstream business able to impose restrictions on the rights of the downstream businesses to supply the product. In this case, the distribution contract between the two parties included a clause setting the minimum price at which Rainbow was allowed to sell Johnson & Johnson's products. When deciding whether the agreement was monopolistic or not, the courts had to consider whether the parties intended to eliminate or restrict competition. The evidence provided by Rainbow did not show any intention on the part of Johnson & Johnson to restrict production across the surgical suture market, nor did it show that the contractual arrangement on minimum pricing was aimed at reducing competition, controlling product supply or changing the price of sutures across the Chinese market. On the contrary, the defendant produced evidence to show that there were many suppliers of similar products, and the agreement with Rainbow would have been insufficient to achieve a monopoly. Shanghai First Intermediate People's Court dismissed Rainbow's claim. In addition, the court held that the damages claimed by Rainbow could have been remedied under the contract.

In February 2013, a high profile anti-monopoly case involving one of China's most famous producers of premium liquor, Kweichow Maotai Co Ltd ("Maotai"), came before the courts. Maotai and Wuliangye Group were fined RMB 449 million for breach of the anti-monopoly regulations, a huge payout which represented 1 percent of their total sales income for 2012. The companies are also facing additional punishment by the NDRC as their actions created a virtual monopoly.

5) Trade secret cases

Technical information and management knowledge are of huge significance to many enterprises, so protection of trade secrets is regarded as a crucial part of IP protection in China. A long running and significant case in the pharmaceutical industry that highlights the complexities of trade secret litigation came to an end in 2012.

At the end of 2005, in order to improve the production of D-calcium pantothenate for its products, Shandong Xinfu Pharmaceutical Co Ltd ("Xinfu") sent security manager Jiang Honghai to Lin'an, a city in Hangzhou, to obtain trade secrets from Zhejiang Hangzhou Xinfu Pharmaceutical Co Ltd ("Xinfu"). Mr Honghai obtained vital trade secrets about Xinfu's production technology by offering bribes to Xinfu workers. Lin'an People's Court found that Mr Honghai had hired Jiang Xinhai to obtain the trade secrets and Mr Xinhai had hired four fellow Xinfu workers (Xie Bolong, Chen Lei, Jiang Xinxiang and Ma Jifeng). Together they obtained trade secrets and were paid for supplying information to Mr Honghai. As well as disclosing business secrets Jiang Xinxiang

instructed two men, Yang Quanlong and Pan Weidong, to sabotage and damage Xinfu's machines and equipment. These acts of sabotage significantly affected Xinfu's business and added further charges to the list of criminal actions brought against Jiang Xinxiang. Mr Xinxiang, Mr Honghai and all of those involved in the disclosure of trade secrets and damage to Xinfu's equipment were sentenced to prison terms of between two and five years. Others who played minor roles in the crimes were dealt with in separate actions.

After the criminal case came to an end in January 2010 Xinfu filed a civil claim at Hangzhou First Intermediate People's Court against Mr Honghai, Ma Jifeng and Xinfu for trade secret theft. Xinfu sought compensation for damages caused by the criminal acts of Mr Honghai and an injunction to stop Xinfu from infringing Xinfu's IP rights through the production of D-calcium pantothenate using Xinfu's technology. Xinfu challenged the jurisdiction of the court arguing that the case should be heard outside of Hangzhou to ensure a fair hearing. The Supreme People's Court agreed to transfer the case to Shanghai First Intermediate People's Court, making this the first trade secret case to be transferred to a new jurisdiction based on an impartiality challenge.

The civil case centred on two issues; firstly whether the statute of limitations applied and secondly whether the trade secrets Xinfu sought to protect were capable of being protected. Xinfu argued that as the cause of action dated back to 2005, Xinfu was outside of the 2 year limitation period for bringing a civil claim. Furthermore, they argued that the technology in question had already been widely publicised and Xinfu's trade secrets were no longer secret and, further, that its patent was not sufficient. The court held that the limitation period was suspended after Xinfu reported allegations of criminal activity and it would be calculated not from the date of the alleged infringement but from the date on which a verdict was reached in the criminal case. Hangzhou Intermediate People's Court made its final decision in the criminal proceedings on 23 February 2009, giving Xinfu two years from that date to file a civil claim. Xinfu filed the lawsuit on 6 January 2010 and therefore the statute of limitations did not prevent the claim from being heard.

On the second issue, the court found that Xinfu's patent did not disclose all the technological details, such as the detailed post-production processes and how to deal with faults and breakdowns, required to perfect the specific type of D-calcium pantothenate that both parties sought to produce. The details that were not in the public domain were of vital importance to the production of Xinfu's specific products, but not vital to producing D-calcium pantothenate, and the patent could not therefore be regarded as insufficient. These details were not accessible to the public according to an assessment by the Ministry of Science and Technology's Division of Intellectual Property Affairs so they could still be regarded as trade secrets. On 21 May 2012, the court ruled in favour of the claimant and Xinfu was ordered to stop using information that it had stolen from Xinfu. Jiang Honghai, Ma Jifeng and Xinfu were ordered to pay RMB 31,557,903 in compensation and another RMB 100,000 to cover Xinfu's legal costs. All three were held to be joint and severally liable for the damages.

This complex case demonstrates the recent trend of pursuing trade secret disputes as criminal

cases before taking civil action to recover damages. This tactic has been employed regularly over recent years as it allows victims of trade secret theft to take advantage of the investigative power of the state to build the case against the infringers. The claimant can then threaten its competitors with prison if they steal trade secrets in the future, and use the criminal case to form the basis of a civil lawsuit later on. These tactics have become an increasingly common way of pursuing trade secrets claims, but they have led to debate among academics and practitioners as to whether claimants genuinely want to protect their IP rights, or simply want a tool to defeat their competitors once and for all.

6) Anti unfair competition cases

Most of the significant anti unfair competition cases in 2012 involved Chinese internet companies battling over IP rights. A price war between online business-to-consumer retailers including 360buy.com, Suning and Gome spawned a number of lawsuits, but it was the dispute between China's leading search engines Baidu Inc (Baidu) and Qihoo 360 Technology Co Ltd (Qihoo) that captured the public's attention.

For years Baidu enjoyed an unparalleled reputation as China's leading domestic search engine and Qihoo operated a successful web browser. On 21 August 2012, Google, the default search engine used by Qihoo's browser, was replaced by a new search engine developed by Qihoo called Qihoo 360, effectively launching Qihoo into the search engine market and placing it in direct competition with Baidu. A legal fight over online IP rights which became known as the "3B war" had begun.

Baidu commissioned a detailed technological analysis of the Qihoo 360 search engine and found that Qihoo had allegedly obtained a significant amount of information from the Baidu Knows and Baidu Encyclopaedia products in violation of the international "Robots.txt protocol" on search engine technology protection. Baidu alleged that the results of searches carried out using Qihoo 360 were identical to those that appeared when the same search was carried out on Baidu. At the very least, Baidu claimed that Qihoo had copied the page structure and design style of Baidu. Baidu owns the IP rights to the results page design as well as the Baidu Knows, Baidu Encyclopaedia and Baidu Tieba platforms.

In addition to the claim that Qihoo had infringed Baidu's copyright, many of the entries uploaded to the Baidu Encyclopaedia were already registered as the intellectual property of other individuals and companies, meaning the content could not be copied without each individual copyright owner's permission. According to the "Robots.txt protocol", Baidu is obliged to protect the IP rights of those with entries on Baidu Encyclopaedia.

Baidu did not limit its claim to copyright infringement; it also accused Qihoo of unfair competition. When searching for the word "Baidu" in the Qihoo 360 search engine, users were allegedly shown a screen telling them that "Baidu has broken down" even though the site was

working. Baidu claimed this effectively misled customers into believing that Qihoo 360 was the only option available to them. Baidu accused Qihoo of breaching article 14 of China's Anti Unfair Competition Law, which states that: "an operator shall not utter or disseminate falsehoods to damage the goodwill of a competitor or the reputation of its goods". Baidu claimed that Qihoo's unfair competition had resulted in a fall in Baidu's market share and a rise in the popularity of other search engines, including Qihoo 360. The case is ongoing.

7) Criminal cases involving IP infringement

As the importance of protecting IP rights continues to increase in China, the difficulty of cracking down on infringement through civil cases and administrative action has become increasingly apparent. The government appreciates the need to tackle serious IP infringement through the criminal courts, and this approach can clearly be seen in a trade mark infringement case from 2012 involving the international mobile phone manufacturer Blackberry.

"Blackberry" is a registered trade mark in China, and the popular mobile phone's IP rights belonged to Canadian firm Research in Motion Ltd ("RIM"), as it was then known. The Blackberry trade mark covers use of the name and logo in data processing equipment, transmitters and mobile phone software. From March 2009, the defendant company, Liu, began collecting broken or discarded Blackberry handsets and purchased keyboards, loudspeaker devices, flash devices for mobile cameras and other accessories which they labelled with the Blackberry name and logo. Without the authorisation of RIM, Liu used these parts to assemble fake Blackberry mobile phones, labelled them as real Blackberrys and sold them. The infringing enterprise was worth an estimated RMB 290,000.

A total of four defendants were jailed at the first instance hearing. The two junior members of the group were sentenced to terms of a year and four months and three and a half years respectively. They appealed to Shenzhen Intermediate People's Court but the original decision was upheld. The two ringleaders were sentenced to 15 years in prison each and fined RMB 150,000. Some commentators argued that compared with other trade mark infringement cases the figures involved in this case were not particularly high, and the general public reaction was that the sentences were too harsh.

Article 1 of the Supreme People's Court and the Supreme People's Protectorate's Interpretation of the Specific Application of Law in Hearing Criminal Cases of Intellectual Property Right Infringement ("the Interpretation") states that where the value of an illegal business operation is more than RMB 250,000 or the proceeds are more than RMB 150,000, the infringing individual will be deemed to have committed an "especially serious" breach of Article 213 of the Criminal Law of the People's Republic of China. The infringing party should therefore be sentenced to a fixed-term of imprisonment of not less than three years but not more than seven years and also face a fine at the discretion of the court. Despite this guidance, the court still

held that in this case, because the value of the illegal business operation was RMB 290,000, the sentence was appropriate.

The Blackberry case was well received by trade mark owners as it showed the willingness of the People's Courts at various levels to take a leading role in protection of IP rights by imposing tough criminal sanctions on infringing parties.

When IP disputes arise in China most parties will now file a claim with the courts, which have become the primary forum for resolving disputes. Trials offer a costly route to solving disputes and the threat of court action often leads to settlements. Increased collaboration between companies and administrative bodies such as the trade mark, patent, copyright and anti-monopoly offices, is also helping to resolve IP disputes more efficiently. The use of arbitration and alternative dispute resolution is growing in China. When agreed by both parties, arbitration can offer a simpler approach to IP dispute resolution than litigation. The proportion of IP cases arbitrated by the Beijing Arbitration Commission is on the rise, with technical contract disputes, franchise disputes and IT disputes forming the majority of the commission's caseload. The proportion of arbitration cases involving online businesses also continues to grow, with a 20% increase in 2012. The professionalism, efficiency, flexibility and fairness of the arbitration commission has been one of the primary reasons for the increasing popularity of the process in recent years.

4. Academic opinions

Throughout 2012 a number of leading academics published articles on IP protection, including everything from government-commissioned legislative studies to individual research published by legal experts and themed studies focussing on IP rights in specific sectors.

1) Studies on online dissemination of copyrighted material

In one of the most persuasive studies of 2012 Kong Xiangjun published an article, Study on Copyright Infringement Through Online Dissemination, in People's Judicature magazine. Kong suggested that online dissemination of copyrighted material should be divided into two categories: firstly the active upload or provision of copyrighted works by an individual infringer and secondly all other forms of online information dissemination such as providing a website or an app which is used by infringing individuals. Successful copyright infringement claims will usually fall into the first category.

When dividing online dissemination into the two categories Kong argues that it is important to consider both the technical distinction and, more importantly, the legal distinction between the two. From the copyright owner's perspective, it is important to establish that the infringing party has violated the owner's exclusive right to disseminate the information. Where the copyrighted

works are disseminated to the public through websites which allow consumers to download, browse or otherwise access the material the infringer will clearly have breached the owner's exclusive right to disseminate the copyrighted material. It does not matter whether the infringer disseminated the copyrighted material alone or in collaboration with an online company or publisher, the legal test for breach of copyright will be met. From the infringing party's perspective, only where someone has put a copyrighted work online without prior permission from the owner has that party committed direct infringement of the owner's exclusive right to online dissemination. Other online activities such as providing the app or website used to download the material will be categorised as an indirect infringement of the owner's copyright. This is the essential difference between direct and indirect infringement.

2) Studies on the transfer of audiovisual performers' rights

On 26 June 2012 the Beijing Treaty on Audiovisual Performances ("the Treaty") was signed, providing a multilateral international framework to regulate copyright laws for audiovisual performances and enhance performers' rights. The Treaty entitles performers to authorise or prohibit anyone from using their image, voice or any other aspect of their performance. Rights previously available only to authors and composers are available to audiovisual performers following the Treaty's implementation in China. The article of the Treaty dealing with audiovisual performers' rights upon transfer of their audiovisual works to another distributor was not mandatory and signatories were entitled to use their own domestic legislation to comply with the Treaty. Prior to the Treaty, China had no domestic legislation dealing with the rights of audiovisual performers on transfer of their works. However, a number of disputes arose in this area prior to 2012 leaving judges with no basic law to apply and a dilemma as to how to protect performers' rights.

In his article, *Discussion on the Transfer of Performers' Rights in Audiovisual Works*, Yu Tian argues that in order to solve the dilemma two basic principles should be established. Firstly, the concept that "contract is king" should be applied, allowing performers to rely on agreements rather than statutory rules when disposing of their IP rights. Secondly, where no contract exists, or where the contract is unclear, once the performer has agreed to record their work and is aware of the intended use and distribution of the recording, the economic rights should belong to the producer. The producer will then be entitled to distribute the recording and profit from that distribution, and receive any royalties for the audiovisual work and any subsequent related profits. While the producer will control the economic rights and distribution, the performer should still be entitled to receive remuneration for his or her work. Where the producer transfers the economic rights, the performer's right to recover remuneration should be enforceable against the transferee.

3) Studies on abuse of patent rights

Abuse of patent rights by non-practising entities (or "patent trolls") has a serious impact on the

interests of the state and the public. Academics have argued that the government needs to take steps to ensure that powers are available to deal with the problem of non-practising entities using their registered patent rights to eliminate or restrict fair market competition. In an article published in *Intellectual Property Magazine* entitled: *The Meaning and Prevention of Abuse of Patent Rights*; Yin Xintian proposes a two-pronged approach to preventing the abuse of patent rights based on powers already available to the authorities. Firstly, he argues that where possible the patent abuse should be dealt with by the authorities under the Anti Monopoly Law. Secondly, where a party is being unfairly restricted from entering a certain industry due to patent right abuse then that party should be granted a compulsory licence under the Patent Law. This second approach would deal with situations where the patent abuse does not constitute monopolistic behaviour, but the patentee is still restricting use of technology that could help develop an industry, while not using that technology themselves. In this scenario, a party could apply for a compulsory licence to use the patented technology. By using the two approaches outlined above, Yin argues that the authorities already have the tools at their disposal to tackle those companies who register patent rights but do not use them.

4) Studies on “post-licensing goodwill”

The highly-publicised trade mark battles over the iPad and WLK herbal tea brands brought the issue of “post-licensing goodwill” to the public’s attention in 2012. Post-licensing goodwill is essentially any goodwill the trade mark attracts during the lawful licensing of that trade mark to the licensee. Where a party uses another’s registered trade mark without prior authorisation, and that registered trade mark has no goodwill or reputation, the ownership of any goodwill which accrues to the trade mark during that unauthorised use is likely to be disputed.

In an article entitled *Discussion on Post-licensing Goodwill from Licensed Use and Ownership of Intellectual Property Rights*, Tao Xinliang and Zhang Dongmei argued that post-licensing goodwill can be transferred to the licensee even if not specifically provided for in the assignment agreement. In *Hong Kong Jiaduobao Group (JDB) v Guangzhou Pharmaceutical Holdings Ltd (GPC)*, it was clear on the facts that the WLK brand had been well marketed and had gained a strong reputation during the 17 year period in which it was licensed to JDB. Xinliang and Dongmei argue that JDB created a great deal of “post-licensing goodwill” for the WLK brand which did not enjoy the same success before JDB began marketing it and using the red can packaging which became synonymous with the drink.

Xinliang and Dongmei argue that the red can became a well-known brand in its own right thanks to the marketing work of JDB and the goodwill arising from that work should belong to JDB. The academics suggest that it would be proper and lawful for the “post-licensing goodwill” to transfer to JDB now that JDB has stopped using the WLK registered trade mark. In this case, two brands can now be established, herbal tea sold in a red can which JDB owns and the WLK herbal

tea brand which GPC owns. JDB should therefore have the right to continue selling herbal tea in red cans, but not to brand it as WLK.

As 2012 was the second year of China's twelfth five-year plan, the development of the government's intellectual property strategy is likely to continue at a fast pace over the next three years, particularly as Chinese enterprises become increasingly aware of the value of protecting their IP rights. We believe that IP rights will become increasingly important to Chinese businesses in years to come and will become a significant part of the public debate on innovation and China's economic future.

Section Two: Improving IP Legislation

In 2012 the third draft revision of the Copyright Law and the fourth draft amendment to the Patent Law were released one after another. A new draft revision of the Trade Mark Law is currently being prepared. The changes to these three key areas of intellectual property law will help develop an improved protection system to encourage businesses to register and enforce their IP rights in China.

1. Copyright law improvements

1) The background to, main content of and problems with the Copyright Law of the People's Republic of China (draft third revision)

In March 2012 the Copyright Law of the People's Republic of China (draft third revision) was published. Since the original Copyright Law was passed in 1990, there have been two revisions, the first designed to help China meet the requirements to join the World Trade Organisation (WTO), the second to enforce agreements made between China and America through the WTO on IP protection. China's rapid economic and social development, combined with dramatic improvements in information technology has led to the need for a third revision. The draft is designed to improve China's capacity for domestic innovation by strengthening IP protection, while also helping China to integrate further into the international community and compete with other jurisdictions to attract investment into research and development projects. Compared to the revised patent and Trade Mark Laws, the new draft Copyright Law is complicated and some of its provisions appear contradictory at first. This is because copyright legislation is shaped not just by technical developments but also by social change. In recent years the Copyright Law has lagged behind as the influence of the internet has increased, creating an urgent need for reform which the

new draft attempts to satisfy.

The new draft represents the most comprehensive change to copyright law since the internet revolution and has attracted plenty of attention. Some traditional copyright violation problems, such as piracy, have spread rapidly online, stifling China's creative industries and constraining the country's capacity for innovation. New technology and the rise of online infringement present significant challenges for the legal system. The new draft aims to balance the competing interests of creators, transmitters and public users, and adjust the copyright system to cope with the demands of an economy increasingly reliant on the internet.

The primary modifications under the draft third revision of the Copyright Law are as follows:

- A. The general administrative and regulatory issues surrounding copyright registration are clarified. For example, the definition of "works" as well as which kind of "works" copyright can subsist in is dealt with in a new set of Implementing Regulations. The basic procedural law for copyright registration and the formalities required are also standardised under the new draft.
- B. The new draft also includes the necessary amendments to bring the Copyright Law into line with international treaties signed since the last revision. The draft adds rules about a performer's rental rights to their audiovisual works and also deals with agreements as to the ownership of economic rights to audiovisual works. In the absence of a contract clearly setting out the ownership of the economic rights, the producer will own them, but the performer will still be entitled to receive payment from the producer for their contribution to the work. Any transfer of the economic rights will not compromise the performer's right to claim remuneration for their work, which can be enforced against a transferee.
- C. Regulations and interpretations issued by the Supreme People's Court that have helped shape jurisprudence in copyright cases are codified in the draft legislation. These include the Supreme Court's Regulations on Computer Software Protection, which the draft Copyright Law uses as the foundation for its section on copyright registration. These regulations are also used to deal with issues such as registration of documents and charges for registration.
- D. The draft legislation was produced following a public consultation on the key issues arising in copyright cases. One of the most significant issues the draft deals with is the basic principles on trade mark ownership for "orphan works". This has never been covered under the Copyright Law before. The draft states that users may apply to the copyright administration department of the State Council to register orphan works. Once they have paid the registration fee and demonstrated that the material is an orphan work they can use it commercially.
- E. The draft legislation gives radio and television stations the right to prohibit rebroadcasting of programmes via the internet. It also deals with computer programme licensing. A legally authorised user of a computer programme will be permitted to copy or translate that

programme for authorised use, but not for any other purposes under the revised Copyright Law. The rules on how the copyright administration department enforces the law are also included in the draft, with the department being given extended powers to confiscate and destroy illegal works. The draft also proposes the establishment of a mediation system to deal with administrative cases of copyright infringement.

The draft legislation solves a lot of the problems of the Copyright Law that have emerged in practice, but there are still many problems that need to be tackled. The position on protection of joint works remains unclear and derivative works are also not properly dealt with under the draft legislation.

2) Other new regulations

On 26 June 2012, after nearly 20 years of negotiations, the Beijing Treaty on Audiovisual Performances was signed by 122 countries. The treaty entitles performers to authorise or prohibit parties from accessing their image, voice or any other aspect of their performance. As a result of the treaty, IP rights previously available only to authors and composers are now available to audiovisual performers. The treaty was signed in 30 languages including Chinese, Arabic, English, French, Russian and Spanish. It contains provisions on the protection of copyright holders, moral rights, national registration of copyright, publishing rights and the assignment of rights. The Beijing Treaty addresses the urgent need to protect the rights of audiovisual performers against online infringement, and its adoption saw China play a leading role in encouraging countries to shelve their differences and reach a compromise. It represents a landmark agreement as it is the first international IP treaty to be signed in China.

On 26 December 2012, the Supreme People's Court issued its Provisions on the Application of Law for Trials of Civil Disputes on Infringement of Online Transmission Rights ("the Provisions"). The Provisions came into force on 1 January 2013 and offer guidance to judges struggling to adapt to the rapid development of online copyright infringement. As new platforms and content sharing systems abound online, the courts have faced a significant new challenge in protecting individual IP rights. One of the key issues dealt with in the Provisions is how to determine the extent to which Internet Service Providers ("ISPs") are liable for online copyright infringement. According to the Provisions, once an ISP commits an indirect infringement by hosting the online transmission of the copyrighted material, it will be jointly liable with the internet user who uploaded or distributed the infringing material for any damage caused to the copyright holder.

On 4 April 2012 the newly drafted Measures for the Administration of Copyright in Zhejiang Province ("the Measures") came into effect. The Measures amended the previous rules on pledges granted over copyright. Under the new system where one party grants a pledge it must enter into a written contract and register the pledge at the relevant copyright office. The licensee's rights will not take effect until registration is completed. The provincial copyright administrative department

also issued new rules about the specific requirements and procedures for registration of copyright pledges in line with national legislative guidance.

2. Patent law improvements

1) The background to, main content of and problems with the Patent Law of the People's Republic of China (draft fourth revision)

On 13 November 2011 the Opinion of the State Council on Further Enforcement on Infringement of Intellectual Property through the Manufacturing and Sale of Fake and Substandard Products was issued ("the Opinion"). The State Council acknowledged that cracking down on patent infringement and ridding the economy of fake and substandard products was a long-term, complex and arduous task. Following the Opinion, SIPO began reviewing the patent enforcement framework in China and suggesting improvements to the Patent Law.

The Patent Law was introduced in 1984 and has been amended three times, in 1993, 2001 and 2009. The revisions to date reflect the increasingly important role patent protection has played in the development of China's economy and the improvements in independent innovation in China.

The core purpose of the 2012 draft fourth revision is to strengthen the protection of patent rights and administrative enforcement; consequently the draft focuses on the problems encountered in practice with the administrative and judicial protection systems currently in place. The draft also introduces the concept of punitive damages to deter future infringers and crackdown on repeat or serious infringement. New tools to help protect patent rights are not the only measures introduced. The draft also seeks to improve coordination of administrative enforcement and criminal enforcement to encourage IP owners to register patents and place their trust in the legal system, to help lay a solid foundation for a more innovative Chinese economy.

The main modifications made under the draft fourth revision of the Patent Law are as follows:

- A. To solve the problems currently encountered by claimants in collecting evidence of infringement for patent disputes, the draft would grant judicial offices and administrative offices new powers to pursue investigations and carry out evidence collection. The relevant local IPO is effectively granted the same powers as the court on evidence collection and investigation under the draft. Where a party refuses to co-operate or violently resists attempts by patent office investigators to collect evidence, that party may be held criminally liable for deliberately impeding law enforcement officials.
- B. To reduce the time it currently takes for patent disputes to be resolved, the draft provides for the relevant IPO to determine the compensation payable for patent infringements. When handling patent infringement disputes, the IPO is also given new powers under the draft legislation to conduct mediations and award compensation based on any agreement

reached between the parties. If the mediation fails, the parties can still launch litigation in accordance with the Civil Procedure Law of the People's Republic of China. In practice, where mediation fails, the parties often turn to the courts and the costs of the dispute increase. Therefore, granting the administrative offices the power to determine compensation will help to settle claims at an earlier stage. The aim of the new system is to combine administrative, civil and criminal procedures to make the patent dispute system as efficient as possible.

- C. To reduce the waiting period for settlement of patent disputes, the procedure for invalidity applications is clarified under the draft legislation. After the declaration comes into effect, the court and administrative authorities will be subject to a series of time limits to encourage them to process disputes swiftly.
- D. To address concerns about low compensation payouts awarded in patent infringement cases, punitive damages are introduced by the draft legislation for cases involving intentional or serious infringement. Under the current Patent Law, damages are determined based on the actual loss suffered by the patentee. However, the damage caused by patent infringement is often far more costly than simple economic loss, with reputational damage and loss of market position often more significant. The punitive compensation system proposed in the new draft legislation is open for public consultation and the government is hoping to encourage patentees to engage actively in shaping the Patent Law.
- E. The draft legislation aims to reduce the high cost of patent litigation and address frustrations expressed by claimants at the lack of effective enforcement of judgments, by granting powers to the IPO to suppress intentional infringement (including powers to seize equipment and destroy stock).

The draft legislation aims to tackle some of the problems currently encountered in practice by taking a more joined up approach to the enforcement of IP rights through administrative, civil and criminal procedures. However, the draft does need to be more specific about how the IPOs will exercise their rights, which body will ultimately be responsible for settling certain types of dispute and how the authorities' powers to suppress intentional infringement will be limited to avoid over-zealous enforcement.

2) Other new regulations

In 2012 four major provincial laws on patent protection were amended as follows:

- A. The Regulations of Sichuan Province on Patent Protection were published on 29 March 2012 and came into effect on 1 May 2012.
- B. The Regulations of Gansu Province on Patent Protection were passed on 1 June 2012, coming into effect the same day. These regulations provided for all patent administration offices at or above county level to strengthen their law-enforcement teams, establish

or optimise their supervision examination system and resolve disputes according to the Patent Law without the need for litigation. Additional rules were also introduced covering specific issues such as publication of patents, industrialisation of patented processes, tax, intermediary services, legal aid and administrative penalties. The regulations were a significant step in boosting the development of patent protection in Gansu to help foster independent innovation and economic development.

- C. The Regulations of Shanxi Province on Patent Protection were passed on 12 July 2012 and came into effect on 1 October 2012. The new regulations build on a previous set of rules from 2003, and reflect the fact that the IP landscape has changed markedly in the past decade. The scope of patent protection is extended under the new regulations to all aspects of the creative process including initial design, patent application, protection and management. The regulations also detail a standard system for patent applications and revocation proceedings to reflect problems encountered in practice.
- D. On 26 July 2012 the Regulations of Guangxi Zhuang Autonomous Region on Patent Protection were passed, coming into force on 1 September 2012.
- E. On 14 May 2012 the Measures of Guangzhou City for Handling Patent Disputes were published, coming into effect on 30 July 2012. These measures amended the previous procedural rules for handling patent disputes as follows: the previous provision in articles 14 and 15 for city officials to “temporarily suspend or seize goods” now allows them to “seize or detain goods”; and article 17 now gives city authorities the power to instruct an inspection team from the IPO to investigate, examine, seal up or temporarily suspend trading of goods, materials, accounting books and equipment used in suspected patent infringement.

3. Trade Mark Law improvements

1) The background to, main content of and problems with the Trade Mark Law of the People’s Republic of China (draft third revision)

Intellectual property law was reviewed step by step over the course of 2012, with the draft revision to the Trade Mark Law the last of the three major pieces of draft legislation to be published. On 24 December 2012 the Trade Mark Law of the People’s Republic of China (draft third revision) was released by the Standing Committee of the National People’s Congress (“NPC”). It was then published on the NPC website on 28 December 2012 for public consultation.

The Trade Mark Law was first published on 23 August 1982, and was the first piece of Chinese legislation to deal with a specific area of IP protection. It continues to play a crucial role in the development of China’s economy. As the economy has developed over the past three

decades the Trade Mark Law has been amended twice, in 1993 and in 2001. The new draft focuses on making the application process simpler and more convenient, maintaining control over the market and strengthening the protection of exclusive trade mark rights online.

The main modifications under the draft third revision of the Trade Mark Law are as follows:

- A. For well-known trade marks, the authorities' starting point will be to provisionally award protection upon application while the trade mark registration application is being examined. In a bid to tackle the problem of abuse of well-known brand names, in the event of an enterprise using another's well-known trade mark as their trading name and misleading the public, the infringer will be dealt with under the Anti Unfair Competition Law.
- B. The draft legislation provides for symbols, sounds and single colours used on goods or packaging which have become distinctive to be registered as trade marks by companies and individuals. In addition, draft legislation amends the rule that each individual type of product must be protected by a separate trade mark if it falls into a separate class to allow an applicant to protect a whole range of goods, or branded goods, through a single trade mark.
- C. The draft legislation introduces punitive damages for malicious or serious trade mark infringement, with the amount awarded to a successful claimant under the new law potentially up to three times higher than the current average award. The draft legislation builds on the practices of foreign countries in an attempt to tackle the problems many claimants encounter in obtaining evidence of infringement and to help claimants secure larger compensation awards. The draft provides for the People's Courts to order the defendant to submit its account books and all information regarding infringement to the court to determine the true value of the infringement. If the infringing party refuses to submit the account books or submits a false version, the court can determine the amount of compensation based solely on the amount claimed by the trade mark owner. Under the new legislation, where the court is unable to determine the trade mark owner's actual losses, the judge will have more power to take into account the infringer's gains from using the registered trade mark can be used to calculate damages. This means that where compensation awards were previously only issued for around RMB 50,000, amounts up to RMB 1,000,000 may now be awarded; however most judges in practice will continue to stick to the average award issued in their province.

While the draft legislation has yet to be implemented, the modifications suggested in it would solve many of the problems currently encountered in practice. However, several issues on compensation and settlement still need to be addressed.

2) Other new regulations

Two major pieces of provincial trade mark legislation were passed in 2012:

- A. The Measures of Qinghai City for the Protection and Certification on Well-known Trade marks were passed on 4 January 2012 and came into effect on 1 March 2012.
- B. The Measures of Guizhou City for the Protection and Certification of Well-known Trade marks were passed on 1 February 2012 and came into effect on 1 May 2012. The measures deal with how to define a well-known trade mark and also provide that from the moment a well-known trade mark is registered in Guizhou, any application to use that well-known trade mark or a similar trade mark as the name of an entity operating in the same industry must not be accepted. Any application to register the well-known trade mark or a similar trade mark as the name of an entity operating in a different industry, which could mislead the public and damage the interests of the trade mark owner, should also be rejected. The measures also state that a network domain name or a trade mark that is not registered should not copy or imitate any well-known trade mark in Guizhou, nor should it imply there is any connection with that well-known trade mark. Any other conduct prejudicing another party's right to use its registered trade mark is also prohibited under the new measures. Where any well-known trade mark is infringed outside of Guizhou, the Guizhou industrial and commercial administrative department may issue a certificate, offer consultation or guidance or cooperate with other provinces to assist the trade mark holder. Where any well-known trade mark in Guizhou is used by any organisation without permission of the trade mark holder anyone who illegally uses the words or logo of that trade mark can be subject to a fine from the Guizhou industrial and commercial administrative department. The infringing party will be fined not more than RMB 30,000 and not less than RMB 5,000 depending on the scale of the infringement.

4. An introduction to the “3-in-1” trial model

The “3-in-1” trial model provides for all civil, criminal and administrative cases involving IP to be handled by IP tribunals. Under the current system the three different aspects of a case are dealt with separately by various bodies.

The earliest example of a “3-in-1” trial dates back to 1995. When hearing the civil criminal and administrative trade mark infringement case of “Feiying” (owned by the Sino-US joint venture Gillette Ltd) the Shanghai Pudong New Area IP tribunal worked with civil, criminal and administrative tribunals to hear the case together. On 1 January 1996 the Pudong court officially set up a 3-in-1 pilot project. At the time this method was christened the “Pudong Model” by the late IP expert Zheng Chengsi, later becoming known as the 3-in-1 model.

In August 2006, Guangdong Supreme People's Court released its "Circular on Implementing 3-in-1 Trial Model Reforms" and a pilot programme was launched in several local courts. The pilot was carried out in Guangzhou Tianhe District People's Court, Shenzhen Nanshan District People's Court and Foshan Nanhai District People's Court. After successful trials in these three areas, the model was used in courts in Jiangsu, Zhejiang and Hubei. The pilot gradually spread across the rest of China in the following years.

In the first half of 2012, the Supreme People's Court followed up on the pilot by establishing a coordination mechanism for civil, criminal and administrative trials involving IP disputes. By the end of June 2012 there were 5 supreme courts, 50 intermediate courts and 52 local courts carrying out "3-in-1" trials for IP cases.

The "3-in-1" model not only helps the courts to establish the facts of a case more efficiently, it also prevents various courts from making different decisions based on the same facts. It offers a means of resolving the conflicts among civil, criminal and administrative courts and could help save costs, speed up the process and reduce the number of full trials. Compared to the traditional approach the "3-in-1" model is more professional, more cost-effective and offers a quick process for rights owners.

The three major legislative changes discussed above are vital to the effective development of China's IP protection system. The government's decision to release these revised laws in quick succession should help to overhaul the current system as efficiently as possible. The new patent, copyright and trade mark laws will come into effect within months of one another, aiming to solve many of the problems currently encountered in practice.

Section Three: IP Cases

1) Copyright Cases

A. *Encyclopaedia of China Publishing House Ltd v Apple Electronic Products Trading (Beijing) Ltd & Apple Inc*

In September 2012, Encyclopaedia of China Publishing House Co Ltd filed a lawsuit against Apple Electronic Products Trading (Beijing) Co Ltd & Apple Inc ("Apple") over the Encyclopaedia of China (Simplified & Traditional) app which Apple's App Store was selling for USD20.99. The claimant alleged that the app infringed the encyclopaedia's copyrighted Chinese History (1st edition) Volume 3 and sought 530,000 RMB in compensation. In November 2012, Beijing Second Intermediate People's Court issued its first instance ruling in favour of the claimant and ordered Apple to pay 500,000 RMB in compensation. Apple has appealed, and that case is ongoing.

The appeal centres on the extent to which Apple can be held liable for apps which appear in the App Store. Apple argued that the app was developed and uploaded by a third party called “Zhoulianchun”; therefore they should not be responsible for the infringement. The court held that Apple could not prove that “Zhoulianchun” was the actual developer, and therefore could not prove the app was developed by a third party so the court had to assume the app was developed by Apple. Even if they had been able to show that the app was developed by a third party, since Apple was involved in the development process and selected the product for inclusion and distribution in the App Store it should still be liable for infringement of Encyclopaedia of China’s copyright. Apple also benefited financially from the sales of the app, which the court held would constitute joint infringement with the third party even if Apple could prove that third party developed the infringing app.

All products in the App Store are selected by Apple. The distributor cannot claim it did not know about the infringement as it should have known the nature of the product before agreeing to distribute it. Therefore the “safe harbour” defence is not available to app distributors. In other words, as long as the copyright owners find the infringing products in the App Store, they can file a lawsuit against the infringers without giving notice and join the distributor to that lawsuit. The significance of this ruling is that all App Stores must meet their duty of care to prevent third parties from using their stores to distribute infringing products.

B. Baidu v Qihoo 360

For years Baidu has enjoyed an unparalleled reputation as China’s leading domestic search engine and Qihoo has operated a successful web browser. On 21 August 2012, Google, the default search engine used by Qihoo’s browser, was replaced by a new search engine developed by Qihoo called Qihoo 360, effectively launching Qihoo into the search engine market and placing it in direct competition with Baidu. An online intellectual property battle which became known in China as the “3B war” began between the two companies.

Baidu commissioned a detailed technological analysis of the Qihoo 360 search engine and found that Qihoo had allegedly used a significant amount of information from its “Baidu Knows” and “Baidu Encyclopaedia” products in violation of the international “Robots.txt” agreement on search engine IP protection. Baidu found that the results of searches carried out using Qihoo 360 were identical to those that appeared when the same search was carried out on Baidu. At the very least, Baidu claimed that Qihoo had copied the page structure and design of Baidu’s results page. Baidu owned copyright in its results page design as well as the Baidu Knows, Baidu Encyclopaedia and Baidu Tieba platforms.

When searching for the word Baidu in the Qihoo 360 search engine, users were allegedly shown a screen telling them that “Baidu has broken down” even though the site was working. Baidu claims this effectively mislead customers into believing that Qihoo 360 was the only option available to them. Baidu sued Qihoo 360 for unfair competition relying on article 14 of the Anti Unfair Competition Law, which states that an operator shall not utter or disseminate falsehoods to

damage the goodwill of a competitor or the reputation of its goods. Baidu took action against Qihoo 360 on three fronts, for infringement of trademark, copyright and unfair competition.

The Beijing First Intermediate People's Court ruled against Qihoo and ordered it to stop all infringing activities and pay RMB 450,000 in damages and costs to Baidu. Qihoo has appealed against the verdict and the case is still ongoing.

C. Microsoft v Beijing E-Future Information Technology Inc

Popular software including Office, Visual studio, Windows and Internet Explorer is copyrighted to Microsoft Inc. Microsoft found that Beijing E-Future Information Technology Inc ("E-Future") had been using its software without permission on computers located in its representative offices, service stations and innovation centres in Wuhan. With notarised evidence of this use of pirated software, Microsoft filed a civil claim at Wuhan Intermediate People's Court, requiring evidence preservation of the infringement at E-Future's representative offices in Wuhan and its Beijing head office. E-Future argued that more than 95% of staff used their own computers bought from home and so E-Future could not be held liable for infringement by individual staff members.

The Court of First Instance found that the computers were owned by individual staff members and the use of those computers was not limited to the workplace. However, E-Future specialised in providing software services for other companies, so the company could have been in no doubt that staff would have to use computer software while at work. Microsoft was able to provide evidence that E-Future not only used its products but also required all staff to be able to use them as a condition of their employment contract. Although the company did not own the computers, subsidies were given to staff to enable them to buy computers for themselves. The court heard that the primary reason staff installed pirated software was to provide services for clients. Bearing in mind all of these factors the court found E-Future liable for infringing Microsoft's rights. Applying the Tort Law of the People's Republic of China, the court found E-Future liable for all damages to Microsoft caused by staff through unauthorised use of their products and ordered E-Future pay more than 3 million RMB to Microsoft in compensation.

This case highlighted some of the key issues that online and remote working creates for protection of IP rights. Fewer physical restrictions make for a more flexible workplace and more flexible concepts of company property ownership. Who pays for and uses a computer and where that use takes place are not necessarily the decisive elements in determining whether that computer is being used for a commercial activity. Instead, the closeness of the connection between the use of the software and the company, the profile and technical requirements of the software and whether the desired result of the software use is commercial gain will be taken into consideration.

D. China Shanghai Character Licence Administrative Co Ltd v Shanghai SynaCast Media Tech Co Ltd

China Shanghai Character Licence Administrative Co Ltd ("CSCLA") found that a TV play called Golden Hero which it had produced could be played through a website, www.pptv.com,

run by Shanghai SynaCast Media Tech Co Ltd (“SynaCast”). CSCLA preserved evidence of this alleged infringement. The evidence was later made into a notary certificate supervised and signed by a notary. When this process was complete, CSCLA asked SynaCast to delete all the infringing videos on its website, which SynaCast did on the same day the request was made. CSCLA then sued SynaCast for violation of its intellectual property rights.

The court ruled in favour of CSCLA and ordered SynaCast to pay compensation for damage caused by the infringement and for the reasonable legal fees of CSCLA. SynaCast was ordered to pay RMB 22,000 to CSCLA in 10 days, while several other claims made by CSCLA were dismissed.

Both parties appealed with SynaCast claiming that the evidence collection methods employed by CSCLA breached the Rules on Notary Procedures. They also appealed claiming the compensation awarded was too high. CSCLA appealed claiming that the amount was too low and claiming they could provide new evidence to show the loss they had suffered due to the infringement was significantly more than the damages awarded.

The Court of Appeal dismissed both parties’ appeals and upheld the original judgment.

The significant issues raised in this case were whether the compensation amount was too high and whether the procedure of making the notary certificate broke the law or not. In terms of compensation, according to paragraph 2, article 25, of the Interpretation of the Supreme People’s Court on the Application of Law in Civil Copyright Disputes, when determining the amount of compensation, a court shall take into consideration the type of artistic work, what a reasonable fee would be for use of that work, the nature of the infringement, the consequences of that infringement, and any other relevant circumstances. In this case, the claimant argued that the non-exclusive use fee for the TV play was RMB 95,680 and the actual loss they suffered was RMB 80,000, so the compensation awarded by the court was insufficient. The courts of first and second instance both held that the evidence was not strong enough to illustrate an actual loss of RMB 80,000 to CSCLA. Therefore taking into account the type of artistic work, the reasonable fee for use of that work, the nature of the infringement, the consequences of that infringement, and all other relevant circumstances, the Court of Appeal considered the decision of the Court of First Instance to be correct and lawful.

On the issue of the procedure for making the notary certificate, the evidence collection was carried out by an individual hired by CSCLA rather than a notary, which violated Paragraph 2, Article 5 of the Rules on Notary Procedures. However, given that the whole process of making the certificate was supervised by notaries and subsequently signed by a notary, the Court of Appeal held that the certificate was valid. This case is likely to play a significant role in guiding judges when courts are asked to consider disputes on the validity of notary certificates in the future.

E. Hunan Happy Sunshine Interactive Entertainment Media Co Ltd v Hong Li Elite Networks Club

The TV show “Invincible Ugly” was produced jointly by Hunan TV and Beijing Xiangchao

International Media Co Ltd. After seasons 1, 2 and 3, they agreed to transfer the rights to online video broadcast of the popular show to Hunan Happy Sunshine Interactive Entertainment Media Co Ltd (“Happy Sunshine”)

After finding that all 3 seasons of the show were being made available to members of the Hong Li Elite Networks Club (“Hong Li”) on computers at its clubs in Furong District, Changsha, Happy Sunshine filed a claim against Hong Li for copyright infringement.

Evidence provided by Hong Li showed that the Hangzhou Centre Online Multimedia Platform (the “Platform”) which was being used to play Happy Sunshine’s show was jointly owned by Shanghai Ao’hong Network Technology Co Ltd (“Ao’hong”) and Hangzhou Centre Online Network Technology Co Ltd (“Hangzhou Online”). Hangzhou Online authorised Hunan Huawei Network Technology Co Ltd to run the platform and supply all legitimate copies of films and media owned by Hangzhou Online. In a service agreement between Hangzhou Online, Hong Li and Hunan Weihua Network Technology Co Ltd (“Weihua”) there was a clause which provided that during the term of the agreement, Weihua was obliged to offer technical support, technical maintenance and update services as and when required.

The Court of First Instance ruled that Hong Li should pay 3,000 RMB (including the reasonable legal fees incurred by the claimant) to Happy Sunshine within 10 days. The case was appealed by Hong Li. However, the Court of Appeal dismissed the appeal and upheld the original judgment.

Happy Sunshine took separate actions against 20 internet service providers. Changsha Intermediate People’s Court heard these cases in a joint trial. Hunan Happy Sunshine Interactive Entertainment Media Co Ltd v Hong Li Elite Networks Club, was tried as a representative case.

The most significant part of this case was that Hong Li could not prove that it had obtained the TV show from a legal source and could not show that any of the other parties involved in providing the Platform had obtained the show illegally so they had to be liable for copyright infringement. The evidence produced by Hong Li only illustrated that they were not actively involved in putting the infringing content on their computers. Ao’hong had obtained the relevant lawful operational qualification certificates and no evidence was produced to show that the infringing film was provided by Weihua. This left Hong Li as the only party which could be liable for the infringement.

This case covered a wide range of issues and involved a chain of internet providers, web hosts and information technology companies. It was a well-publicised case and has had a significant influence on the industry, encouraging computer club owners to look more carefully at the law on copyright.

F. Getty Creative (Beijing) Images Technology Co Ltd v Guangdong Oppein Home Group Inc

The photo licensing company Getty Creative (Beijing) Images Technology Co Ltd (“Getty”) filed a lawsuit at Baiyun District People’s Court in Guangzhou, claiming that Guangdong Oppein Home Group Inc (“Oppein”) had used pictures owned by Getty on its official microblog without Getty’s permission. The internet service provider Beijing Micro Dream Techtronic Network

Technology Co Ltd (“Micro Dream”) runs the Sina Microblog on which the images were posted, and the ISP was added as a co-defendant to the claim. Oppein argued that the picture reposted on its microblog site came from a photo gallery operated by a piece of software called “Pipi Time Machine”. Oppein further claimed that it made no profit from use of the picture and asked the court to dismiss the case. Micro Dream argued that after receiving a complaint from Getty, they immediately deleted the picture, and therefore could not liable for any subsequent infringement by Sina microblog users.

The court held that Oppein had not checked the ownership of the copyright nor obtained authorisation to use the image when reposting the picture to the micro blog. Therefore Oppein had infringed Getty’s intellectual property rights to the work. Micro Dream, as the ISP, had not received a complaint from the claimant until after the infringement, so there was no legal basis for Getty’s claim against Micro Dream. The court ordered Oppein to delete the infringing picture and to pay RMB 1,000 in compensation.

This case typifies the growing number of infringement disputes heard in 2012 which centre on microblog platforms such as Sina. As the rapid growth of microblogs continues, this case should act as a warning to all users that when reposting other’s content it is vital to be aware of copyright and intellectual property issues.

G. Han Han v Baidu Online Network Technology (Beijing) Co Ltd

Han Han claimed that several files on Baidu Library infringed its copyright, and lodged a petition to the court to shut down the Baidu Library literature database, to require Baidu to post an apology on its homepage for one week, and to pay RMB 760, 000 in compensation. Baidu claimed that it had not infringed Han Han’s copyright as it had posted a procedure for the reporting of pirated works on its homepage and developed the “green complaint channel” which allowed those who believed their rights were being infringed by Baidu users to request deletion of links and content. On the specific facts of this case, Baidu claimed that after receiving a complaint from Han Han it had taken reasonable steps to prevent the continued upload of infringing works. Based on these arguments Baidu attempted to use the “safe harbour” defence to claim that as the internet service provider it was not responsible for the infringement of Han Han’s copyright.

The court rejected Baidu’s “safe harbour” defence and ordered the defendant to pay Han Han compensation of RMB 39,800 as well as legal fees of RMB 4,000.

Prior to this high profile case the Writers’ Rights Protection Alliance had also sued Baidu for infringement of copyright. The Han Han case was a significant milestone as it affirmed the principle that Baidu could be held liable for failure to protect copyright online. It also dealt with the limitations on the “safe harbour” principle for search engine sites like Baidu, and showed that this cannot act as a catch all defence to help relieve major websites of their liability for copyright infringement, especially after receiving a complaint from the copyright owner.

2) Trade mark cases

A. Michael Jordan v Qiaodan Sports Company Ltd and Shanghai Bairen Trading Company Ltd

In one of the most high profile cases of 2012, the American basketball legend Michael Jordan sued Qiaodan Sports Company Limited (“Qiaodan Sports”) for trade mark infringement. Jordan claimed Qiaodan Sports used a Chinese version of his name to promote its products without his authorisation. Furthermore, Qiaodan also registered the names of Jordan’s sons (Jeffrey and Marcus) and other associated names as trade marks. In total Qiaodan registered more than a dozen trade marks involving the word “Qiaodan” (in Chinese characters & Pinyin) and using the image of the basketball star.

Mr Jordan alleged that customers in China were being misled by the defendant company. Moreover, he accused Qiaodan Sports of using a Chinese version of his name, polo shirts printed with his former jersey number 23, and even the names of his sons to profit from his image and trade mark. The worldwide fame of Mr Jordan ensured that this case attracted significant media coverage both in China and in the USA.

Mr Jordan’s lawyers argued that sports goods consumers would always associate the word Jordan or its Chinese equivalent with him rather than any other individuals sharing the same name. Qiaodan Sports on the other hand, argued that Jordan is a common surname in England and America and that except for in the field of basketball merchandise the word Jordan is not synonymous with Michael Jordan. The case is still ongoing and has already led to lengthy discussion among judges and scholars, as well as in the media. However, for commercial reasons and to save costs the best choice for both parties would probably be a quick out-of-court settlement.

B. Guangzhou Pharmaceutical Holdings Ltd (GPC) v Hong Kong Jiaduobao Group (JDB)

This dispute can be traced back to 1997 when GPC entered into a licensing agreement with Hong Kong Hung To Group Ltd (“Hung To Group”). Under that agreement the WLK herbal tea trade mark owned by GPC was licensed to the Hung To Group, which further licensed the trade mark to its subsidiary JDB for sales in mainland China.

As the original licensing agreement expired, GPC and Hung To entered into a new agreement in 2000 to extend the licence to 2 May 2010. However, unbeknown to GPC, in August 2001 and August 2002 Li Yimin, former vice president of GPC, accepted HKD 1 million in bribes from Chan Hung To, president of the Hung To Group. This resulted in challenges to the validity of the licensing agreement entered into in 2000 and all subsequent agreements between the parties. In November 2002, Hung To Group and GPC entered into a supplementary licensing agreement, extending the deal until 2013. Again, in June 2003, Li Yimin accepted another HKD 1 million bribe from Chan Hung To. Later that month the two companies signed a second supplementary agreement extending the licence to 2020.

The bribery and corruption involving Li Yimin and Chan Hung To was not discovered until

April 2011. GPC had no option but to submit all of the agreements with Hung To Group to the China International Economic and Trade Arbitration Commission (CIETAC). On 11 May 2012 CIETAC ruled that both the licensing of the WLK trade mark to Hung To Group and the agreement for JDB to use the trade mark in mainland China were invalid.

With the trade mark battles over, GPC and JDB moved to a new front in the war over the lucrative WLK brand: the packaging. Both parties recognised that it was the distinctive red can design rather than just the WLK name that was attracting customers. GPC argued that since WLK was a well-known product, the trade mark and the packaging of the product were inextricably linked. The WLK trade mark and the packaging (including the words, colours and patterns) should be treated as one inseparable whole by the courts and both therefore belonged to GPC without the need for separate registration of rights for the can design. GPC therefore claimed the exclusive right to use the packaging design to sell herbal tea. JDB argued that the design rights to the red can had always belonged to them. In 2000, Chan Hung To, chairman of Hung To and JDB, had unsuccessfully applied for a trade mark to protect the design rights to the red can. Despite this failure, JDB argued that they had the exclusive right to design the packaging under the original licence with GPC; therefore, it was JDB that had made the red can a well-known design in China, and the can's trade mark rights belonged to JDB.

On 30 November 2012, GPC filed a claim at Guangzhou Intermediate Court for 10 million RMB against JDB and Chung (the owners of a store in Guangzhou which stocked JDB's products) claiming that the continued use of the red can constituted unfair competition. In addition to the damages, GPC also applied for an injunction to stop JDB using advertising slogans associated with the WLK trade mark. JDB was found by the court to be using slogans including "WLK has changed its name to JDB" and "the red-canned herbal tea has been changed to JDB".

The court found that the herbal tea being sold by JDB had only been recently developed following its loss of the WLK licence; the drink had not existed prior to that and could not have changed its name as it did not have a previous name. WLK brand herbal tea had been popular for years and enjoyed a leading position in the market, whereas the herbal tea drink JDB was selling was new to the market. On the issue of unfair competition, the court found that a company offering "the popular red canned herbal tea drink" would lead the public to assume that they were selling WLK herbal tea. Therefore, the court held that JDB had been misleading consumers into believing that its products were the same as WLK. In January 2013, the court granted GPC an injunction prohibiting JDB from using advertising slogans linking their product to the WLK brand.

C. Apple Inc v Proview Technology (Shenzhen) Co Ltd

Proview (Taipei) became the first company to register the Ipad trade mark eight years before Apple designed its iconic tablet computer. Proview gave up on its Ipad development project, but kept the registered trade mark. Apple, through a development company, entered into an agreement with Proview (Taipei) transferring the worldwide rights to the "iPad" trade mark to Apple for £35,000. However, a careless mistake in the contract meant that the trade mark rights to "iPad"

in China were not included. In China, the “iPad” trade mark was owned by Proview Shenzhen and Proview (Taipei) was not entitled to sell it. Proview Shenzhen was in financial difficulties and only became aware that the transfer agreement with Apple did not cover China after it became insolvent.

Proview Shenzhen filed a lawsuit against Apple, claiming up to 1.6 billion USD in compensation for the trade mark rights to “iPad” in China. At the same time, industrial and commercial administrative departments in China began to investigate Apple’s “iPad”. They found that Apple’s “iPad” was an infringing product, and ordered it to be removed from sale. The first instance verdict in favour of Proview was reached in February 2012 and in June 2012 Apple reached a settlement with Proview Shenzhen for USD 60 million. On 28 June 2012 Apple applied to the Court of First Instance (Shenzhen Intermediary People’s Court) for enforcement of the mediation document. According to records held by China’s Trade mark Office, the “iPad” trade mark was duly transferred to Apple on 27 July 2012.

This case underlines the importance of having clear strategies in place for global IP rights and acts as a warning to companies on the huge potential costs of carelessness when drawing up trade mark agreements. The case also shows how important it is for foreign firms doing business in China to appreciate the diversity of the laws governing different jurisdictions when drawing up contracts.

D. Yahoo! Inc v State Intellectual Property Office (SIPO)

The trade mark “Y.K YAHOO and image” (No. 124582) (the “opposed trade mark”) was applied for by Qingdao Tingfeng Textile Co Ltd (“Tingfeng”) in December 1999. The trade mark was granted for use on 24 varieties of textiles including washcloths, bath towels and bed sheets. After the initial trade mark was granted, Yahoo! Inc (“Yahoo”) submitted an opposition application within the relevant time limit. On 10 September 2003 SIPO rejected Yahoo’s application. Yahoo applied for a trade mark review and adjudication board hearing. On 6 July 2009, the review (No. 18289) ruled that the opposed trade mark could be registered and dismissed Yahoo’s case. Still unsatisfied, Yahoo filed a lawsuit at Beijing First Intermediate People’s Court. The court affirmed the rulings made by SIPO and the review board.

Before the opposed trade mark was registered, Yahoo had already registered the trade mark “Yahoo!” and “yahu” (in Chinese characters) in classes 9, 16, 25, 28, 35, 36, 48 and 42 for international classification.

In this case Yahoo’s products and the items covered by the opposed trade mark were not similar commodities or services. Companies often find the law on protecting registered well-known trade marks against similar trade names for non-similar commodities complex and confusing. This case showed that courts will consider the degree of approximation, originality, popularity and connection between the trade marks when deciding on infringement. The court held that Yahoo was a common English word and the connection with the Yahoo! brand was not strong enough to allow for protection against non-similar goods. There were also several obvious differences in this

case between the opposed trade mark and Yahoo. The Court of First Instance and Court of Appeal both ruled that the evidence provided by Yahoo was collected outside China, or from the internet, so could not be relied upon to show that Yahoo was a well-known trade mark in China before the opposed trade mark was registered. This final part of the courts' reasoning may be significant in future cases involving protection of well-known online brands.

3) Patent cases

A. Neoplan Bus GmbH v Yancheng Zhongwei Passenger Coach Co Ltd and Beijing Zhongtong Xinhua Automobile Sales Company

German firm Neoplan Bus GmbH ("Neoplan") filed a lawsuit in 2012 claiming that Yancheng Zhongwei Passenger Coach Co Ltd ("Zhongwei") and Zonda Industrial Group of China ("Zonda") had infringed the design patent of Neoplan's passenger coaches. The claim was successful at first instance and Neoplan was awarded substantial damages. Zonda applied to SIPO's Patent Re-examination Board to revoke Neoplan's design patent (which had only been granted on the third application after the first two attempts failed) on the grounds that the design was similar in appearance to a design published in Today's Coach Magazine and commonly used in China. Zonda argued that the decision to grant the patent breached Article 23 of the Patent Law (2000). Neoplan argued that the design patent published in Today's Coach Magazine was a model rather than a real design. According to Patent Review Guidance (published in 2006) patents on products which are not in the same category, such as a coach and a model coach, can be granted unless a certified comparison between the original design and the patent design is made. Following this guidance, the Court of First Instance found that the design published in Today's Coach Magazine was not in the same category as Neoplan's design patent so could not be invalidated.

Following Zonda's application to review the initial decision to grant Neoplan a patent over the coach design, the Patent Re-examination Board invalidated Neoplan's patent, finding that the information published in the magazine was intended to introduce a new design of passenger coach to the reader rather than simply displaying a model coach which was not yet capable of production. While Neoplan claimed that the picture was a model, it was, the Patent Re-examination Board found, a full design sketch of a passenger coach and Neoplan could not patent this design as it was already in the public domain. The board held that the publication of the model coach pictures was effective not only as a model, but also as a design, and their opinion was affirmed on appeal.

This case shows that the Patent Review Guidance should not be applied too rigidly. If a model of a product is sold in a toy shop and is purely intended for children to play with then clearly it should be regarded as a toy, and cannot be considered to be in the same category as a full working example of that product. However, if the model is used for display in an exhibition or at a counter (for example a mobile phone model displayed in a shop), for the purposes of displaying the features of the item to encourage people to buy it then it is a product of itself and should be

considered to be in the same category as a full working example of the product. The Neoplan case belongs in the latter category. The Patent Review Guidance (2006) must be interpreted in line with developments in intellectual property law, especially the revised Patent Law which adopts a standard of “absolutely novelty” for design patents. Following demands for more certainty in the law and more protection for creative works, a new set of Patent Review Guidance has now been published. This explicitly states the circumstances under which patent rights can transfer between different categories of design including toys, decorations, models etc.

B. Huainan Jieming Biomedicine Research Institute v Sichuan Longsheng Pharmaceutical Company Limited

Sichuan Longsheng Pharmaceutical Company Limited (“Longsheng”), under its former name of Chengdu Huahua Pharmaceutical Co Ltd, concluded an agreement with Wang Wenxian (“Wang”), one of the producers of Armillariella Syrup (“the Syrup”), agreeing that the parties would work together to produce Liangshen Nectar (the main constituent part of the Syrup). For various reasons, the parties stopped cooperating and a dispute arose when Longshen continued to produce the Syrup, claiming to be using a new technique they had developed themselves. In March 2002 Wang applied to Sichuan IPO to investigate Longshen for patent infringement. In September of that year, the IPO decided that the formation of enzymes used by the two parties was different, so ruled that Longsheng had not infringed Wang’s patent and could continue to produce the Syrup.

In 2003 the patent was transferred from Wang to Huainan Jieming Biomedicine Research Institute (“Jieming”). Jieming sued Longsheng, claiming that Longsheng had infringed the patented Syrup recipe. In January 2005, Hefei Intermediate People’s Court found that Longsheng had infringed the patent. Anhui High People’s Court affirmed the verdict on appeal. Following these rulings, Longsheng applied to the Patent Re-examination Board to revoke the patent, but this was unsuccessful. In July 2007, Longsheng applied to the Supreme People’s Court for a retrial, claiming that the judge in the original case had wrongly applied the doctrine of equivalence and that new technical evidence was available to challenge the decision. Longsheng argued that the Patent Re-examination Board had wrongly concluded that the water proportion, extraction duration and temperature used in their processes and those used in the patented process were not substantially different. Based on this, Longsheng claimed that the court was wrong to apply the doctrine of equivalence. In addition, Longsheng said the new evidence disproved Jieming’s claim that there were essential differences between the two processes in areas such as enzyme digestion at low temperatures and boiling digestion.

The Supreme People’s Court held that, in terms of the technical features, the two processes were neither entirely different nor completely identical. The court concluded that Longsheng’s technique for producing the Syrup did not infringe the patent and in April 2012 it overturned the first and second instance judgments and dismissed Jieming’s case.

As far as this case was concerned, the key issue was previous statements of the patentee rather than the technical points made by Longsheng in their appeal. In the initial claim, Jieming

focussed on the technical steps used to prepare the active ingredients of the Syrup, arguing that enzyme digestion at low temperatures and concentration at sub-atmospheric pressure rather than boiling digestion and concentration at a normal pressure were vital to produce the Syrup. However, the complex technical points made by both parties were less significant than the basic legal issue regarding consent to use patented information. The techniques Longsheng used to produce the syrup were given to them voluntarily by the previous patentee and the processes Jieming were seeking to protect could not be protected because they had already been given to Longsheng through the cooperation agreement.

C. Guangzhou IPO's investigation of Chen Jiawen

Chen Jiawen owned a canning company based in Guangzhou. His company invested in researching and developing new canning equipment that had proprietary intellectual property rights. Mr Chen was granted eight patents including an invention patent, six utility model patents and one design patent (with several other patents pending). In early 2012 Mr Chen discovered that two companies, Guangzhou Yuanxin Metal Processing and Machinery Plant Co Ltd (“Yuanxin Metal”) and Yuanxin Equipment Co Ltd were manufacturing and selling infringing canning machines. Mr Chen made a complaint to the Intellectual Property Office (IPO) of Guangzhou, asking them to take action to stop the infringement. He provided samples of the infringing products purchased from the two companies, an evaluation report summarising his patents and a guarantee bond to cover any costs incurred by the IPO. The IPO accepted the case and after an initial investigation and verification process they seized the infringing products. With the help of the IPO Mr Chen reached a mediation agreement with the two infringing companies. They admitted to manufacturing, selling and permitting others to sell infringing products and agreed to pay damages of RMB 200,000. The speed at which this case was concluded was remarkable; the Guangzhou IPO accepted the case on 24 February 2012, and it took just 59 days to close. This efficiency created positive publicity and the authorities hope it will encourage more companies to register and enforce their rights in future.

The way in which Mr Chen's case was handled highlights the growing willingness of the authorities to act swiftly to deal with clear cases of infringement. According to Article 25 of the Administrative Enforcement Law of the People's Republic of China, seizure and detainment of infringing goods should not last longer than 60 days. It is hoped that this timescale will encourage administrative offices to investigate patent cases faster and allow patentees to take advantage of these powers.

4) Anti-monopoly cases

A. Rainbow Medical Equipment & Supplies Co v Johnson & Johnson Medical (Shanghai) Ltd and Johnson & Johnson Medical (China) Ltd

Johnson & Johnson Medical (Shanghai) Ltd and Johnson & Johnson Medical (China) Ltd

(together “Johnson & Johnson”) control a significant share of the medical supplies market in China. In July 2008, without authorisation from the National Development and Reform Commission’s (“NDRC”) Department of Price Supervision, Johnson & Johnson significantly reduced the minimum price suppliers of its surgical sutures could charge the medical profession in a bid to increase its market share. Johnson & Johnson had been operating through Rainbow Medical Equipment & Supplies Co (“Rainbow”), which paid a deposit to Johnson & Johnson in exchange for the right to sell its products. Johnson and Johnson suspended the agreement with Rainbow, took the deposit and cancelled the supply of surgical sutures. Johnson & Johnson cited Rainbow’s failure to deliver goods to order as the grounds for suspending the agreement. Rainbow argued that Johnson & Johnson had no grounds for suspending the agreement and by significantly reducing the price of the sutures was acting with monopolistic intent. In the first anti monopoly case since the introduction of the regulations, Rainbow sued Johnson & Johnson claiming RMB 14 million in compensation.

Anti monopoly cases often involve “vertical agreements” with the upstream business able to impose restrictions on the rights of the downstream businesses to supply the product. In this case, the distribution contract between the two parties included a clause setting the minimum price at which Rainbow was allowed to sell Johnson & Johnson’s products. When deciding whether the clause was aimed at creating a monopoly or not, the courts had to consider whether the parties intended to eliminate or restrict competition. The evidence provided by Rainbow did not show any intention on the part of Johnson & Johnson to restrict production across the surgical suture market, nor did it show that the contractual arrangement on minimum pricing was aimed at reducing competition, controlling product supply or changing the price of sutures across the Chinese market. On the contrary, the defendant produced evidence to show that there were many suppliers of similar products, and the agreement with Rainbow would have been insufficient to achieve a monopoly. Shanghai First Intermediate People’s Court dismissed Rainbow’s claim and also held that the damages claimed by Rainbow could have been remedied under the contract without the need to litigate the case.

B. In February 2013, a high profile anti monopoly case involving one of China’s most famous producers of premium liquor, Kweichow Maotai Co Ltd (“Maotai”), came before the courts. Maotai and Wuliangye Group Co Ltd (“Wuliangye”) were fined RMB 449 million for breach of the anti monopoly regulations, a huge payout which represented 1 percent of their total sales income for 2012. The companies are also facing additional punishment by the National Development and Reform Commission (NDRC) as their behaviour created a virtual monopoly.

5) Trade secrets cases

A. Zhejiang Hangzhou Xinfu Pharmaceutical Co Ltd v. Shandong Xinfu Pharmaceutical Co Ltd

At the end of 2005, in order to improve the production of D-calcium Pantothenate for its products, Shandong Xinfu Pharmaceutical Co Ltd (“Xinfu”) sent security manager Jiang Honghai to Lin’an, a city in Hangzhou province, to obtain trade secrets from Zhejiang Hangzhou Xinfu Pharmaceutical Co Ltd (“Xinfu”). Mr Honghai obtained vital trade secrets about Xinfu’s production technology by offering bribes to Xinfu workers. Lin’an People’s Court found that Mr Honghai had hired Jiang Xinhai to obtain the trade secrets and Mr Xinhai had hired four fellow Xinfu workers (Xie Bolong, Chen Lei, Jiang Xinxiang and Ma Jifeng). Together they violated the law on trade secrets and were paid for supplying information to Mr Honghai. As well as disclosing business secrets Jiang Xinxiang instructed two men, Yang Quanlong and Pan Weidong, to sabotage and damage Xinfu’s machines and equipment. These acts of sabotage significantly affected Xinfu’s business and added further charges to the list of criminal actions brought against Jiang Xinxiang. Mr Xinxiang, Mr Honghai and all of those involved in the disclosure of trade secrets and damage to Xinfu’s equipment were sentenced to prison terms of between two and five years. Others who played more minor roles were dealt with in separate actions.

After the criminal case came to an end in January 2010 Xinfu filed a civil claim at Hangzhou First Intermediate People’s Court against Mr Honghai, Ma Jifeng and Xinfu for trade secret infringement. Xinfu sought compensation for damages caused by the criminal acts of Mr Honghai and an injunction to stop Xinfu from infringing Xinfu’s IP rights through the production of D-calcium Pantothenate using Xinfu’s technology. Xinfu challenged the jurisdiction of the court arguing that the case should be heard outside of Hangzhou to ensure a fair hearing. The Supreme People’s Court agreed to transfer the case to Shanghai First Intermediate People’s Court, making this the first trade secret case to be transferred to a new jurisdiction based on an impartiality challenge.

The civil case centred on two issues: firstly whether the statute of limitations applied; and secondly whether the trade secrets Xinfu sought to protect were capable of being protected. Xinfu argued that as the cause of action dated back to 2005, Xinfu was outside of the two year limitation period for bringing a civil claim. Furthermore, Xinfu argued that the technology it was using had already been widely publicised and the patent no longer prevented the use of such technology. The court held that, after Xinfu reported allegations of criminal activity to the authorities the limitation period was effectively suspended and would be calculated not from the date of the alleged infringement, but from the date on which a verdict in the criminal case was reached. Hangzhou Intermediate People’s Court made its final decision in the criminal proceedings on 23 February 2009, giving Xinfu two years to file a civil claim from that date. Xinfu filed the lawsuit on 6 January 2010 and therefore the statute of limitations did not prevent the claim from being heard.

On the second issue, the court found that documents already in the public domain regarding Xinfu’s patent did not include all the technological details, such as the detailed provisions on how to deal with faults or the post production procedures required to perfect D-calcium Pantothenate production. The details that were not in the public domain were of vital importance to the patent

and could therefore be regarded as trade secrets. These details were not accessible to the public after assessment by the Ministry of Science and Technology's Division of Intellectual Property Affairs as Xinfu had claimed. On 21 May 2012, the court ruled in favour of Xinfu. Xinfu was ordered to stop using technology obtained through infringement of Xinfu's IP rights. Jiang Honghai, Ma Jifeng and Xinfu were ordered to pay RMB 31,557,903 in compensation and another RMB 100,000 to cover Xinfu's legal costs. All three were held to be joint and severally liable for the damages.

B. American Superconductor v Sinovel Technology (Group) Co Ltd

The series of cases involving American Superconductor and Sinovel Technology (Group) Co Ltd ("Sinovel") attracted a great deal of attention in 2012, with large amounts being claimed in a high-profile cross-border dispute. One of the most significant cases in the dispute over IP right infringement was a trade secret claim against Sinovel by American Superconductor.

Suzhou Mei'en Superconductor ("Mei'en"), a wholly-owned subsidiary of American Superconductor, signed a purchase agreement with Sinovel which lasted from 2008 to 2010. Under the agreement, Mei'en would provide core components of a wind power generator and software for the electronic control of the generator to Sinovel. The contract was worth up to RMB 7 billion.

In August 2010 Sinovel stopped making the payments due under the contract. Mei'en asked why the payments were not being made and found that Sinovel had installed an electronic control system of their own design and no longer needed Mei'en's products or technical assistance. Mei'en claimed Sinovel had illegally modified their new electronic control system using Mei'en's patented processes. In addition, Mei'en found that in order to build the allegedly infringing generator control system, Sinovel had allegedly offered huge payments to hire technicians working for Mei'en in an attempt to steal all the source software programmes to Mei'en's patented 1.5MW electronic control system for wind generators. Furthermore, Sinovel allegedly used these illegally obtained source programmes to modify Mei'en's software and destroy the protective measures Mei'en had built into the software to prevent it being used without authorisation. Even though they knew that American Superconductor owned the technical secrets behind the electronic control system, the three technicians who moved to Sinovel are accused of deliberately stealing those trade secrets and offering them to Sinovel. In September 2011, American Superconductor and Mei'en sued Sinovel and the three technicians for trade secret infringement, claiming up to RMB 3 billion in compensation. The case is still ongoing and continues to attract widespread public attention.

According to the Anti Unfair Competition Law of the People's Republic of China, an individual or organisation shall not adopt any of the following means to obtain the business secrets of others:

- obtaining business secrets from the owner by stealing those secrets, promising financial gain to induce others to steal them or resorting to coercion or other illegitimate means;

- disclosing, using or allowing others to use business secrets that the individual or organisation has obtained by breaking an agreement or disregarding the requirements of the owner of the rights to preserve the business secrets; or
- where a third party obtains, uses or discloses the business secrets of others when it or he has or should have full knowledge of the illegal acts mentioned in the preceding section, it or he shall be deemed to have stolen the business secrets of others.

The three Sinovel technicians in the American Superconductor case have been traced to Austria and are facing charges of data manipulation and of cross-border industrial espionage. Sinovel is facing a huge challenge in defending the case, both at home and abroad, with significant legal, financial and reputational consequences.

6) Criminal cases involving IP infringement

A. The Blackberry case

“Blackberry” is a registered trade mark in China, with the popular mobile phone’s IP rights belonging to Canadian company Research in Motion Ltd (RIM), as it was then known. The Blackberry trade mark covers use of the brand name and company logo in data processing equipment, transmitters and mobile phone software. From March 2009, the defendant company, Liu, began collecting broken or discarded Blackberry handsets and purchased keyboards, loudspeaker devices, flash devices for mobile phone cameras and other accessories which they labelled with the Blackberry name and logo. Without the authorisation of RIM, Liu used these parts to assemble fake Blackberry mobile phones, labelled them and sold them. The infringing enterprise was worth an estimated RMB 290,000.

The central legal point at issue in this case was how the phrase “same kind of commodities” would be interpreted by the courts. According to Article 213 of the Criminal Law of the People’s Republic of China and subsequent relevant judicial interpretation, the trade mark used on the goods by the infringing party needs to be identical to a registered trade mark on the same kind of commodities, in order for the infringing party to be held liable for the crime of counterfeiting the registered trade mark. In this case the use of an identical trade mark was clearly established, the issue was whether the Blackberry branded products made by the defendants were the same kind of commodity as the Blackberry phones produced by RIM.

The defence argued that the products made by the defendants should be regarded as simple traditional mobile phones rather than the more complicated smartphones covered by the data processing equipment, transmitter and mobile phone software trade marks of RIM. Based on this the defence argued Liu could not be held to be criminally liable for counterfeiting as the “same kind of commodities” test was not satisfied.

The court held that, as long as the fundamental nature of the infringing products was the same as those covered by the registered trade mark, they could be held to be the “same kind of

commodities”. In this case, the devices produced by Liu were able to make phone calls, send emails and synchronise data as well as transmit documents, which made them similar in operation to RIM’s Blackberry handheld devices. The court held that Liu’s products were portable electronic data devices rather than traditional mobile phones, which meant that they fell within the range of uses covered by Blackberry’s registered trade mark and were the “same kind of commodities” for the purposes of establishing criminal liability.

Another issue in this case was the point at which restoring broken or discarded items became production of new, infringing items. In practice, it is universally accepted that there will always be a market in which individuals will collect discarded goods and repair them in order to sell them again. In this case, Liu failed to show that all they did was to repair goods without any infringement. The point at which exhaustion of trade mark rights occurs is often a complex one for lawyers and academics. The court in this case considered that Liu would not have committed any infringement had it simply resold or distributed goods that had already been sold legally, without making any changes to the original trade marked phones and parts. However, this was not a case involving genuine refurbishment and restoration of damaged or discarded phones, so there was no exhaustion of trade mark rights. The defendants had purchased huge quantities of keyboards, speakers and various other parts including mirror surfaces, all of which had been illegally branded with RIM’s trade mark Blackberry logo. Liu hired a team of assemblers to add the infringing products to the discarded handsets, and they were labelled with model numbers and IMEI numbers to give the appearance that these were genuine RIM Blackberry devices. The court considered these actions to be clear evidence of wilful trade mark infringement and counterfeiting rather than simple mobile phone repair and resale and found the defendants criminally liable.

A total of four defendants were jailed at the first instance hearing. The two junior members of the counterfeiting gang were sentenced to a year and four months and three and a half years respectively. They appealed to Shenzhen Intermediate People’s Court but the appeal was rejected. The two ringleaders were sentenced to 15 years in prison each and fined a total of RMB 150,000. Some commentators argued that compared with other trade mark infringement cases the figures involved in this case were not particularly high, and the general public reaction was that the sentences were too harsh.

The relevant law on sentencing is Article 1 of the Supreme People’s Court and the Supreme People’s Protectorate’s Interpretation of Issues Concerning the Specific Application of Law in Hearing Criminal Cases of Intellectual Property Right Infringement (“the Interpretation”). The Interpretation states that where the value of an illegal business operation is more than RMB 250,000 or the proceeds are more than RMB 150,000, individuals involved in that business will be deemed to have committed an “especially serious” breach of Article 213 of the Criminal Law. The infringing party shall therefore be sentenced to a fixed-term of imprisonment of not less than three years but not more than seven years and also face a fine at the discretion of the court.

Despite this guidance and even though the value of the illegal business operation was only RMB 290,000, the court still imposed significantly longer sentences on the two main defendants in this case.

Section Four: Abstracts from the latest academic opinions

In 2012, experts and scholars continued to publish opinions on traditional IP issues, but also tackled emerging issues in the field of online IP rights protection, covering everything from mobile internet use to “Cloud” storage copyright issues. With such a complex and challenging IP environment, several different theories and interpretations were put forward by academics. The debate on China’s IP law development in 2012 focussed on the following key areas: the transfer of audiovisual performers’ rights, the influence of arbitration awards on IP disputes, the challenges faced by copyright holders in light of the development of “Cloud” storage, preventing abuse of patent rights and issues surrounding ownership of post–licensing goodwill.

1) Yu Tian: Discussion on the transfer of the performer’s rights on audiovisual works

One of the most significant developments in 2012 was the Beijing Treaty on Audiovisual Performances, which represented a breakthrough in international cooperation to protect the IP rights of audiovisual performers. The section of the Treaty dealing with transfer of audiovisual performers’ rights was not mandatory. In fact, the Treaty laid down broad principles on transfer of rights allowing signatories to implement their own domestic legislation to deal with this complex issue. Before the Beijing Treaty, China had no domestic law dealing with the transfer of audiovisual performers’ rights. However, a number of disputes arose in this area prior to 2012 leaving judges with no basic law to apply and a dilemma as to how to protect performers’ rights.

In his article, Discussion on the Transfer of Performers’ Rights on Audiovisual Works, Yu Tian argues that the lack of legislation in this area is not only affecting the financial interests of the producers and performers, but also the consumers, as disputes tend to interfere with the transmission of the audiovisual performance. Yu Tian suggests that what is needed is not just legislation but a deeper cultural shift to recognise the IP rights of performers so that a system for transferring those rights can be established and complied with. His interpretation of the Treaty is that the signatories should try their best to coordinate the relationship between performers and producers in line with their own domestic legislation, while leaving the parties free to

agree specific details through contracts. Yu Tian argues that in China a new system to protect performers' rights is essential if the audiovisual industry is to succeed.

Yu Tian argues that two basic principles should be established to deal with the transfer of audiovisual performers' rights in China. Firstly, the concept that "contract is king" should be followed, allowing performers to rely on agreements rather than statutory rules when disposing of their rights. Secondly, where no contract exists, or where the contract is unclear, once the performer has agreed to record their work and is aware of the intended use and distribution of the recording, the economic rights should belong to the producer. The producer will then be entitled to distribute the recording and profit from that distribution, receive any royalties for the audiovisual work and any subsequent related profits arising from the work. While the producer will control the economic rights and distribution, the performer will still be entitled to receive remuneration for his or her work. Where the producer transfers the economic rights to the material, the performer's right to recover remuneration will be enforceable against the transferee.

2) Ni Jing: The influence of arbitration awards on IP disputes

In this article, Ni Jing argues against the position that final and binding arbitration awards cannot meet the same standards as the courts in resolving IP disputes. He points to the fact that the parties can choose arbitrators with experience and professional knowledge in a specific field to make up a balanced and professional arbitral tribunal as one of the key factors in the success of the arbitration system. In fact, he goes further and suggests that the arbitration system doesn't need the same exhaustive appeal mechanism as the courts because the initial ruling is so much more reliable. In most arbitration hearings, the parties tend to choose three arbitrators to constitute a tribunal rather than appoint a sole arbitrator, which is, to a degree, similar to the make-up of the appeal courts and therefore makes an appeal less necessary.

Of course, if the parties think an appeal mechanism is required then they are free to file a lawsuit at the outset of proceedings rather than go down the arbitration route. If they do choose arbitration, one or both parties may still appeal to the civil courts afterwards under Chinese law. That party would then undertake the risks and cost disadvantages of a trial.

Some experts argue that a new arbitral appeal tribunal, with similar powers to an appeal court, should be established but Ni Jing suggests there are significant disadvantages to such a move. For example, it is likely to be difficult to find enough capable arbitrators in certain regions, and the division of jurisdiction between the two arbitral tribunals may prove problematic. Ni Jing argues that the current system, with no appeal mechanism, is fit for this purpose.

3) Luo Xianjue and Yin Fenglin: The copyright system and the challenges posed by "Cloud" computer storage

The "Cloud" system for storing movies, music, games and books downloaded from the internet

has revolutionised the way many people access copyrighted material and as such it has sparked academic debate on how IP rights can be protected. The rapid growth of Cloud technology clearly poses significant challenges for the legal system, particularly when it comes to the doctrine of fair use and exhaustion of distribution rights.

The way that the Cloud system is programmed actually makes online infringement of copyright and unauthorised access to protected material more difficult for two main reasons. Firstly it is easier to control access and prevent unauthorised use of the Cloud than it is with other methods of storage. Movies, games and music stored in the Cloud cannot be accessed through streaming or capture technology because it is much harder to avoid the protection systems built into the Cloud. The source code to the Cloud is hard to copy and any attempt to target individual files from the Cloud and copy them separately is very unlikely to succeed as the local computer does not install the files, it simply allows the authorised Cloud user to access them. This is the second key measure of protection that the Cloud offers; there is no copy of the original works stored so the possibility of illegal copying is significantly reduced. If the public cannot access the copyrighted works, then any attempt by a defendant who has managed to obtain copyrighted material illegally through an authorised user's Cloud to rely on defences such as fair use or statutory licence which have been used for previous online copyright disputes will not succeed. Not only does the Cloud provide a better technical protection system through its programming, it also reduces the likelihood of a successful fair use or statutory licence defence in the event of infringement.

The Cloud also raises up some interesting issues surrounding exhaustion of distribution rights. In traditional distribution of copyrighted material once the original work and copies have been distributed to the market (with the permission of the copyright owner), the owner can no longer control the republication and resale of the original or copies. This principle does not apply to Cloud access to copyrighted material. Under the Cloud system the internet service provider or Cloud operator gives the Cloud user access to the material (i.e. reading books on a mobile phone or watching audiovisual works on a tablet computer) but does not provide digital copies to the user. For example, the fact that there is no trade of hardcopy books means a literary work can be uploaded to the internet as soon as it is published and can be instantly distributed to millions of Cloud users. What those users are actually buying is a licence to read the material, not the material itself. As a consequence, exhaustion of distribution rights will not apply, and any unauthorised use of the material by a party other than the Cloud user will be a breach of copyright.

4) Yin Xintian: The meaning and prevention of abuse of patent rights

Yin Xintian argues that possession of knowledge is much more influential than possession of real property therefore protection of intellectual property under the law should be a priority for China. In order for the Chinese economy to thrive, patentees need to exercise their rights reasonably and not abuse the patent system; otherwise they risk harming the interests of the public and the state.

Effective protection of patents and preventing abuse of patent rights are both equally significant in developing China's legal system and economy.

According to the Anti Monopoly Law of the People's Republic of China, any patent holder who abuses the patent system which has or may have the effect of eliminating or restricting market competition can be found criminally liable for monopolistic behaviour. Typical examples of monopolistic behaviour include: the establishment of a monopolistic agreement between two or more organisations which are in direct competition, unreasonable provisos concluded in an agreement for a patent licence, patent licensing contracts made by means of a tie-in to sales and unreasonable refusal to licence a patent to others.

Preventing abuse of patent law by companies with monopolistic intent is a complicated issue and the Anti Monopoly Law alone is unlikely to be enough on its own. Yin Xintian argues that administrative regulations need to be formulated to specify details about controlling monopolistic practices. The phrase "abuse of patent rights" does not appear in the Anti Monopoly Law, but the legislation does introduce a compulsory licence system which may help to tackle the problem. Such a licence can only be granted where there is an actual need in the domestic market for the patented product or patented method and the patentee or the authorised licence holder does not exercise the patent or licence to satisfy the need. This behaviour constitutes an abuse of patent rights and under the compulsory licence system the State Intellectual Property Office (SIPO) can intervene. However, even where there is clear abuse of the patent system, SIPO is not entitled to grant a compulsory licence unless it first receives an application from an entity or individual interested in using the patented process or technology.

Yin Xintian proposes a two-pronged approach to preventing the abuse of patent rights based on powers already available to the authorities. Firstly, where the abuse constitutes an attempt to establish a monopoly in a certain industry, the patentee should be pursued by the authorities under the Anti Monopoly Law. Secondly, where a party is being unfairly restricted from entering a certain industry due to patent right abuse then that party may be granted a compulsory licence under the Patent Law. This second approach would deal with situations where the patent abuse does not constitute monopolistic behaviour, but the patentee is still restricting use of technology that could help develop an industry, while not using that technology themselves. In this scenario, a party can apply for a compulsory licence to use the patented technology. By using the two approaches outlined above, Yin Xintian argues that the authorities already have the tools at their disposal to tackle those companies who register patent rights but do not use them.

5) Wen Kaixi: Exploring the application of orders to stop infringement^①

The current understanding of the law is that the court or administrative office hearing an IP

① Wen Kaixi: Exploring the application of orders to stop infringement in the Intellectual Property Laws, *Intellectual Property*, April Issue of 2012, Page 24-32

dispute should always order a party who infringes another's IP rights to suspend their production or business. However, Wen Kaixi argues that the courts should take a less rigid approach.

Protecting IP rights is essential to the government's aim of securing more and more patent applications and spreading technological innovation across China. But Wen Kaixi argues that it is a patentee's duty to permit others to use the patented process in reasonable circumstances. The law can achieve a balanced result only if the patent holder is paid a reasonable fee for granting a licence to use the patent. However, Wen Kaixi argues that patentees should only refuse applications to licence the patent where the other party is not offering sufficient remuneration or the patentee has legitimate grounds for believing the potential licensee might default on payments under the licence.

If the patent holder discovers that his IP rights are being infringed and files a lawsuit against the infringing company, Wen Kaixi argues that the court should not automatically order suspension of production. However, where there is no benefit to the patentee from such an order by the court then he argues that the judge should be prepared not to order the suspension of the infringing production. Where the patentee refuses to allow others to use his patent it can damage the development of the economy. Therefore the court may be acting in the public interest by showing greater caution before ordering suspension of the infringing party's production.

Wen Kaixi also argues that patented products and patented production methods should be treated differently by the courts. A large number of significant construction projects are currently underway in China. If courts rigidly apply the rules on suspending production of infringing products and destroying moulds, then Wen Kaixi believes it is inevitable that construction projects will be delayed and economic growth will slow down. If that is allowed to happen it is not just construction companies using infringing products that will suffer financial loss, it is the Chinese public. Where the damage caused by the infringement can be easily remedied by money, for example by selling the infringing products and giving the proceeds to the patent holder rather than simply destroying them, Wen Kaixi argues that this could benefit all parties. He suggests that this approach respects the legal rights of the patent holder to profit from the design, but also reduces waste and mitigates against any negative impact on economic growth.

6) Kong Xiangjun: Study on breach of copyright through online dissemination^①

While the Copyright Law does protect a copyright holder's right to disseminate the protected material online, it does not define what activities will constitute a breach of the copyright holder's dissemination rights. The Regulations on the Protection of Rights to Online Communication and the relevant judicial explanations are also silent on this issue. However, numerous judgments have addressed the issue in practice and what constitutes online infringement has led to heated debate

^① Kong Xingjun, Study on breach of copyright through online dissemination, *People's Judicature*, July Issue 2012, Page 59-69.

among academics. Kong Xiangjun believes that a clear distinction can be drawn between direct infringement and indirect infringement when considering online dissemination of copyrighted material.

He argues that online dissemination of copyrighted material can be divided into two categories: firstly the active upload or provision of copyrighted works by an individual infringer; and secondly all other forms of online information dissemination such as providing a website or an app which is used by infringing individuals. Successful copyright infringement claims will usually fall into the first category. In terms of protection of copyright online, Kong Xiangjun argues that distinguishing between these two types of infringement at an early stage will help courts to balance the interests of copyright holders and web users.

The debate over technical and legal definitions to determine responsibility for online dissemination of copyrighted material is of particular interest to Kong Xiangjun in addressing the problems faced in practice.

The two general technical standards used to distinguish between those who disseminate copyrighted material online and those that merely provide the internet service used by the disseminating party are the “user perception standard” and the “server standard”. The disseminating party under the user perception standard is simply the point of contact the user has with the infringing material; for example the website that the user downloads the material from. Unlike the more technical server standard, the user perception standard simply deals with who the user believes is providing the material. The server standard is a purely technical way of working out who is disseminating the infringing material. It is much clearer and easier to follow than the user perception standard and identifies the party responsible for uploading and disseminating the material by examining the server usage. However, it still has some disadvantages; for example, it cannot always deal with the complexities of online distribution as technology evolves and infringing parties become more adept at disguising their dissemination of copyrighted material. The user perception standard is too subjective and cannot be used as hard evidence of infringement. Neither of these two technical standards can offer a clear legal picture of responsibility for the online dissemination of infringing material.

When examining cases involving online dissemination of copyrighted material Kong Xiangjun argues that it is important to consider the technical distinction highlighted above but, more importantly, courts must focus on the legal distinction between the two. Since the two technical standards discussed above are mainly used to settle the issue of who is responsible for copyright infringement, the standards should be more closely connected with the wording of the copyright law; that is, the standards should distinguish between direct and indirect copyright infringement. From the copyright owner’s perspective, the most important legal point to establish is that the infringing party has violated the owner’s exclusive right to disseminate the information. Where the copyrighted works are disseminated to the public through websites

which allow consumers to download, browse or otherwise access the material the infringer will clearly have breached the owner's exclusive right to disseminate the copyrighted material. It does not matter whether the infringer disseminated the copyrighted material alone or in collaboration with an online company or publisher, the legal test for breach of copyright will be met. From the infringing party's perspective, only where someone has put a copyrighted work online without prior permission from the owner has that party committed direct infringement of the owner's exclusive right to online dissemination. Other online activities such as providing the app or website used to download the material will be categorised as an indirect infringement of the owner's copyright. This is the essential difference between direct and indirect infringement and all technical standards used to distinguish between different activities should be used to help reach a conclusion as to whether the alleged infringement is direct or indirect.

7) Tao Xinliang and Zhang Dongmei: Ownership and Transfer of Post–licensing Goodwill

Post–licensing goodwill is essentially any goodwill the trade mark attracts during the lawful licensing of that trade mark to the licensee. Where a party uses another's registered trade mark without prior authorisation, and that registered trade mark has no goodwill or reputation, the ownership of any goodwill which attracts to the trade mark during that unauthorised use is likely to be disputed. In China, the issue of goodwill played a crucial role in two of the biggest IP cases of 2012. In the WLK herbal tea dispute there was a question over who owned goodwill created after the trade mark was licensed, while in the iPad dispute between Apple and Proview the goodwill was created pre–assignment of the trade mark. The WLK herbal tea dispute offers insight into how the courts will treat post–licensing goodwill in future.

In Hong Kong Jiaduobao Group (JDB) v Guangzhou Pharmaceutical Holdings Ltd (GPC), it was clear on the facts that the WLK brand had been well marketed and gained a strong reputation during the 17 year period in which it was licensed to JDB. JDB created a great deal of post–licensing goodwill for the WLK brand which did not enjoy a strong market position before JDB began marketing it and using the red can packaging which became synonymous with the drink. The relevant law on the naming, packaging and decoration of well–known goods is covered by Article 5(2) of the Anti Unfair Competition Law, so the WLK herbal tea dispute became an important case not just in terms of the Trade Mark Law but also the Anti Unfair Competition Law.

The authors of this report on the high profile herbal tea dispute argue that it would be proper and lawful for the “post–licensing goodwill” that the drink now enjoys to transfer to JDB provided it no longer uses the WLK registered trade mark. In this case, two brands can effectively be separated from one another: one is herbal tea sold in red cans which JDB owns, while the other is

the WLK brand of herbal tea which GPC owns. JDB should therefore have the right to continue selling herbal tea in red cans, but not to brand it as WLK, while GPC can keep selling WLK brand tea but not use the red cans or the marketing material that JDB produced.

Appendix 1: Main Channels for Intellectual Property Disputes in China

1. Civil disputes

1) Litigation

Litigation in the People's Courts is the main channel for resolving IP disputes in China.

Normally, the first instance case falls under the jurisdiction of the local Intermediate People's Court. However, there are some exceptions. According to the Supreme People's Court report on Judicial Protection of Intellectual Property by Chinese Courts (released on 12 April 2012) by the end of 2011 the numbers of Intermediate Courts with jurisdiction over patent cases was 82, with 45 courts dealing with new plant varieties, 46 dealing with integrated circuit design and 43 handling well-known trade mark cases. The number of People's Courts that have jurisdiction over IP cases was up to 119 by the end of 2011 with a further three People's Courts having carried out pilots to hear utility model and appearance design cases.

The Civil Procedure Law determines which court will have jurisdiction to hear a first instance claim. Normally this will be the nearest local court to where the alleged infringement took place. The various appellate courts will have jurisdiction to hear any challenges to the first instance decision.

2) Administrative

Depending on the type of IP rights involved, parties can turn to various administrative offices to settle disputes without the need for court action. Where either party is unsatisfied with the determination of the administrative office, they can pursue litigation.

The following administrative bodies have jurisdiction to deal with IP disputes:

- The Copyright Office at various levels is in charge of copyright disputes;
- The Trade mark administrative offices (run by the Administrative Bureau for Industry and Commerce at various levels) are in charge of trade mark disputes;
- The Patent administrative offices (run by the Intellectual Property Office at various levels) are in charge of patent disputes;
- Unfair competition disputes fall under the jurisdiction of the Administrative Bureau for

Industry and Commerce at various levels and the Ministry of Information (along with other offices authorised by various administrative regulations and rules); and

- Anti-monopoly disputes are dealt with by the Antitrust Division of the relevant State Council, the National Development and Reform Commission's Department of Price Supervision and the State Administration for Industry and Commerce's Antitrust and Unfair Competition enforcement agencies.

3) Arbitration

Where there is an arbitration clause in the contract between the parties, or an arbitration agreement has been reached, the parties may settle their dispute through an arbitration procedure. The arbitral tribunal should be selected by agreement between the parties.

2. Administrative disputes

According to Patent Law and Trade Mark Law if a party wishes to contest a patent or trade mark registration they can apply to the relevant administrative office for adjudication. If that party is dissatisfied with the ruling of the administrative office, it can issue legal proceedings in the People's Court to challenge the decision.

1) Trade mark disputes

Where an application is rejected by the administrative office, the applicant can ask the Trade mark Review and Adjudication Board for a review of the decision. If the applicant is dissatisfied with the decision of the Trade mark Review and Adjudication Board they can appeal to the Beijing First Intermediate People's Court.

If a party wishes to oppose a trade mark decision published following a preliminary examination by the administrative office that party can file an objection against the decision at the Trade mark Office. If the objecting party is dissatisfied with the decision of the Trade mark Office they can appeal to the Trade mark Review and Adjudication Board. If the objecting party is dissatisfied with the ruling of the Trade mark Review and Adjudication Board they can file legal proceedings at Beijing First Intermediate People's Court.

Parties seeking to have a trade mark registration cancelled can apply to the Trade mark Review and Adjudication Board. If the party is dissatisfied with the ruling of the Trade mark Review and Adjudication Board they can file legal proceedings at Beijing First Intermediate People's Court.

2) Patent disputes

If a party wishes to apply for a review of a patent decision or seek invalidation of an existing patent they must apply to the Patent Re-examination Board. In the event that a party is dissatisfied with the ruling of the Patent Re-examination Board, they can file legal proceedings at Beijing First Intermediate People's Court.

Appendix 2: List of Major IP Legislation

1. Copyright Law of the People's Republic of China
2. Measures for the Administration of Copyright Law in Zhejiang Province
3. Beijing Treaty on Audiovisual Performances
4. Provisions on the Application of Law for Trials of Civil Disputes on Infringement of Online Transmission Rights
5. Draft Revision of the Patent Law of the People's Republic of China (Draft for Comments)
6. Regulations of Gansu Province on Patent Law
7. Regulations of Guangxi Zhuang Autonomous Region on Patent Law
8. Regulations of Shanxi Province on Patent Law
9. Regulations of Sichuan Province on Patent Protection
10. Measures of Guangzhou for Handling Patent Disputes
11. Draft Revision of the Trade Mark Law of the People's Republic of China
12. Measures for the identification and protection of Famous Trade marks in Guizhou Province
13. Measures for the identification and protection of Famous Trade marks in Qinghai Province

Appendix 3: Significant events and academic forums in 2012

1) Round table event on Collective Administration of Copyright Law

On 11 January 2012, the China Audio-Video Copyright Association held a Collective Administration of Copyright Round Table event in Beijing. More than 30 experts from China and abroad attended the conference. The experts came from SIPO, the Supreme People's Court, various courts in Beijing, China's five major copyright associations, the International Confederation of Societies of Authors and Composers ("CISAC") and other copyright associations from Australia,

Canada and Norway. The three main themes discussed at the event were the development of a cohesive collective administration process for dealing with copyright issues in China and problems encountered with this in practice, the arbitration system for copyright disputes and how best to extend collaboration between administrative agencies and the legal system to achieve a more cohesive approach to the copyright system. The round table format allowed attendees to discuss the difficulties and problems they had encountered in practice and the international experiences shared by overseas guests were of particular interest to many of the Chinese copyright experts.

2) Beijing AIPPI International IP Forum 2012

From 11 April to 12 April the Beijing AIPPI International IP Forum 2012 was held at the city's Capital Hotel. The forum was organised by the International Association for the Protection of Intellectual Property ("AIPPI") through its China branch, and was supported by SIPO and the China Council for Promotion of International Trade ("CCPIT"). More than 300 people attended the two day forum, including members of AIPPI from all over the world, officials from SIPO and the Trade mark Office and experts, scholars and IP judges from across China.

Opening speeches were given by Dong Songgen, vice chairman of CCPIT, and Jin Yunpei, on behalf of the director general of SIPO. Both speakers made positive comments about the development of IP law in China and gave their thoughts on the future of IP protection both in China and worldwide. Following the opening ceremony, attendees discussed a broad range of issues, including hot topics such as IP protection, international perspectives on design protection in China, online trade mark infringement in China and how to improve administrative procedures and litigation of trade mark disputes in China.

3) The 3rd Intellectual Property in China Forum

In June 2012 Beijing hosted the 3rd Intellectual Property in China Forum. The event was co-organised by UK-based magazine *Managing Intellectual Property*, the AIPPI, the Patent Protection Association of China ("PPAC") and the Patent Protection Association of Beijing. More than 350 international IP experts and industry leaders attended, including representatives from SIPO, WIPO, the European Patent Office, the US Patent and Trade mark Office and the Japan Patent Office. The event included a series of keynote speeches, specialist lectures on the IP environment in various countries, round table discussions, a forum and several informal question and answer sessions. The main topics covered were: how to apply for patents in Europe and the USA; how to apply for patents in Japan and Africa; how the latest changes to policies and legislation in various countries has changed the international IP landscape; how the Patent Cooperation Treaty ("PCT") work; how International Trade Commission ("ITC") is working to strengthen IP protection; upcoming changes in the European patent litigation system; and the latest legal updates on patent procedures around the world. The forum section of the event included a heated debate over PCT

applications and the future of IP protection at home and abroad.

4) The 4th Intellectual Property Conference for Chinese and Foreign Enterprises & the 2nd Intellectual Property Fair for Chinese and Foreign Enterprises

The 4th Intellectual Property Conference for Chinese and Foreign Enterprises was held at the China National Convention Centre in 2012. The conference organisers included PPAC, the China Intellectual Property Research Association (“CIPRA”), AIPPI China, the China Association of Enterprises with Foreign Investment (“CAEFI”), the Commission for Protection of Premium Brands, the China Licensing Executives Society and the China Patent Technology Development Corporation. The annual conference was aimed at encouraging businesses from China and overseas to communicate on IP issues. The event has gained a strong reputation in recent years and the 2012 conference was attended by high level executives from major companies. The high profile platform allowed attendees to exchange ideas and improve cooperation on IP protection, promote their upcoming projects, market their brands and attract investment. At a summit meeting on creative development at international enterprises, company executives exchanged ideas on how to marry innovations in science and technology with cultures around the world, how to increase competitiveness of innovation, brand competitiveness and IP protection, self-dependent innovation and how online industries can foster creativity and entrepreneurship.

The 2nd Intellectual Property Fair for Chinese and Foreign Enterprises was also held in Beijing on 6 June 2012.

5) Global IP & Innovation Summit 2012

From 4 to 5 September 2012 the Global IP & Innovation Summit was held in Shanghai. Hosted by Managing Intellectual Property, the event was co-organised by the Pudong New Area (Shanghai) Association for the Protection of Intellectual Property. More than 300 people attended the event to discuss new developments in global IP law, including officials from the US Patent and Trade mark Office, inventors and entrepreneurs from China and overseas, legal experts and leading industry figures.

The summit focussed on protection of patents, trade marks, copyrights and trade secrets in China. Foreign and domestic experts discussed the best practical strategies for improving IP protection and enforcement of IP rights in China. The new America Invents Act was also discussed, as well as the protection of rights during patent auctions, industrialisation of patented processes with the help of private finance and the latest developments in biotechnology and medicine. One of the most interesting speeches came from a director of JK Sucralose Inc, one of the companies that took part in a US International Trade Commission investigation into IP infringement and production of infringing products in China. The speech focussed on the root causes of infringement and how the investigation has helped leading US businesses to improve their understanding of the

IP protection system in China.

6) The 2012 Annual Trade mark Meeting of China

The 2012 Annual Trade mark Meeting of China, organised by China Trade mark Association and SAIC was held in Kunming. The event included: a forum on international trade mark issues, a trade mark cases forum, a forum on trade mark protection for agricultural products, a round table hosted by the Trade mark Agency Organisation of China and the Madrid international registration of trade mark association and forums for each of the countries attending the event. The Yunnan Industrial and Commercial Bureau also made a presentation about the development of the new Yunnan Bridge Tower and investment opportunities for foreign and domestic companies.

7) The online IP dispute resolution seminar 2012

On 12 September 2012, the Beijing Arbitration Commission and the Internet Society of China Dispute Resolution Centre hosted a seminar on online IP disputes. Based on their own experiences in practice, participants discussed the resolution of various typical disputes. The event also focussed on the tactics adopted in arbitrations when internet cases are heard and what lessons can be learned from arbitral proceedings in front of expert panels. Attendees were very positive about the use of alternative dispute resolution procedures for online IP disputes, and praised the professionalism, effectiveness, flexibility and fairness of both arbitration and mediation hearings.

8) China Intellectual Property Society's report on themes and trends in proprietary technology developments in Chinese industry 2012

The China Intellectual Property Society ("CIPS") published its "Themes and trends in proprietary technology developments in Chinese industry" report on 10 November 2012. The project focussed on the key industries involved in state development planning. Based on an analysis of patent data from 14 sectors in China and abroad, the project examined developments in technology and China's role in international research and development across a range of industries. The report made suggestions on improving the IP protection system in China and commented on how the application and registration system for IP rights has impacted on the competitiveness of Chinese businesses. Finally, the project looked ahead to future development trends, and made suggestions as to how the patent protection system might evolve to match those trends.

The report was first published in 2004. Since then eight reports have been published, offering valuable technical insight and a useful reference resource for both the public and private sectors. It has also played a key role in enhancing the CIPS's reputation.

9) CIPS report on hot IP issues 2012

On 10 November 2012, the CIPS published its “Hot IP issues of 2012” report. Experts in international IP law analysed data from across the world to draw together lessons for the various administrative offices on how to improve China’s IP system. The project looked at five issues this year: changes to the administrative procedure for granting patents, problems with patenting processes for recycling waste heat and excess pressure in electrical generators, IP issues in the telecommunications industry, how to prevent abuse of IP rights in patent licensing agreements and patent protection of genetically modified plants and crops.

The aim of the project was to offer a reference resource on developments in Chinese IP law for relevant state administration departments, private companies and scientific research establishment through analysis and researching of the IP issues which have had the strongest international influence in 2012. The project has also led to the publication of a series of books entitled “The interpretation of significant IP cases” which have been popular with practitioners and the public.

10) The international seminar on collective administration of online copyright issues

From 29 to 30 November 2012 the China Written Copyright Society and Zhejiang IPO organised an international seminar on collective administration of online copyright issues. The seminar was co-hosted by SIPO and the International Federation of Reproduction Rights Organisations (“IFRRO”).

Among the attendees were senior officials from IFRRO, the International Confederation of Societies of Authors and Composers (“CISAC”), patent experts from the copyright organisations of Australia, the UK, Norway, Singapore and the USA, representatives of the relevant legislative, judicial and executive branches of the Chinese government and well-known patentees and scholars from across China.

Representatives of the participating nations gave presentations on the challenges facing of protecting copyright online, and the benefits of a joined up approach between the various government departments responsible for enforcing IP rights. The attendees discussed collective administration of copyright organisations and potential future developments in the battle against online copyright infringement.

11) China Institute of Intellectual Property Law Annual Conference 2012 & Forum on the Revision of Intellectual Property Law

From 8 to 9 December 2012, the China Institute of Intellectual Property Law held its annual conference at Suzhou High Tech Industry Park. The event was co-hosted by Renmin University of China’s Law School, School of Intellectual Property and School of International Studies. More than 340 people

attended the conference including leading legal, judicial and political figures in IP protection, senior executives from major companies and professors and researchers from the university. Liu Chuntian, the president of the School of Intellectual Property and chairman of the China Institute of Intellectual Property Law, Guo He, the secretary general of the institute and Professor Li Chen from the School of Intellectual Property gave opening speeches at the conference.

Attendees were split between two conference rooms, with presentations on 10 topics that are likely to have a significant impact on the future development of the IP protection system in China. The topics included: administrative enforcement of IP law, compensation levels for successful claimants, consultation on new draft Service Invention Regulations, avoiding cyclical litigation in patent and trade mark cases, litigation and mediation of IP disputes from a judge's perspective, revision of the Patent Law, protecting well-known trade marks, international IP law changes, revision of the Copyright Law and how patent protection can be strengthened. Academics and experts from the various fields engaged in an open and lively debate on the issues, and the event helped to enhance the reputation of the university and the institute.

Appendix 4: A List of National Intellectual Property Academic Groups

China Intellectual Property Society
China Patent Protection Association
Copyright Society of China
China Institute of Intellectual Property Law
Chinese National Group of the International Association for the Protection of Intellectual Property
Music Copyright Society of China
China Written Works Copyright Society
Images Copyright Society of China
China Film Copyright Protection Association
China Audio-Video Copyright Association