China Maritime Arbitration

Annual Report 2015

China Maritime Arbitration Commission

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Table of Contents

Chapter One: China Maritime Arbitration Overview 2015 3
Chapter Two: The review of New Laws and Regulations on Arbitration law 5
Chapter Three: Arbitration Rules of CMAC 12
I. Efforts in Achieving Efficiency 12
II. Efforts in Pursuing Fairness 18
Chapter Four: Big Data of CMAC in Year 2015 22
I. Number of Cases Accepted 22
II. Amount in Controversy 26
III. Cases Involving Large Amount in Controversy 27
IV. Summary Procedure Cases 28
Chapter Five: Big Data Analysis of the Judicial Assistance and Supervision of China Maritime Arbitration 36
Chapter Six: Comments on Cases 43
I. Setting Aside the Arbitral Award on the Ground of Legal Representative Status Disputes 43
II. Request for Affirming the Validity of Arbitration Agreement 46
III. Setting Aside the Arbitral Award on Grounds of Incorrect Ascertainment of Facts and Incorrect Application of Law 50
IV. Setting Aside the Arbitral Award on the Ground of Improper Constitution of the Tribunal 53
Chapter Seven: Review on 2015 China Maritime Arbitration 57
Chapter Eight：Memorabilia of CMAC 2015 58

Chapter One: China Maritime Arbitration Overview 2015

China maritime arbitration has witnessed a landmark year in 2015, during which the whole industry is fueled with opportunities and supports. On the one hand, it is the twentieth anniversary since the *Arbitration Law of the People's Republic of China* (the "***Arbitration Law***") had come into effect, and the new arbitration rule of China Maritime Arbitration Commission ("**CMAC**") was implemented on the 1st of January. On the other hand, the industry has received strong policy supports from the government. There are two policies directed to support maritime arbitration, one of which is the *Several Opinions of the State Council on Promoting the Healthy Development of the Shipping Industry* (the "**Opinions**") published on the 15th of August, 2014. The Opinions, as the first top-level policy designated for the development of maritime industry, made clear the goal and task of the industry. The Article 7 of the Opinions provides, "*[M]odern shipping service industries shall be vigorously developed. It is vital to promote the transformation and upgrading of traditional shipping service industries, and accelerate the development of shipping finance, shipping trading, information services, design and consulting, technology research and development, maritime arbitration and other modern shipping service industries; set up shipping development funds subject to market operations; and innovate in shipping insurance to reduce financing costs and diversify risks.*" The other one is the "*Opinions of the Ministry of Transport on Accelerating the Development of the Modern Shipping Service Industry*", the Article 7 of which states, "*[T]he China Maritime Arbitration Commission shall be supported to expand its service scope. It shall gradually establish a team of arbitrators with authority and impartiality, and arbitration procedures in conformity with the international practice. It shall, as a domestic arbitration institution, participate actively in international maritime arbitration.*" On the April 8th, 2015, Shanghai Maritime Court published the "*Opinion on Enhancing Maritime Judicial Services in Protecting the State's Strategies*", which emphasizes on the legitimate and steady support of maritime arbitration regime innovation.

In 2015, China maritime arbitration has become more interconnected. As the maritime arbitration institution with the highest professionality, CMAC, basing on Shanghai, Tianjin, Chongqing and Hong Kong Sub-Commissions and Tianjin, Dalian, Guangzhou, Qingdao and Ningbo Liaison Offices, established Fujian Sub-Commission (Fujian Pilot Free Trade Zone Arbitration Centre), South China Sub-Commission (Guangdong Pilot Free Trade Zone Arbitration Centre), Changjiang Maritime Mediation Centre, Zhoushan Liaison Office. Gradually, CMAC has formed a service network covering the whole country, and will provide more convenient arbitration services.

In 2015, China maritime arbitration has become more diversified. On the basis of providing traditional arbitration law services, CMAC held various trainings and seminars in publicizing China maritime arbitration. CMAC held four sessions of forums and arbitrator trainings, of which the topics included "Procedural Issues and Substantive Issues in Maritime Arbitration", "China Maritime Arbitration Moot Competition", "Arbitration in China Is An Effective Method in Resolving Contractual Disputes" etc. CMAC Shanghai Sub-Commission ("**CMAC Shanghai**") held the Salon on Legal Risks of Shipping & Trade Enterprises; the Seminar on Maritime Arbitration and Legal Services of Shipping Industry; the Seminar on Legal Practice of Shipping Enterprises and Policy Interpretation; the Seminar on Legal Practice of Vessels, and held numbers of seminars for

local ship owners in Zhoushan, and held the "Seminar on Legal Practice of Vessels and the Emergency Arbitrator Procedure Moot" with the Hong Kong Arbitration Centre. CMAC Hong Kong Arbitration Centre held training sessions involving "CMAC Arbitration Moot Competition" and "Emergency Arbitrator Procedures of Maritime Arbitration", took the lead in the study of the new issue of "Third Party Funding" in international commercial arbitration, drafted the "Third Party Funding Guidelines of CIETAC Hong Kong Arbitration Centre", and drafted the Ad Hoc Arbitration Rules of CMAC Hong Kong Arbitration Centre. Maritime Arbitration shall serve the market and provide innovations of maritime legal services. Therefore, CMAC cooperated with China National Shiprecycling Association in the enaction of the "*China National Shiprecycling Association Standard Contract for Scrapping and Recycling Vessels*". CMAC Shanghai cooperated with Zhengzhou Commodity Exchange, in combination with its upcoming categories of coastal shipping futures, enacted the "Transport Contract for Future Delivery", another innovation of shipping finance. In addition, with respect to the market's chaotic situation and the ambiguous relationship between power and responsibility, CMAC Shanghai drafted the "Freight Agency Agreement".

In 2015, the caseload and the amount of disputes in maritime arbitration reflected a steady growing trend. Take CMAC as an example, there are 136 cases accepted in 2015 with an increase of 17 cases and 14.29% overall, among which there are 61 foreign-related cases, with an increase of 15 cases and 32.60%. The total amount of dispute is RMB 1.374 billion. The foreign-related cases involve parties from 17 countries and regions, including mainland China, Hong Kong, New Zealand, Sweden, Mexico, Britain, Singapore, British Virgin Islands, Vietnam, Denmark, Germany, Korea, Japan, Mongolia, and Russia. There are 83 cases closed without a ruling by the court to set aside or refuse to enforce.

In respect of judicial supervision of maritime arbitration, there are 22 cases involving judicial assistance and supervision in 2015, corresponding to a total of 29 judicial documents, of which 16 are first instance civil orders, 4 are second instance civil orders (3 affirmed the original orders, 1 retrial), 2 requests and 7 final orders.

Chapter Two: The review of New Laws and Regulations on Arbitration law

The Supreme Court issued two judicial interpretations in respect of maritime arbitration in 2015. The *Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* (Fa Shi [2015] No. 5) which took effect on February 4, and the *Provisions of the Supreme Court on the Recognition and Enforcement of the Arbitral Awards Rendered in Taiwan Region* (Fa Shi [2015] No. 14) which came into effect on July 1, 2015. These two judicial interpretations will provide strong legal foundations and guidance for China maritime arbitration.

I. *"Interpretations on the Application of the Civil Procedure Law of the People's Republic of China"*

On February 4, 2015, the Supreme People's Court issued the *Interpretations on the application of the Civil Procedure Law of the People's Republic of China* (Fa Shi [2015] No. 5) (the "***Interpretations***"), which took effect on February 4, 2015. The *Interpretations* introduced comprehensive and systematic, clear and specific provisions on the *Civil Procedure Law of the People's Republic of China* ("***Civil Procedure Law***"), and includes 17 provisions concerning commercial arbitration.

A. Governing Court in Disputes Involving Improper Pre-litigation Preservation

Pursuant to Article 27 of the *Interpretations*, "*[W]here a party concerned fails to file a lawsuit or apply for arbitration within the statutory time period after applying for pre-litigation preservation, a lawsuit filed against the resulting losses caused to the respondent or an interested party shall be governed by the people's court that takes the preservation measures. Where a party concerned files a lawsuit or applies for arbitration within the statutory time period after applying for pre-litigation preservation, a lawsuit filed by the respondent or an interested party against the losses suffered due to preservation measures shall be governed by the people's court that accepts the lawsuit or the people's court that takes the preservation measures.*"

This Article followed the provisions of Article 32 of the *Opinions of the Supreme People's Court on Certain Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China* in 1992 (the "***Opinions 1992***"), made modifications thereof according to the provisions of Article 101 of the *Civil Procedure Law*, and provided new provisions on pre-litigation preservation of arbitration. Meanwhile, this Article is basically in line with Article 23 of the *Interpretations on the application of the Maritime Procedure Law of the People's Republic of China* issued by the Supreme Court in 2003 (the "***Interpretations of Maritime Procedure Law***"). In accordance with Article 23 of the *Interpretations of Maritime Procedure Law*, "*[W]here a person against whom the application for maritime claim preservation is filed or an interested party requires that the applicant compensate losses in accordance with Article 20 of the Special Maritime Procedure Law, and brings a suit to the maritime court taking the preservative measures, that maritime court shall accept the case.*"

B. The Probative Value of Facts Ascertained by Binding Arbitral Awards

Pursuant to Article 93 of the *Interpretations*, a party concerned is not required to produce any evidence to prove the facts that have been ascertained by the binding arbitral award rendered by an arbitration commission. However, such facts shall be proved if a party concerned has sufficient evidence to the contrary to overturn the same.

This Article is basically in line with Article 9 of the *Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings*. "Facts ascertained by binding arbitral awards bear the nature of notary documents. According to the rules of notary documents, the probative effect of evidence to the contrary shall be enough to overturn such facts ascertained, i.e. the probative effect of such evidence shall be enough to prove the existence of the facts to the contrary."[1]

C. Preservation in Foreign-Related Arbitrations

Pursuant to Article 542 of the *Interpretations*, "*...if a foreign-related arbitration institution of the People's Republic of China submits the application for preservation by a party concerned to the competent people's court for a ruling thereon, the people's court may review the said application, and render a ruling on whether to take preservation measures. The people's court shall order the applicant to provide guarantee if it renders a ruling to take preservation measures, and shall render a ruling to dismiss the application if the applicant fails to provide guarantee. An applicant that applies for the preservation of evidence is not required to provide guarantee if upon review the people's court is of the opinion that no guarantee needs to be provided.*"

The application for preservation in foreign-related arbitration shall be filed with the people's court by a foreign-related arbitration institution, and shall not be submitted directly to the people's court by the parties concerned. Because, in respect of evidence preservation, neither the *Maritime Procedure Law of PRC* or the *Arbitration Law* requires the applicant to provide guarantees, this Article provides people's courts with the discretion in deciding on whether guarantees are to be provided in applications for evidence preservation.

D. Effective Arbitration Agreements Exclude Jurisdictions of Courts

Pursuant to Article 215 of the *Interpretations*, "*...where the parties concerned already have an arbitration clause in their written contract, or have reached a written arbitration agreement after disputes occur, the competent people's court shall inform the plaintiff who files a lawsuit thereto to apply for arbitration to the relevant arbitration institution, and shall render a ruling on non-acceptance of the lawsuit if the plaintiff insists on filing the lawsuit, except where the arbitration clause or arbitration agreement is not established, is invalid, has lapsed or is unenforceable due to ambiguous contents."* Furthermore, pursuant to Article 531, parties to a case that falls under the exclusive jurisdiction of the courts of the People's Republic of China may not

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[1] "The Comprehension and Application of the Supreme Court's Judicial Interpretations on the Civil Procedure Law", p.321, Shen Deyong, First Edition of 2015, People's Court Press.

select a foreign court as the competent court by agreement, provided that they may select arbitration by agreement.

An effective arbitration agreement has the effect of excluding not only the general jurisdiction but the exclusive jurisdiction of courts, i.e. if the parties choose to resolve their disputes through arbitration, they would not be restricted by the exclusive jurisdiction of courts. In respect of the demurrer effect of arbitration agreements, the *Interpretations* introduced new rules which provides, "*…the competent people's court shall inform the plaintiff who files a lawsuit thereto to apply for arbitration to the relevant arbitration institution, and shall render a ruling on non-acceptance of the lawsuit if the plaintiff insists on filing the lawsuit…*" "In respect of the situations where the plaintiff insists on filing the lawsuit, this Article introduced provisions on non-acceptance ruling by the court, which is a completion of the law and provides guidance for the judicial practice"[2] Besides, the *Interpretations* provides for situations where arbitration agreements may not demur the jurisdiction of courts, adding the circumstance that arbitration agreement is not established.

In addition, pursuant to Article 216 of the *Interpretations*, "*[B]efore the commencement of the first court session, if the defendant to a civil case raises objections to the acceptance of the civil case on the ground of having a written arbitration agreement, the competent people's court shall conduct review. Where any of the following circumstances is found upon review, the competent people's court shall render a ruling to dismiss the filing of the lawsuit: (1) Where the relevant arbitration institution or a competent people's court has confirmed the validity of the arbitration agreement; (2) Where the parties concerned have not raised any objection to the validity of the arbitration agreement prior to the commencement of the first hearing session by the relevant arbitral tribunal; (3) Where the arbitration agreement meets the requirements of Article 16 of the Arbitration Law, and does not fall under any of the circumstances prescribed by Article 17 thereof.*"

According to this Article, the time limit for a respondent to raise objections against the acceptance of the case on the ground of the existence of a valid arbitration agreement is the commencement of the first court session. Besides, combining with Article 223 of the *Interpretations*, where the party concerned submits defense or statements, or lodges a counterclaim, with regard to the substantive aspects of the case without raising objections on jurisdiction, the party concerned may be found as responding to the case pursuant to Section 2 Article 127 of the *Civil Procedure Law*. If the respondent raises objections after the first court session, the people's court obtains the jurisdiction and shall continue the trial.

E. Request for Refusing Enforcement of Arbitral Awards

The request for refusing to enforce arbitral awards is prescribed in three Articles of the *Interpretations*, among which Article 481 provides "*[A] party concerned that intends to request for refusing to enforce an arbitral award…shall make the request to the relevant court of enforcement prior to the completion of enforcement proceedings*", Article 477 provides "*[W]here certain matters*

[2] "The Comprehension and Application of the Supreme Court's Judicial Interpretations on the Civil Procedure Law", p.568, Shen Deyong, First Edition of 2015, People's Court Press.

contained in an arbitral award rendered by an arbitration institution fall under any of the circumstances prescribed by Section 2 or Section 3 of Article 237 of the Civil Procedure Law, the competent people's court shall render a ruling on the refusal of enforcement of such matters. Where the matters that shall not be enforced are inseparable from the remaining matters, the people's court shall render a ruling on the refusal of enforcement of the entire arbitral award", and Article 478 provides "*[P]ursuant to Section 2 or Section of Article 237 of the Civil Procedure Law, after the competent people's court has rendered a ruling on the refusal of enforcement of an arbitral award, if a party concerned raises objections against enforcement on, or applies for reconsideration of, the said ruling, the competent people's court shall not accept such objections or reconsideration application, the parties concerned may reach a new written arbitration agreement in respect of the civil disputes in question to re-apply for arbitration, or may bring a lawsuit to a people's court.*"

Although Article 481 does not expressly provide that the request for refusing enforcement of an arbitral award shall be submitted after the commencement of the enforcement procedure, it should be clarified that "the request for refusing enforcement of arbitral awards could only be raised after the opposing party's submission of the request for enforcement and the commencement of the enforcement procedure. Should the request for enforcing the arbitral award has not been submitted, parties would not be allowed to submit the request for refusing enforcement of arbitral awards."[3] The parties shall submit their requests for refusing to enforce arbitral awards before the completion of the enforcement procedure. Requests submitted after the completion of the enforcement procedure would not be reviewed by the people's court.

Article 477 established the rule dealing with the situation where certain matters contained in an arbitral award fall under the circumstances for refusal of enforcement, i.e. under the condition that the maters contained in the arbitral award are separable, the competent people's court shall render a ruling on the refusal of enforcement of such matters; whereas the remaining matters outside the scope aforesaid shall be enforced nevertheless. If the matters falling under the scope of refusal of enforcement are inseparable from the remaining matters, the people's court shall render a ruling on the refusal of enforcement of the entire arbitral award.

Article 478 provides for the remedies which may be exercised and those may not be exercised by the parties after the ruling of refusal of enforcement. After such ruling, objections against enforcement and reconsiderations may not be exercised by the parties. "The refusal of enforcing arbitral awards is in essence the supervision procedure over the basis for enforcement, rather than the objection in respect of the conduct of enforcing an arbitral award. Therefore, in combination with the legislation rationale and the judicial practice, it would not be appropriate to include the ruling on the refusal of enforcement into the scope of the objection against enforcement and reconsideration."[4]

F. Affirming the Right Holder of and Dividing Assets under Measures of Seal-up, Seizure, or Freezing Shall not Interrupt the Enforcement Proceedings

[3] "The Comprehension and Application of the Supreme Court's Judicial Interpretations on the Civil Procedure Law", p.1280, Shen Deyong, First Edition of 2015, People's Court Press.

[4] *Ibid.*, 1269.

Pursuant to Article 479, "*[D]uring enforcement proceedings, the activities by the enforcee concerned to use arbitration proceedings to affirm a party not involved in the case at hand as the right holder of the assets sealed up, seized or frozen by the competent people's court or to divide such assets to a party not involved in the case at hand shall not interrupt the enforcement proceedings of the people's court. A party not involved in the case at hand may raise objections, if any, pursuant to Article 227 of the Civil Procedure Law.*"

The rationale of this Article is to prevent the enforcee and the party not involved to use false arbitration against the enforcement proceedings. In cases where it involves the affirmation of a party not involved as the right holder of the assets sealed up, seized or frozen or the division of such assets to such party, and where the party not involved in the case at hand raises objections to the enforcement procedure by submitting an arbitral award and requests the court to lift the measure of seal-up, seizure or freezing, the court of enforcement shall review and rule correspondingly.

G. Recognition and Enforcement of Foreign Arbitral Awards

Foreign arbitral awards (including ad hoc awards) may be recognized and enforced in China according to the treaties to which China is a party or the principle of reciprocity. It should be clarified that recognition and enforcement are two separate procedures, and that courts shall review the case per the request submitted by the parties. The time limit for parties to request for recognition and enforcement of foreign awards is governed by the *Civil Procedure Law*. The time limit for enforcement will be renewed from the date on which the ruling on the application for recognition takes effect.

There are four articles of the *Interpretations* in relation to the recognition and enforcement of foreign arbitral awards, namely Article 545, Article 546, Article 547 and Article 548. Article 545 provides that "*[W]here a party to an arbitral award that is rendered by an ad hoc arbitral tribunal outside the territory of the People's Republic of China applies to a people's court for recognition and enforcement of the same, the people's court shall handle the application in accordance with the international treaties to which China is a party and the reciprocity principle.*" Pursuant to Article 546, "*[W]here a legally binding judgment/ruling rendered by a foreign court or a foreign arbitral award needs to be enforced by a court of the People's Republic of China, the party concerned shall first apply to the competent people's court for recognition of the said judgment/ruling or arbitral award. The people's court shall enforce the said judgment/ruling or arbitral award pursuant to Part 3 of the Civil Procedure Law after rendering a ruling to recognize the same upon review. Where a party concerned only applies for recognition of a legally binding judgment/ruling rendered by a foreign court or a foreign arbitral tribunal, and does not apply for enforcement at the same time, the competent people's court shall only review, and render a ruling on, whether to recognize the said judgment/ruling or arbitral award.*"

According to these provisions, foreign arbitral awards include the arbitral awards made by foreign permanent arbitration institutions and ad hoc arbitral tribunals outside the territory of the People's

Republic of China. The parties may apply only for the recognition of a foreign arbitral award, or apply for recognition and enforcement of a foreign arbitral award at the same time.

Pursuant to Article 547, "*[T]he time limit for a party concerned to apply for recognition and enforcement of a legally binding judgment/ruling rendered by a foreign court or a foreign arbitral award shall be governed by Article 239 of the Civil Procedure Law. Where a party concerned only applies for recognition of a legally binding judgment/ruling rendered by a foreign court or a foreign arbitral award, and does not apply for enforcement at the same time, the period for applying for enforcement shall be re-calculated from the date when the ruling rendered by the people's court on the recognition application comes into effect.*"

Matters during the period of the application for recognition and enforcement of foreign arbitral awards shall be governed by the *Civil Procedure Law*. If a party applies for the recognition of a foreign arbitral award, and then apply for the enforcement of the award, the recognition procedure would constitute the interruption of the time limit for enforcement. The time limit for enforcement shall be renewed from the date on which the ruling on the application for recognition takes effect.

Pursuant to Article 548, *"[A] people's court shall form a collegiate panel to review a case for recognition and enforcement of a legally binding judgment/ruling rendered by a foreign court or a foreign arbitral award. The people's court shall serve the written application on the respondent who may state its opinions. The ruling rendered by the people's court upon review shall come into legal effect once served."*

II. *Provisions of the Supreme People's Court on the Recognition and Enforcement of the Arbitral Awards Rendered in Taiwan Region*

The *Provisions of the Supreme People's Court on the Recognition and Enforcement of the Arbitral Awards Rendered in Taiwan Region* ("***Provisions 2015***"), which was implemented since July 1, 2015, basing on the mutual recognition and enforcement of arbitral awards between the Mainland China and Hong Kong and Macau, and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "***New York Convention***"), provides a set of detailed rules on applicant, time limit for application, procedure of recognition and enforcement, jurisdiction, trial entity, agency, conditions for acceptance, standards in determining Taiwan arbitral awards, preservation procedure, withdrawal of application, rejection of application, statutory grounds for refusal of recognition, service of ruling, litigation fees, interpretation and coming into effect. There are 22 articles in the *Provisions 2015*, among which Article 14 is of the greatest importance, which specifies the conditions for refusal of recognition and enforcement.

Pursuant to Article 14, "*[W]here a respondent under the application for recognition and enforcement furnishes evidence to prove any of the following circumstances, the competent people's court shall render a ruling on the refusal of recognition of the arbitral award after relevant circumstances are verified upon examination:*

1. Where one party to the arbitration agreement in question has no civil capacity upon the

conclusion of the arbitration agreement pursuant to the laws applicable thereto; or, where the arbitration agreement is invalid pursuant to the governing laws agreed upon by the parties concerned or pursuant to arbitration provisions of Taiwan region in the absence of any applicable governing law agreed upon by the parties concerned; or, where the parties concerned have not reached any written arbitration agreement, unless the application is for the recognition of an arbitration mediation rendered in Taiwan region;

2. *Where the respondent concerned is not properly notified of the selection and appointment of arbitrators or the commencement of arbitration procedures, or has failed to state its opinions due to other reasons not attributable thereto;*

3. *Where the disputes dealt with during arbitration are not the disputes submitted for arbitration, or are beyond the scope of the arbitration agreement in question; or, where the arbitral award contains decisions on matters beyond those submitted for arbitration by the parties concerned, provided that the decisions on matters submitted for arbitration as specified in the arbitral award may be recognized if they can be separated from the decisions on matters beyond those submitted for arbitration as specified in the arbitral award;*

4. *Where the composition of the arbitral tribunal or the arbitration procedures are against the agreements of the parties concerned, or are against the arbitration provisions of Taiwan region in the absence of relevant agreements between the parties concerned; or*

5. *Where the arbitral award is not yet binding on the parties concerned, or where a court in Taiwan region has revoked the arbitral award or dismissed an application for enforcing the arbitral award.*

The competent people's court shall render a ruling on the refusal of recognition of the arbitral award if the matters in dispute cannot be resolved through arbitration pursuant to China law, or if the recognition of this arbitral award will violate the basic principles of China law, such as the One-China Principle, or harm the public interest."

As such, apart from the special provision on the "One China" principle, other conditions such as the validity of arbitration agreements, due process, defects in the validity of arbitral awards, arbitrability and public interest are basically referenced from the *New York Convention*.

Chapter Three: Arbitration Rules of CMAC

The new Arbitration Rules of CMAC (the "***Revised Rule***") was enacted in 2014 and implemented on Jan 1, 2015, to adapt to the needs of maritime arbitration practice. By taking in the international experience, the *Revised Rule* includes amendments in respect of arbitral proceeding, hearing and arbitral award, and is a giant step towards the internationalization of CMAC. The *Revised Rule* consists of 6 chapters and 81 articles, and includes General Provisions, Arbitral Proceedings, Conservatory and Interim Measures, Arbitrator and Arbitral Tribunal, Hearing, Arbitral Award, Summary Procedure, Special Provisions for Hong Kong Arbitration and Supplementary Provisions. The *Revised Rule* also includes 3 appendixes, of which Appendix One is Arbitrator Lists of CMAC and Sub-Commissions, Appendix Two is Arbitration Fee Schedule and Appendix Three is the Emergency Arbitrator Procedure which basically applies to Hong Kong Arbitration Center and may be applied to CMAC and its sub-commissions according to the applicable law or the parties' agreement.

Arbitration rules, as a part of arbitration regime, are directed by the parties' expectations, and should be examined by arbitration practice. Combining the application of the *Revised Rule* in 2015, this Report, basing on the two value orientations of arbitration, analyses the rules of efficiency and fairness and purports to provide guidance for parties in applying the *Revised Rule* in dispute resolution practice.

I. Efforts in Achieving Efficiency

The primary reason for parties to choose arbitration in dispute resolution is efficiency. This character of arbitration is highly valued in competitions among international arbitration institutions. The *Revised Rule*, in compliance with the law, takes maximizing efficiency as its primary role. Increasing efficiency of arbitration has been the focus of some international arbitration institutions, as well as CMAC, in amending their arbitration rules. The *Revised Rule*'s efforts in increasing efficiency are manifested from the following aspects.

A. Application of the *Revised Rule*

With respect to the selection of arbitration rules, the *Revised Rule* gives due respect to the parties' autonomy by modifying the previous provisions under which the parties are required to obtain CMAC's consent before using the arbitration rules which the parties select. Article 4 Section 3 of the *Revised Rule* provides "*[W]here the parties agree to refer their dispute to CMAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings. Where the parties have agreed on the application of other arbitration rules, CMAC shall perform the relevant administrative duties.*" Parties' autonomy is the core element of commercial arbitration. The parties to arbitration are in the best place to decide on their interests. No arbitration rule, even those with universality, is able to cover all aspects of complicated disputes, or is able to protect the parties'

interests as their needs differentiate in each specific case. Parties' autonomy is an important aspect in achieving efficiency of arbitration, and is also vital in respecting the contract nature of arbitration rules. However, the *Revised Rule* also sets certain limits on the parties' selection of arbitration rules. The provision that "*the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings*" is in line with the arbitration rules of most of the international arbitration institutions around the world, and reflects the fundamental principle that private rights will always subordinate to public authorities. Pursuant to Article V Section 2 of the *New York Convention*, recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the arbitral award is in conflict with the lex arbitri. As to the "delocalization" theory of international commercial arbitration, most of the countries and arbitration institutions still hold rigorous attitude; and the "delocalization" theory is rarely seen in practice.

The *Revised Rule* added in Article 4 Section 4 that "*[W]here the parties agree to refer their dispute to arbitration under these Rules without providing the name of the arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by CMAC.*" Pursuant to this provision, as long as the parties choose the *Revised Rule*, CMAC would "naturally" obtain the "implicit" jurisdiction over the dispute. Should the parties fail to select an arbitration institution, CMAC's jurisdiction over the dispute would become explicit. This provision, to a certain degree, expanded the scope of cases that CMAC may accept, and is in line with Article 4 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"* which provides "*[W]here an arbitration agreement only includes the arbitration rules applicable for the dispute at issue, the parties concerned shall be deemed not to have agreed upon the arbitration institution, unless the parties have reached a supplementary agreement or the arbitration institution can be identified through their agreed-upon arbitration rules*" and the trend of international arbitration in promoting the recognition of the validity of arbitration agreements. The arbitration laws of most of the countries tend to recognize the validity of arbitration agreements, and not to set undue limits on their formality. Determining the jurisdiction of the arbitral tribunal in accordance with the parties' agreements is the extension of parties' autonomy. As such, CMAC is empowered to accept disputes pursuant to arbitration agreements, concluded according to the laws of such countries, with the provision for arbitration under *the Revised Rules*.

B. Competence-Competence

Competence-competence doctrine means an arbitral tribunal has the authority to decide on the validity of an arbitration agreement and on objections against the tribunal's jurisdiction over the dispute. Competence-competence doctrine is the core element of the tribunal's authority, which also precludes the interference from local courts. Article 16 Section (1) of the *UNCITRAL Model Law on International Commercial Arbitration* provides that "*[T]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*" The basis for competence-competence doctrine is the parties' trust in the arbitral tribunal they select, which is also an outcome in pursuing efficiency of arbitration. This doctrine is recognized in the arbitration laws of many countries.[5]

[5] *See* Article 31 of the *Arbitration Act 1996* of UK; Article 1040 of the *Code of Civil Procedure* of Germany; Article 2 of the *Swedish*

Excessive reliance on public authorities is the deeply rooted tradition of China. The competence-competence doctrine has been fundamentally denied by the law. Pursuant to the law currently in force, only arbitration commissions and local courts, rather than arbitral tribunals, may rule on the jurisdictions of disputes, and local courts always have the priority in deciding on such matters. Currently, though it has been argued by academics that the rule must be changed. However, under the background that the *Arbitration Law* cannot be immediately revised, and conditioned on the compliance with the current law, the *Revised Rule* tries to apply the doctrine of competence-competence to a certain degree. Article 6 Section 1 of the *Revised Rule* provides "... *CMAC may, where necessary, delegate such power to the arbitral tribunal*". This innovative provision is originated from the *CIETAC Arbitration Rules 2005*, and is an attempt to enhance the power of arbitral tribunals. This provision is directed to increase arbitration efficiency and to strengthen the power of arbitral tribunals. And of course, unless the *Arbitration Law* is revised correspondingly, this provision, as a rule of an arbitration institution, cannot bring any breakthrough to the arbitration practice of China.

C. Arbitral Tribunal

1. With respect to the determination of presiding arbitrators, the parties may, according to the *Revised Rule*, submit lists of recommended candidates. In a three-arbitrator tribunal, where a majority opinion cannot be reached by the tribunal, the arbitral award shall be rendered in accordance with the presiding arbitrator's opinion. As such, disputes often arise with respect to the appointment of the presiding arbitrator. In extreme circumstances, some parties to arbitration abuse this right appointing arbitrators without proper competence with the purpose to delay the whole arbitral proceeding. The common practice of appointing arbitrators is that the parties respectively appoint one arbitrator, and the two appointed arbitrators will negotiate, within a limited period of time, on the appointment of the presiding arbitrator, failing which the arbitration institution will appoint the presiding arbitrator. The problem of this approach is that it easily abused by the parties to delay the arbitral proceeding, and the presiding arbitrator appointed by the arbitration institution may not be the most suitable candidate. The *Revised Rule* takes in some arbitration practices, and allows the parties to respectively nominate 1-5 candidates as presiding arbitrator. If there are at least one common candidate of the lists submitted by the parties, the Chairman of CMAC will appoint the presiding arbitrator among the common candidates having regard to the circumstances of the case. By this approach, to protect their own interests, the parties would be more discreet in nominating their candidates, and the parties' abuse of arbitration procedure could be eliminated. The *Revised Rule* gives full respect to the parties' will, and provides the parties with an approach to determine the presiding arbitrator with fairness and efficiency. Even though in circumstances where there is no common candidate nominated by the parties, their lists of candidates still provide a reference for the Chairman of CMAC in deciding on the person for presiding arbitrator.

2. In considering the various situations in arbitration practice, the *Revised Rule* takes in the rule of continuation of arbitration procedure. Both Article 12.1 of *LCIA Arbitration Rules*, and *ICDR*

Arbitration Act.

International Arbitration Rules[6] contain such provisions under which if an arbitrator on a three-member tribunal is unable to or refuse to participate in deliberations, upon noticing CMAC, the parties to arbitration and other relevant parties, the other two arbitrators may continue the arbitral proceeding and make decisions, rulings, or render the award. This rule is deeply rooted in the common law system where due process is highly valued, and could effectively prevent malicious conspiracies to interfere the continuation of arbitral proceedings by arbitrators and parties. However, this rule may also bring unfairness to the other party in respect of substantive ruling, and is therefore, not recognized by many civil law system countries. Nowadays, when efficiency is becoming one of the major goals of commercial arbitration, the continuation of arbitration by majority arbitrators has receive more attention than ever before, and is accepted, to a certain degree, by *ICC Arbitration Rules*[7]. Introducing the rule of continuation of arbitration in the revision this time manifests its internationalization and CMAC's pursuance of efficiency. Compared to common law system countries, the continuation of arbitration by majority arbitrators in the *Revised Rule* sets certain limits: First, it must be exercised after the completion of the first oral hearing; Second, the reason that the arbitrator cannot participate in arbitration must be demise or removal; Third, the tribunal should consult with the parties with respect to the application of this procedure; Fourth, it must be approved by the Chairman of CMAC. As such, the continuation of arbitration procedure contained in the Revised Rule achieved both efficiency and fairness.

D. Hearing

1. With respect to hearings of arbitration, the *Revised Rule* provides the tribunal with more flexible powers. In considering the experience of other arbitration institutions, it adds four sections to Article 39. According to the Section 1 of this article, the arbitral tribunal shall examine the case in any way it deems appropriate unless otherwise agreed by the parties. Section 3 gives special consideration to the parties in common law system countries. In considering parties' autonomy, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case. Section 4 provides that the arbitral tribunal may hold deliberations at any place or in any manner that it considers appropriate, which is more advanced than other civil law system countries, where it must be decided upon the parties' negotiation. Section 5 takes in the good practice of some international arbitration institutions, and provides that the arbitral tribunal may, if it considers it necessary, issue procedural orders or question lists, produce terms of reference, or hold pre-hearing conferences, etc. It is the current trend to enhance the power of arbitral tribunals, which would be significant in increasing the efficiency of arbitration.

2. In respect of evidence production, the *Revised Rule* introduced rules on overdue production. The evidence production in arbitration differs from that in civil procedure law, and is generally not governed by the rules of civil procedure law. Civil procedure law, in considering the difficulty in evidence production, the parties' respective status, characteristics of conducts etc., provides for many exceptions to the production of evidence. However in commercial arbitration, each party

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[6] *See* Article 12.1 of the *LCIA Arbitration Rules 2014*, and Article 15 Section 3 of the *ICDR Commercial Arbitration Rules 2014.*
[7] *See* Article 15 Section 5 of the *ICC Arbitration Rules 2012*.

shall bear the burden of proof of the facts on which it relies to support its claim, defense or counterclaim and provide the basis for its opinions, arguments and counter-arguments. Furthermore, to protect the fairness in arbitration, there is no strict time limit on the production of evidence in arbitration. At any stage of arbitration, evidence produced by the parties may be admitted upon the tribunal's approval. Many parties in arbitration use this rule to delay the proceeding with malice by producing the evidence right on the last day of the limit, and thereby reduce the efficiency of arbitration. CMAC allows the arbitral tribunal to specify the time limit for evidence production, as well as the legal consequences should the parties fail to abide by such limit.

3. The *Revised Rule* introduces new attempts with respect to the place of arbitration. First, the *Revised Rule* changed the previous practice that hearings shall be held at the place of arbitration, and provides for the place of arbitration and the place to hold hearings respectively in Article 7 and Article 40. This approach is in line with other international arbitration institutions[8]. "Place of arbitration" is a notion with special legal meaning in international commercial arbitration. Place of arbitration is crucial to law application, the recognition and enforcement of arbitral awards etc. Whereas the "place of hearing" is merely a notion with only geographic meanings. A hearing may be held in any country, or even on high seas, and would not in any way affect the making of the arbitral award. As such the *Revised Rule* conforms to the parties needs that the place of hearing should be distinguished from the place of arbitration.

   Another amendment of the revision is that, with respect to the place of arbitration, the *Revised Rule* provides that "*...the arbitral award shall be deemed as having been made at the place of arbitration.*" Pursuant to the "reciprocity reservation" made by China when joining the *New York Convention*, the recognition and enforcement of an arbitral award made in another contracting state shall be governed by the *New York Convention*. The determination of the nationality of an arbitral award according to the *New York Convention* depends on the place where the arbitral award is made. And according to the *Revised Rule*, the arbitral award shall be deemed as having been made at the place of arbitration. As such, the place of arbitration determines the nationality of an arbitral award. In another word, the parties may select any contracting state to the *New York Convention* as the place of arbitration; and, even though the place of hearing is in China, the arbitral award rendered by CMAC would be deemed as a foreign award, and may be recognized and enforced in our country according to this convention. This approach largely promotes the autonomy of arbitration, and the recognition and enforcement of arbitral awards. Even though, arbitration rules are only binding upon the parties and the arbitral tribunal. The recognition and enforcement of arbitral awards are exercised by courts in accordance with the laws of our country. As such, the *Revised Rule* would not be deemed as a basis for the recognition and enforcement of arbitral awards. Moreover, there are conflicts in the recognition and enforcement of foreign awards in China[9], and there is no explicit rule in respect of the determination of the nationality of arbitral awards. Neither is there any rule with respect to the "place where the arbitral award is made" as mentioned in the *New York Convention*. This rule of the *Revised Rule*, using place of arbitration as the nationality of an

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[8] *See* Article 18 of the *ICC Arbitration Rules 2012*; Article 17 of the *ICDR Commercial Arbitration Rules 2014.*

[9] *See* "*A Jurisprudential Study on the International Commercial Arbitral Award System of China*", LIU Xiangshu, p. 161.

arbitral award, has to be examined by the practice of local courts. The determination of arbitral awards is a matter of sovereignty, and is subject to the public laws of a country instead of the parties' agreements. Arbitration institutions, of course, do not have the authority in making such determinations. The solution to this dilemma is to obtain the approval from the level of our country, and to write the rules into laws, and thereby restrain the activities of courts.

E. Multiple Parties and Multiple-Contract Disputes

1. Multiple-contract arbitration and joinder of additional parties. With the growing complexity of commercial relationships, amount of disputes involving multiple parties and multiple contracts has increased largely. Where a dispute involves multiple parties or multiple contracts between the same parties, the ideal approach is to solve the dispute through one, rather than several, arbitral proceeding. This approach saves time and reduces expenses, and more importantly, avoids the risk of conflicts among separate arbitral awards. Most of the civil procedure laws provide for the consolidation of disputes involving multiple parties or multiple contracts to ensure the expedient trying of both facts and legal issues. However as parties' autonomy is the foundation of commercial arbitration, disputes involving multiple parties or multiple contracts cannot be effectively solved. Whether to consolidate the disputes in such cases into one arbitral proceeding has been a dilemma for both academic and practice community, and has been heavily argued in each country's legislation and legal practice.

   Article 14 of the *Revised Rule* introduced provisions in respect of arbitrations involving multiple contracts, under which disputes arising from such contracts may be consolidated provided that, (a) such contracts constitute underlying contract and its ancillary contract(s), or such contracts involve the same parties as well as legal relationships of the same nature; (b) the disputes arise out of the same transaction or the same series of transactions; and (c) the arbitration agreements in such contracts are identical or compatible. Another innovation of the *Revised Rule* is the "joinder of additional parties" provided in Article 18. Pursuant to this article, a party wishing to join an additional party to the arbitration may file a request for joinder with CMAC, based on the arbitration agreement invoked in the arbitration that prima facie binds the additional party. Where the request for joinder is filed after the formation of the arbitral tribunal, a decision shall be made by CMAC after the arbitral tribunal hears from all parties including the additional party if arbitral tribunal considers the joinder necessary. Multiple-contract arbitration and the joinder of additional parties are of great significance, which could simplify the procedure of arbitration, save time and expenses, and successfully and completely solve disputes. These rules are in line with the parties' fundamental interests and the efficiency value orientation of arbitration.

2. Consolidation of Arbitrations and Consolidation of Oral Hearings. Article 19 of the *Revised Rule* introduces a whole new standard compared to the previous rule. First, the consolidation of arbitrations shall be requested by the parties, rather than ordered directly by CMAC. Second, at least one of the four conditions shall be satisfied: (a) all of the claims in the arbitrations are made under the same arbitration agreement; or (b) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties as well as legal relationships of the same nature; (c) the claims in the arbitrations

are made under multiple arbitration agreements that are identical or compatible and the multiple contracts involved consist of the principal contract and the ancillary contract(s); or (d) all the parties to the arbitrations have agreed to consolidation. At last, CMAC has the ultimate authority in deciding on whether consolidation of arbitrations should be permitted. CMAC shall take into account the opinions of all parties and other relevant factors such as the correlation between the arbitrations concerned, including the nomination and appointment of arbitrators in separate arbitrations.

Consolidation of arbitrations has been a dilemma for both academic and practice community, and has been heavily argued in each state's legislation and legal practice. Those opposing to this regime believe that the consolidation of arbitrations is in conflict with and would reduce the autonomy of the parties which is the foundation of commercial arbitration. Those supporting the consolidation of arbitrations hold that it would cause repeat trying of the same facts and is inefficient. This is contrary to the parties' intention in entering into an arbitration agreement, and conflicts with the goal in increasing the efficiency of arbitration. Consolidation of arbitrations is of great significance in ensuring the successful and efficient resolution of disputes, and in promoting fairness and efficiency of commercial arbitration. The application of this rule in the arbitration rules of the major arbitration institutions around the world proves that it is necessary in nowadays commercial arbitration regime. The *Revised Rule's* introduction of clear and complete standard for consolidation of arbitrations will ensure the parties' prediction of their disputes and their knowledge of this regime. This will help the parties in reaching agreements, and make sure the successful application of consolidation of arbitrations procedure.

The *Revised Rule* also introduced the consolidation of oral hearings. Pursuant to Article 49 of the *Revised Rule*, if two or more cases on arbitration involve the same issues de jure or de facto, after inquiring the parties, the arbitral tribunal in consultation with CMAC may decide to consolidate the oral hearing of the cases and may also decide: (a) that the documents submitted by the parties in one case may be forwarded to the parties in other case(s); (b) that the evidence produced in one case may be accepted and adopted in other case(s), provided that all parties have been offered sufficient opportunities to comment on the evidence. This regime is introduced from common law system countries, and cases are still to be independently heard by the respective arbitral tribunals. Consolidation of oral hearing governs only the disclosure of the evidence or documents of the same issues de jure or de facto. Even though, the correlated arbitral tribunals will proceed independently. As such, compared to the consolidation of arbitrations, the consolidations of oral hearings would be more practicable.

II. Efforts in Pursuing Fairness

Fairness and justice is the source of the law, and have been argued among different academic groups over thousands of years. However, there is no doubt in respect of their function as the goal of the law. The resolution of disputes relies on the balance of fairness and the parties' interests. As a civil method of dispute resolution, commercial arbitration, of which the core value is achieving fairness, relies on this value orientation to obtain the parties' trusts. Therefore, exercising its powers with fairness is the focus of the *Revised Rule*.

A. Arbitrators

1. With respect to the appointment of arbitrators, the *Revised Rule* empowers the parties to nominate arbitrators from outside CMAC's Panel of Arbitrators. This provision of the *Revised Rule* sets a precedent for CMAC, even though this rule has already been applied by the big arbitration institutions. Based on the autonomous nature of arbitration, this rule reflects the original goal of arbitration, according to which disputes are to be decided by the impartial third party chosen by the parties. Panel of arbitrators serves to provide guidance to the parties, rather than limits the parties' autonomy to choose. The parties' purpose in selecting arbitration is to resolve disputes with fairness. As such, from this point of view, limit means interference with fairness. The new Panel of Arbitrators of CMAC has been implemented since the 1st of May, 2014. The new Panel of Arbitrators optimized the major and age composition of arbitrators, and provided supports to the hearing of admiralty, maritime and logistics disputes by CMAC and its sub-commissions. The new Panel of Arbitrators expended the nationality of arbitrators and the region where they are from. It includes 279 arbitrators, among which there are 214 arbitrators from the mainland of China and takes 76.70%, 65 arbitrators from Hong Kong Special Administration Region, Macau Special Administration Region, Taiwan, and foreign countries. Arbitrators with foreign nationality are from 18 countries and regions around the world, with Turkish, French and German arbitrators added to the list. This revision of the CMAC Arbitration Rules provides more choice for the parties in appointing arbitrators and is of great significance.

   The revision of CMAC Arbitration Rules did not touch the issue of challenging arbitrators on the ground of nationality. This regime, for instance, is contained in R-15 of *AAA Commercial Arbitration Rules and Mediation Procedures*, which provides "*... the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties.*" There are similar rules in the arbitration rules of the most international commercial arbitration institutions[10]. Bearing the same nationality with one of the parties would not necessarily result in the partiality of arbitrators, and the effect of arbitrators' nationality over the fairness of arbitral awards is not yet clear. However, people would take it for granted to divide people into groups by nationality or gender. As such, it would be fair to say the challenge of arbitrators on the ground of nationality could increase the parties' faith in the tribunal.

2. Regarding the disclosure by arbitrators, the *Revised Rule* takes in the experience of ICC, and provides in Article 35 that "*an arbitrator nominated by the parties or appointed by the Chairman of CMAC shall sign a Declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.*" Most of the countries take the disclosure obligation of arbitrators as a mandatory obligation. The *Arbitration Law* does not, in principle, provide for the disclosure obligation of arbitrators, and only provides for the challenge of arbitrators. Arbitrators shall disclose information with respect to the issues under challenge; whereas there is no mandatory requirement for the issues unchallenged. This flaw of the *Arbitration Law* is remedied by the *Arbitration Rules of CMAC*. Such a regime could restrict

[10] See Article 6 of the *LCIA Arbitration Rules 2014*; Article 13, Section 1 of the *ICC Arbitration Rules*; Article 12 Section 4 of the *ICDR International Arbitration Rules*.

the conducts of arbitrators, and promote the fairness of arbitration. However, disclosure by declarations is rarely seen in other arbitration institutions. The disclosure by arbitrators is regulated by laws or arbitration rules as a substantive obligation; whereas the declaration by arbitrators is merely a procedure in fulfilling this obligation, an obligation embedded in procedure basically resulted from the parties' agreements. As such, if the arbitrator fails to sign a declaration or fails to make full disclosure in the declaration executed, the parties may request to set aside the arbitral award on the ground of breach of procedural agreements rather than breach of disclosure obligation. Furthermore, at the request of one of the parties, contracting states to the *New York Convention* may refuse to recognize and enforce the foreign arbitral award on the ground of breach of arbitration procedure. Therefore, this provision of the *Revised Rule* undoubtedly burdens arbitral tribunals with respect to their obligations on arbitration procedure, and is aimed in achieving the fairness of arbitral awards.

B. Hearing

1. The *Revised Rule* introduced provisions on counter-claims. As opposed to claims, a counterclaim in arbitration could be referenced to the counterclaim regime in civil litigation. It is a claim by the respondent opposing the claim of the claimant. Counterclaim, as an important tool of defense, is a protection for respondents. Contrary to court, which plays different roles in common law and civil law systems, arbitral tribunal has always played a passive role in arbitration. As a dispute resolution institution, its power of investigation and decision cannot be compared to those of court. As such, counterclaim regime is of great significance in arbitration. The rules on counterclaims contained in the *Revised Rule* is more complete and added 3 sections to Article 16, which makes counterclaims and defense to counterclaims more practicable and promotes the achievement of fairness.

2. Examination of Evidence. The *Revised Rule* uses a single article to provide for the examination of evidence, which manifests the importance of this regime. Examination of evidence, as one of the major methods for parties' debate, is an important right for the parties to present their cases, and is crucial for arbitral tribunals in admitting evidence submitted by the parties. The *Revised Rule* especially could meet the needs for procedural justice of parties who are from common law system, which would bring them with more confidence in arbitration. Moreover, the *Revised Rule* is flexible with respect to the provision of evidence examination, and provides only from the principle level that evidence examination shall be conducted either in oral hearings or in cases to be decided on the basis of documents. There is no specific requirement as to the manner in which examination of evidence is to be carried out, which means that the parties enjoy great extent of freedom with respect to this regime.

C. Arbitral Award

1. With respect to the dissenting opinions in arbitral awards, Article 54 Section 5 of the *Revised Rule* provides that "*...A written dissenting opinion shall be kept with the file and may be appended to the award. Such dissenting opinion shall not form a part of the award.*" This article changes the rule in *the Arbitration Law*, where there is no mandatory requirement for appending

of dissenting opinions. In the arbitration rules of other international arbitration institutions, appending dissenting opinions is the right of arbitral tribunals. However, it is still disputed as to whether dissenting opinions should be written into arbitral awards, or whether dissenting opinions should be served together with arbitral awards. Appending of dissenting opinions is originated from the practice of common law system. This regime is purported to enhance public supervision over judgements, and to ensure the fairness and transparency of judgements. Through this regime, judges could let the public know his legal opinions, even though the appending of dissenting opinions could also, to a certain degree, ensure the transparency of arbitral awards.

2. Scrutiny of Draft Award. The *Revised Rule* expanded the scope of scrutiny by CMAC. Scrutiny of draft award by arbitration institution is a characteristic regime of ICC. By arbitration institution's interference of arbitration procedure, situations where arbitral award is unable to be enforced due to formality issues or substantive injustice could be avoided. The scrutiny of draft award regime contained in the *Revised Rule* is not only applicable to formality issues, but to "relevant issues", which means this regime covers both formality and substantive issues. CMAC may scrutinize draft awards from the standpoint of recognition and enforcement of arbitral awards, without interfering the independence of arbitral tribunal.

3. In terms of the losing party's compensation to the winning party, the *Revised Rule* requires the arbitral tribunal to consider factors including the outcome and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in controversy, etc. This modification makes it more reasonable in determining the amount of compensation, protects the legitimate rights of the parties, and is in line with the international practice "Costs Follow-Events" doctrine, of which the core element is "reasonability". Empowering the arbitral tribunal to determine the amount of compensation without restrictions reflects CMAC's recognition of arbitral tribunals' independence.

The *Revised Rule* manifests the direction of reform for China arbitration regime. The revision this time conforms to the goal in achieving efficiency and fairness. The *Revised Rule* introduces advanced practices from other international arbitration rules, takes in experience from our country and foreign countries. This is an important step of CMAC towards internationalization. The *Revised Rule* keeps certain rules with "Chinese Characteristics", such as combing arbitration and mediation.

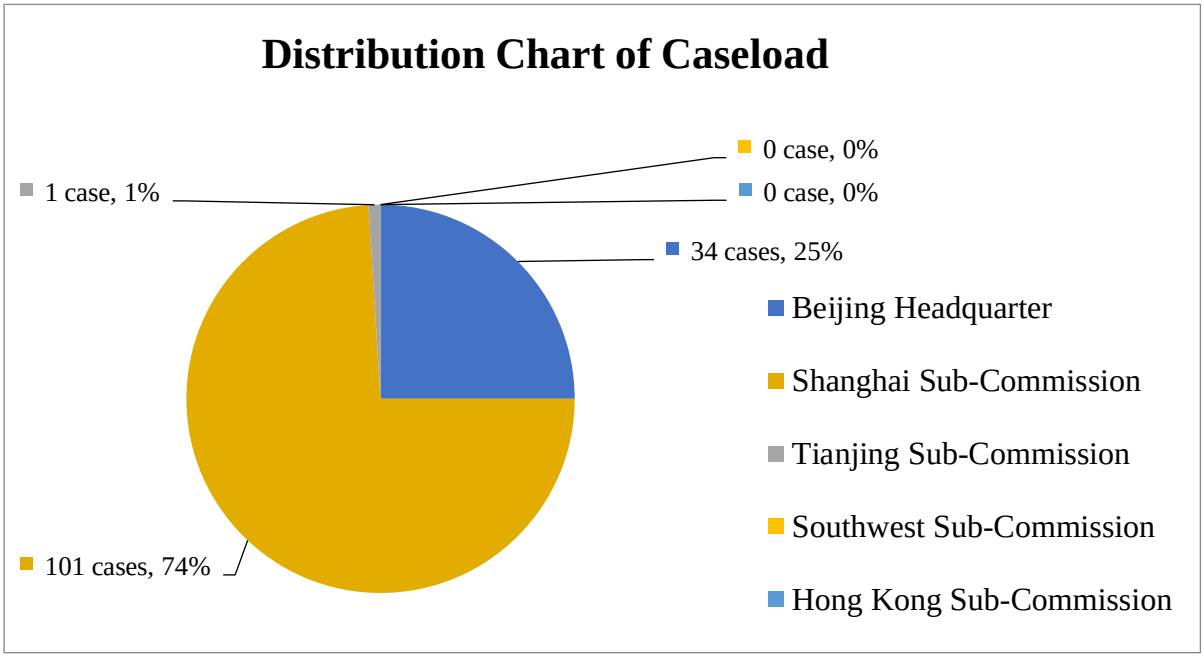
Chapter Four: Big Data of CMAC in Year 2015

I. Number of Cases Accepted

A. Overview

1. Geographic Distribution

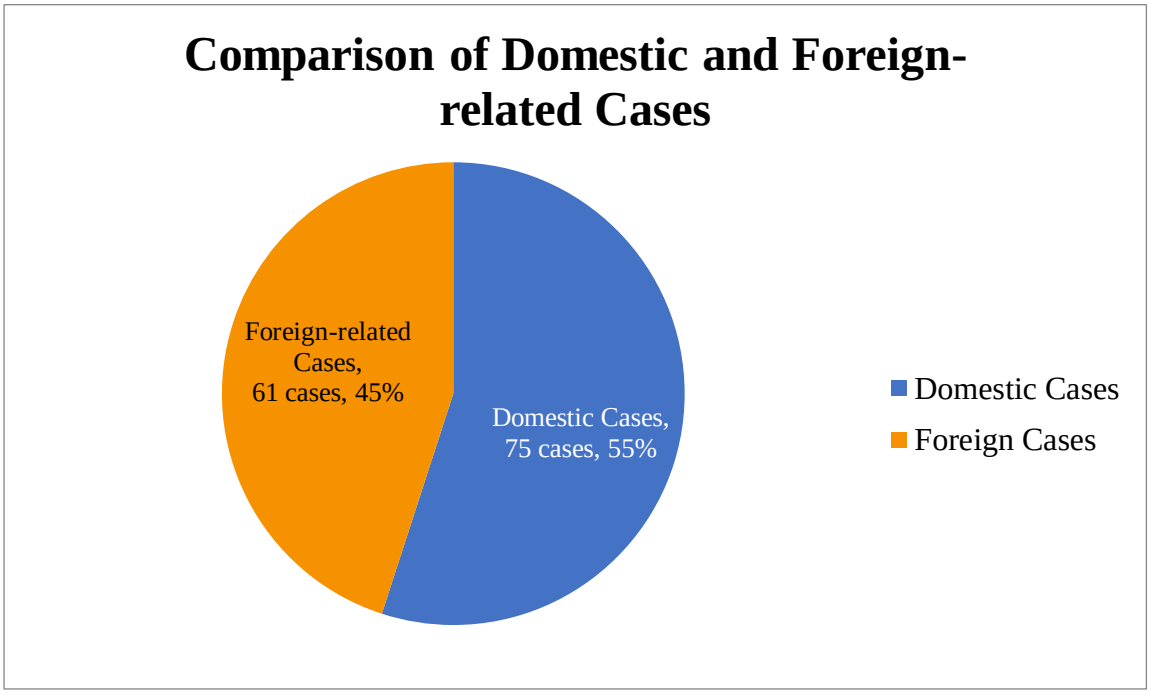
Up to December 2015, the number of cases accepted is 136, among which there are 34 cases accepted by Beijing Headquarter, 101 cases accepted by Shanghai Sub-Commission, 1 case accepted by Tianjin Sub-Commission. There is no case accepted by Southwest Sub-Commission and Hong Kong Sub-Commission this year. The number of cases accepted at Shanghai Sub-Commission is greater than the aggregate number at Beijing Headquarter and Tianjin Sub-Commission, and takes more than 2/3 of the total number of cases accepted by CMAC. (Chart 1)



(Chart 1)

2. Comparison of Domestic and Foreign-Related Cases

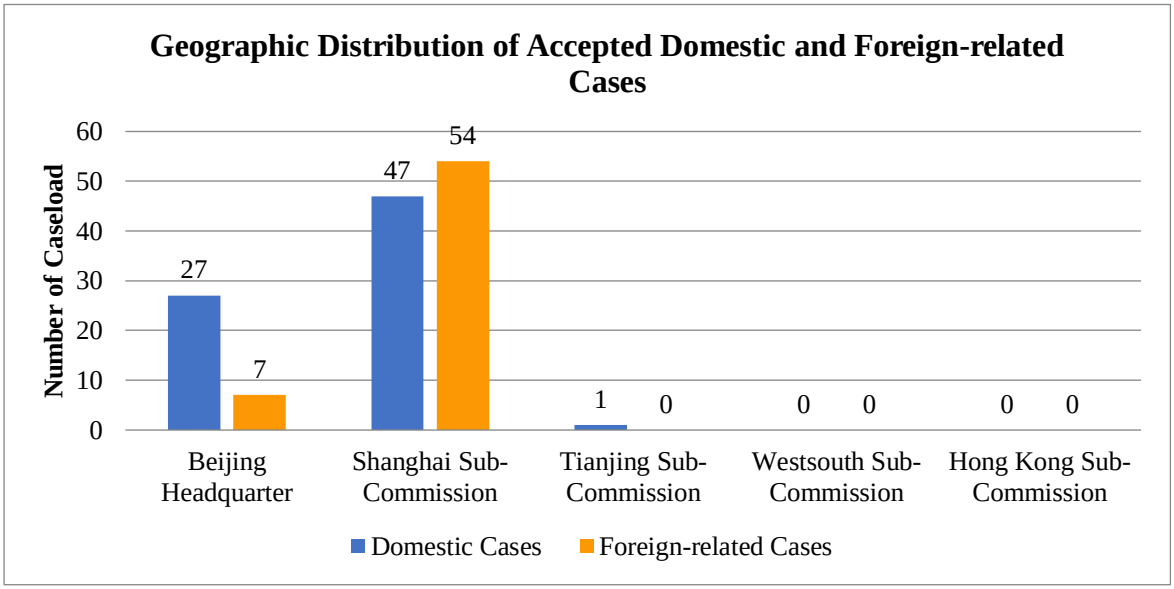
The caseload of CMAC as of December of 2015 consists of 75 domestic cases, and 61 foreign-related cases. (Chart 2)



(Chart 2)

3. Geographic Distribution of Domestic and Foreign-Related Cases

There are 34 cases at Beijing Headquarter including 7 foreign-related cases and 27 domestic cases, and 101 cases at Shanghai Sub-Commission including 54 foreign-related cases and 47 domestic cases. (Chart 3)

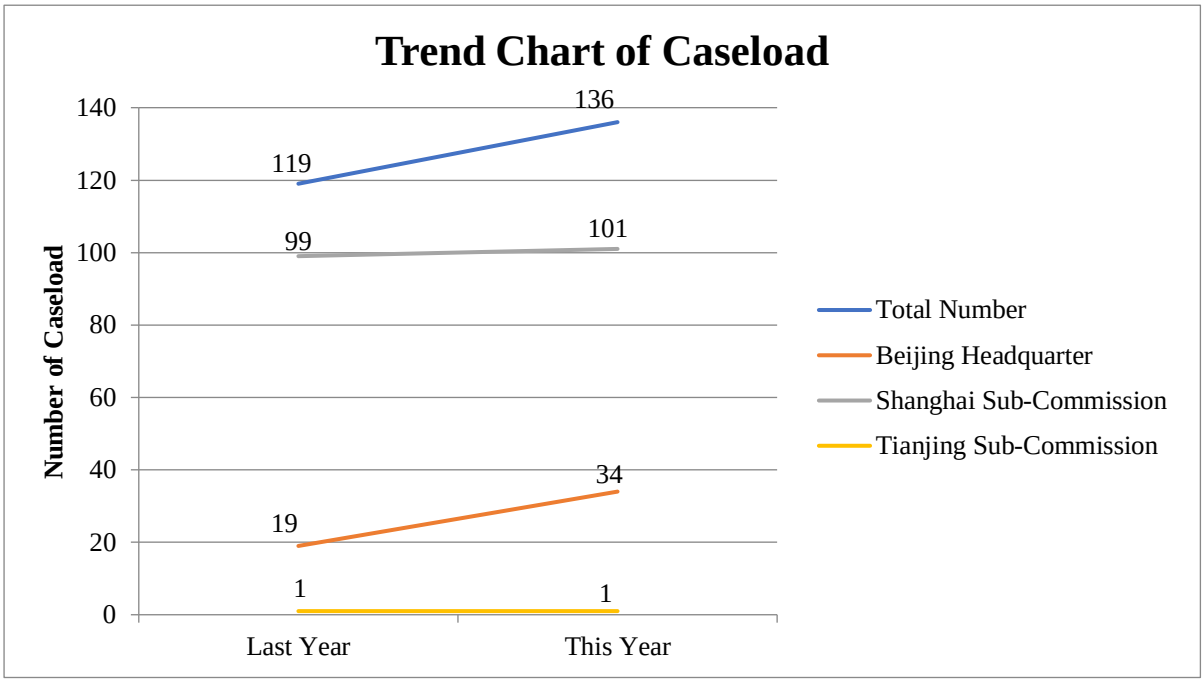


(Chart 3)

B. Trend of Caseload

1. Trend of Caseload

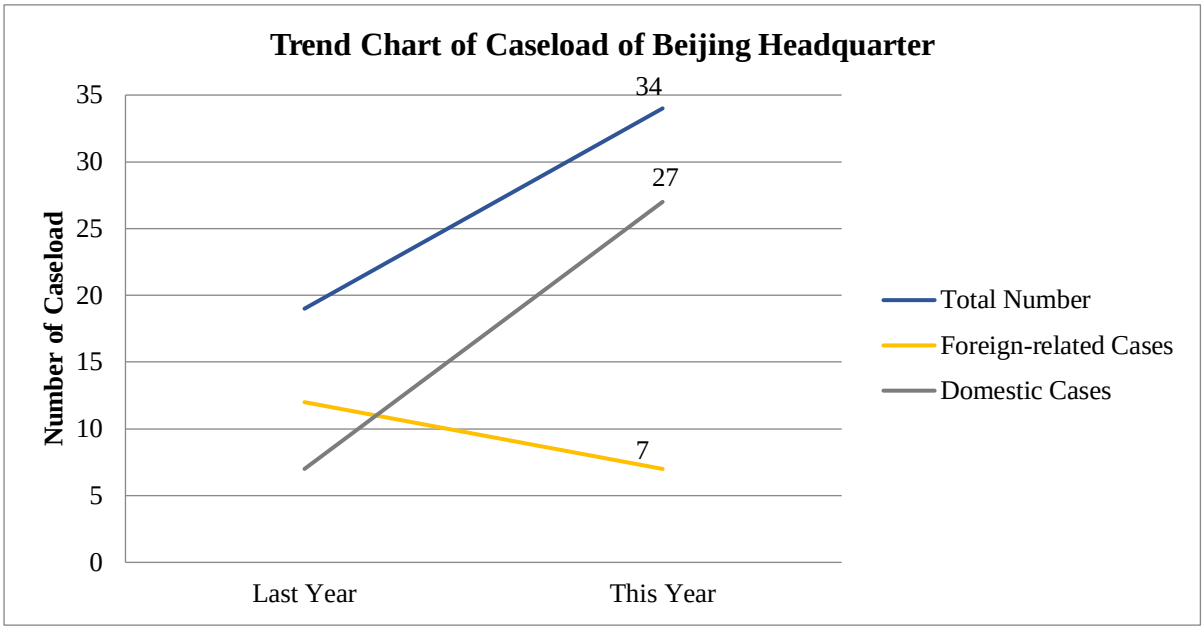
The total number of cases accepted is 136 with 17 cases increased (↑ 14.29%). There are 34 cases at Beijing Headquarter with an increase of 15 cases (↑ 78.95%), 101 cases at Shanghai Sub-Commission with an increase of 2 cases (↑ 2%), and 1 case at Tianjin Headquarter with no increase this year. Besides, the trend of increase of the total number of cases accepted is roughly in line with the trend of Beijing head-quarter. The increase of the total number of cases accepted this year is largely contributed by the cases at Beijing Headquarter. (Chart 4)



(Chart 4)

2. Trend of Caseload of Beijing Headquarter

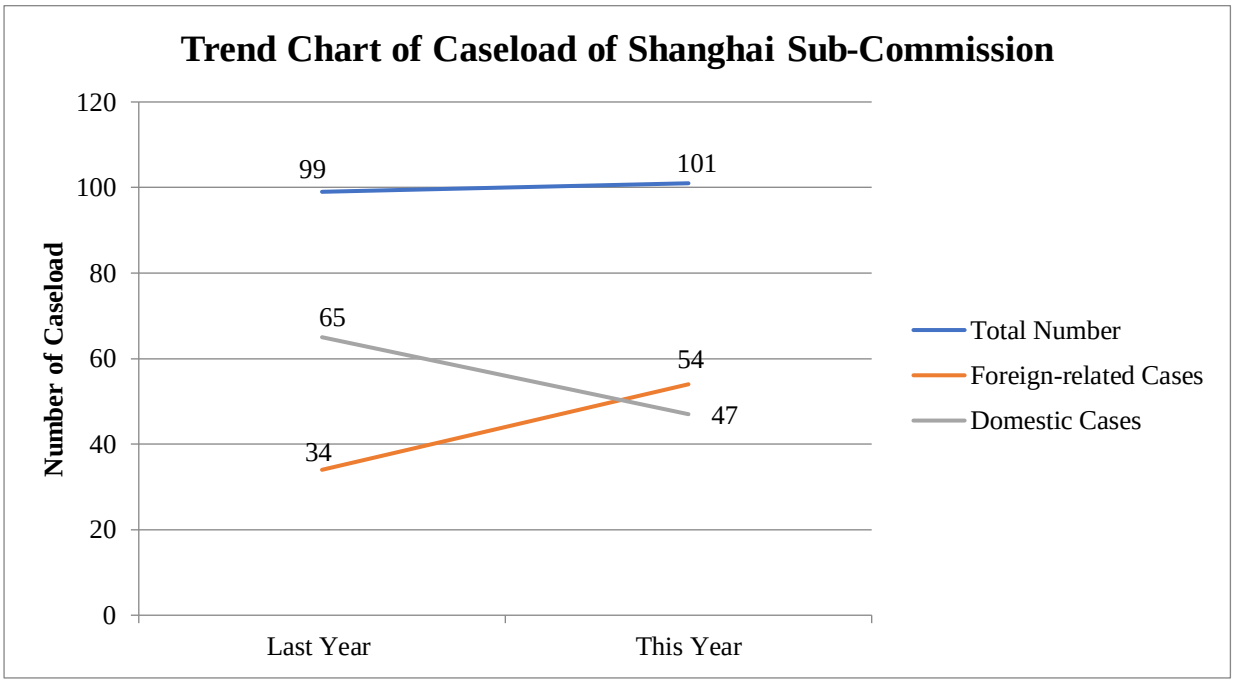
The total number of cases accepted at Beijing Headquarter is 34 cases with 15 cases increased (↑ 78.95%), among which there are 7 foreign-related cases (5 cases decreased), and 27 domestic cases with an increase of 20 cases (↑ 286%). The domestic cases accepted this year has largely increased in amount; and the amount of foreign related cases has decreased with minor amplitude. Generally, it is the increase of domestic cases that give rise to the increase of the total amount at Beijing Headquarter. (Chart 5)



(Chart 5)

3. Trend of Caseload of Shanghai Sub-Commission

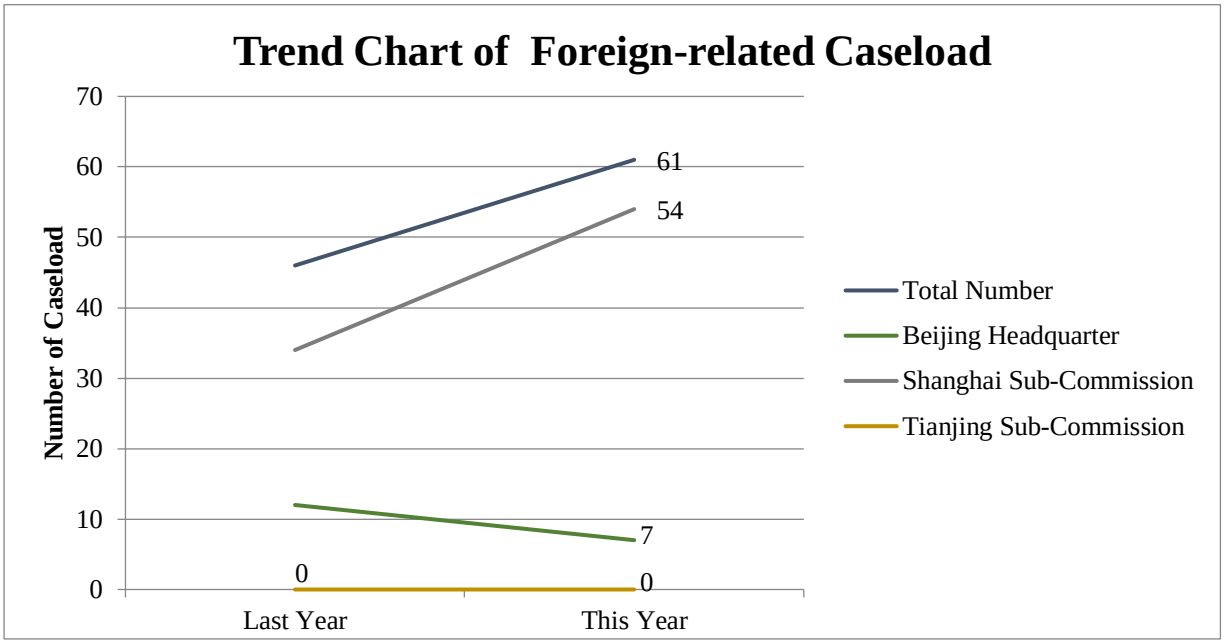
The total number of cases accepted at Shanghai Sub-Commission is 101 with 2 cases increased (↑ 2%), among which there are 54 foreign-related cases with an increase of 20 cases (↑ 58.8%) and 47 domestic cases with 18 cases decreased (↓ 27%). Foreign-related cases have increased largely at Shanghai Sub-Commission, whereas domestic cases have decreased with large amplitude. However, the overall case number at Shanghai Sub-Commission has increased. Upon analysis, the reason for the overall trend is the large increase amplitude of foreign-related cases. (Chart 6)



(Chart 6)

4. Trend of the Number of Foreign-related Cases Accepted

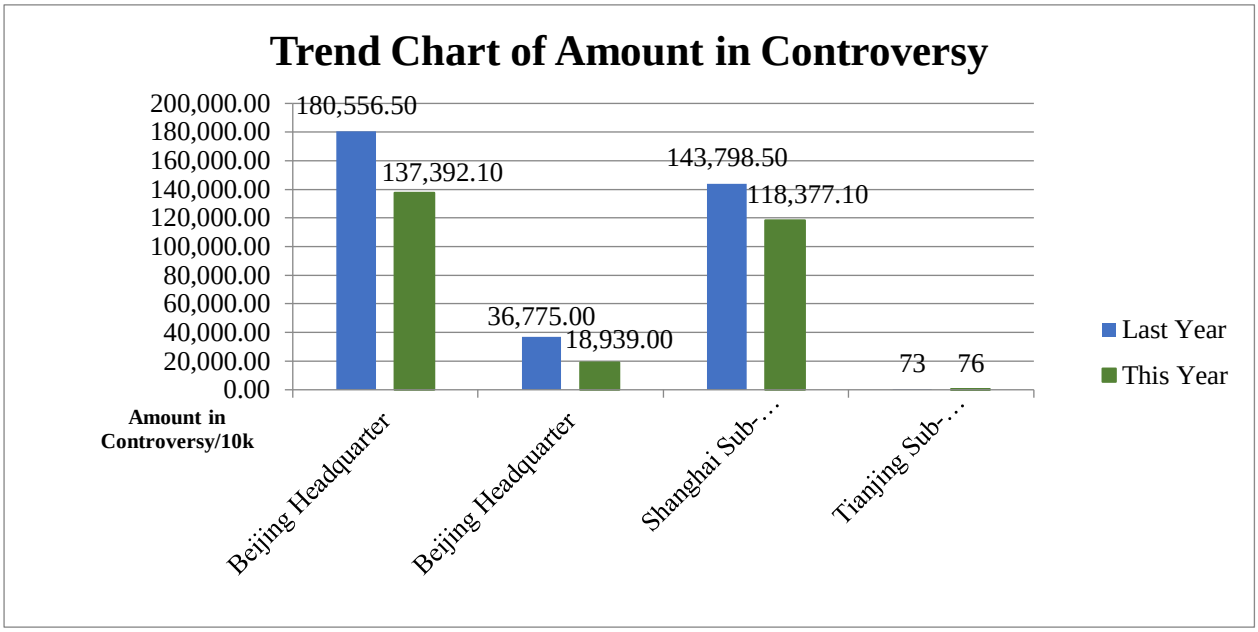
The total number of foreign-related cases is 61 with an increase of 15 cases (↑ 32.60%), among which there are 7 cases at Beijing Headquarter with a decrease of 5 cases, 54 cases at Shanghai Sub-Commission with 20 cases increased (↑ 58.8%), and no case accepted at Tianjin Sub-Commission. Upon analysis, even though there is a 5-case decrease at Beijing Headquarter, the overall increase trend of foreign-related cases is not affect with the large amplitude of increase at Shanghai Sub-Commission. Shanghai Sub-Commission has provided the most contribution to the overall trend of increase in year 2015. (Chart 7)



(Chart 7)

II. Amount in Controversy

The overall number of amount in controversy is RMB 1.373921 billion, with a decrease of RMB 431.644 million (↓ 23.91%). There are RMB 189.39 million at Beijing Headquarter with a decrease of RMB 178.16 million (↓ 48.47%), RMB 1.183771 billion at Shanghai Sub-Commission with a decrease of RMB 254.214 million (↓ 17.7%), and RMB 760 thousand at Tianjin Sub-Commission with an increase of RMB 730 thousand (↑ 2433%). (Chart 8)

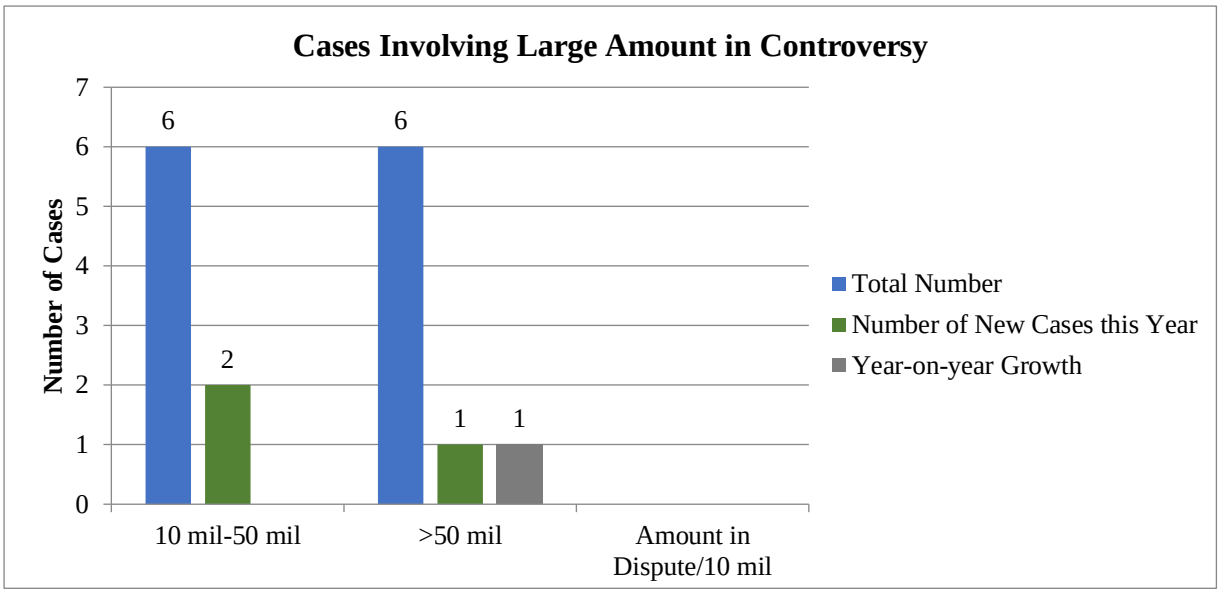


(Chart 8)

As reflected in Chart 8, apart from the increase of RMB 300 thousand at Tianjin Sub-Commission, the amounts in controversy at Beijing Headquarter and Shanghai Sub-Commission both largely decreased. However, the above analysis shows that the number of cases at Beijing Headquarter and Shanghai Sub-Commission had increased. Especially at Beijing Headquarter, the amount in controversy decreased almost in half (48.47 %). Its 286% increase of the number of domestic cases did not result in the increase of the amount in controversy. In respect of Shanghai Sub-Commission, even though its decrease of the amount in controversy is not as large as that of Beijing Headquarter, there is still a decrease of 17.7%. Compared to last year, the number of cases accepted increased with only 2 cases. As there is a 58.8% increase of foreign-related cases at Shanghai Sub-Commission, the foreign-related cases did not contribute much for the overall amount in controversy at Shanghai Sub-Commission.

III. Cases Involving Large Amount in Controversy

There are 6 cases with the amount in controversy between RMB 10 million and 50 million (2 cases increased). The number of cases with the amount in controversy greater than 50 million is 6 (1 cases increased). (Chart 9)

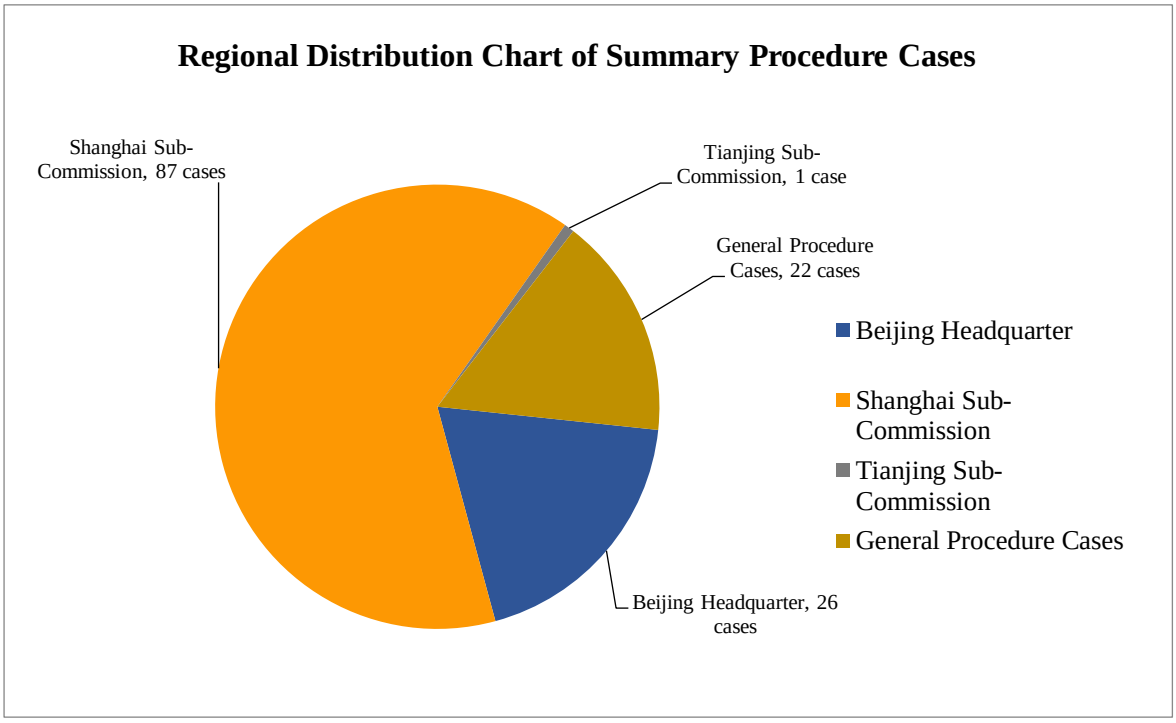


(Chart 9)

IV. Summary Procedure Cases

A. Number and Geographic Distribution of Summary Procedure Cases

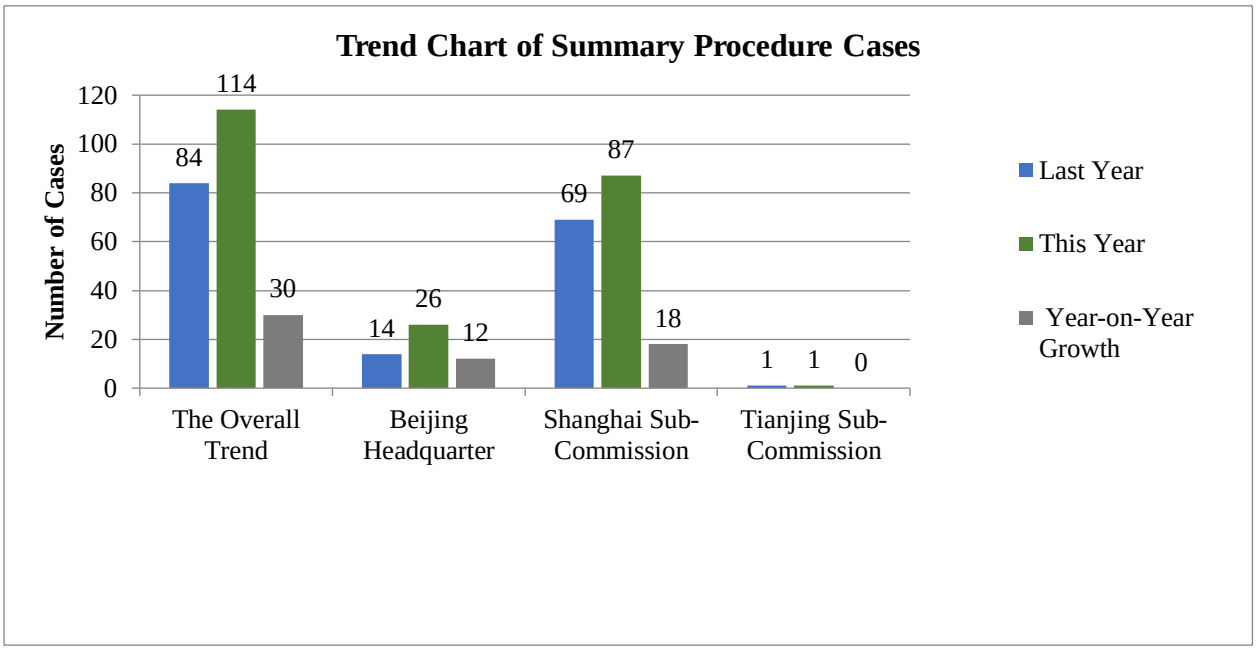
The total number of summary procedure cases accepted is 114, among which there are 26 cases at Beijing Headquarter, 87 cases at Shanghai Sub-Commission and 1 case at Tianjin Sub-Commission. (Chart 10-1)



(Chart 10-1)

B. Trend of Summary Procedure Cases

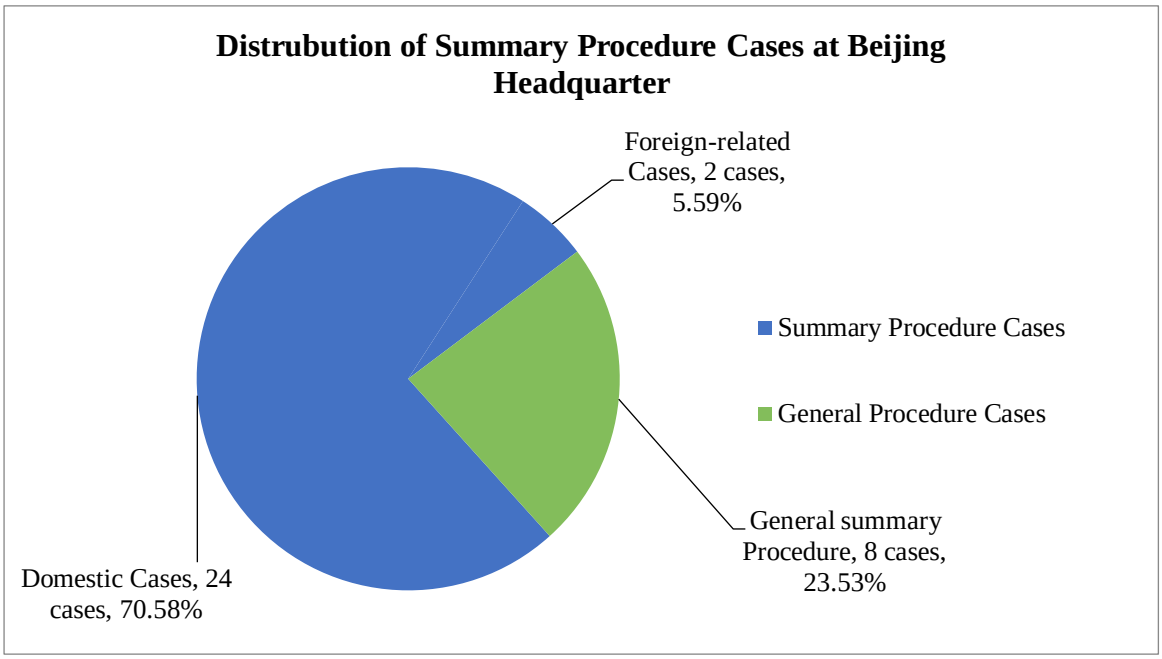
The total number of summary procedure cases is 114 and takes 84.44 % with an increase of 30 cases (↑ 35.71%), among which there are 26 cases at Beijing Headquarter (24 domestic, 2 foreign-related) with an increase of 12 cases, 87 cases at Shanghai Sub-Commission (37 domestic, 50 foreign-related) with an increase of 18 case, and 1 case at Tianjin Sub-Commission with no increase. (Chart 10-2)



(Chart 10-2)

C. Summary Procedure Cases at Beijing Headquarter

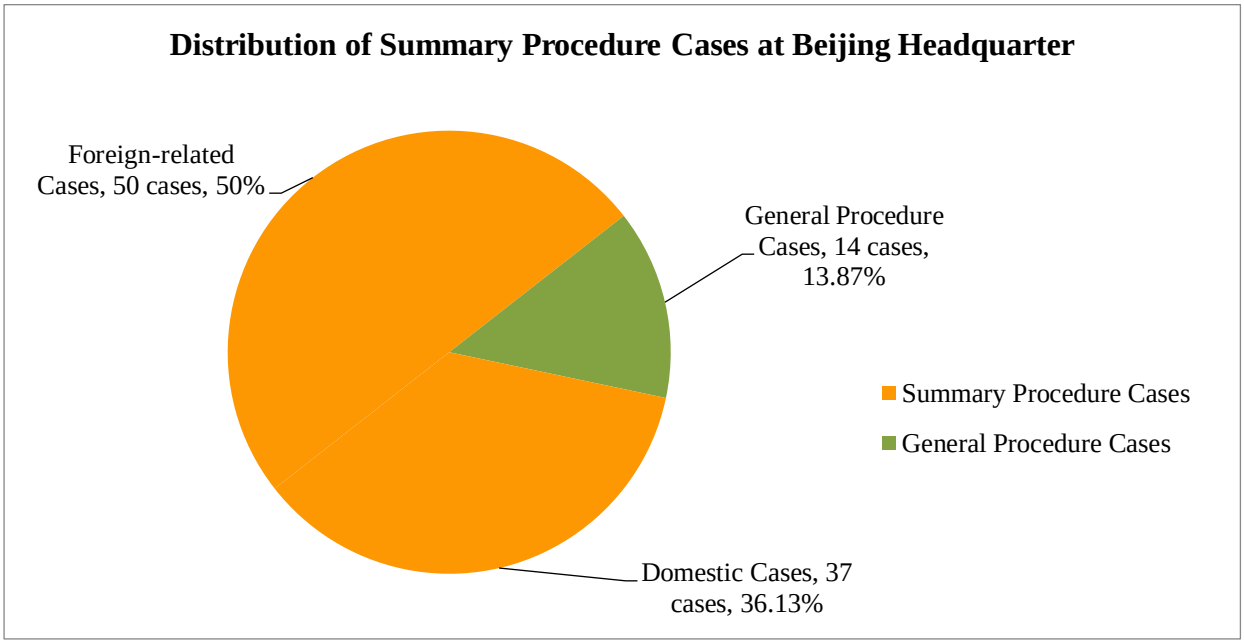
There are 26 summary procedure cases at Beijing Headquarter, among which there are 24 domestic cases and 2 foreign-related cases, taking 76.47% of the overall summary procedure cases accepted. (Chart 11)



(Chart 11)

D. Summary Procedure Cases at Shanghai Sub-Commission

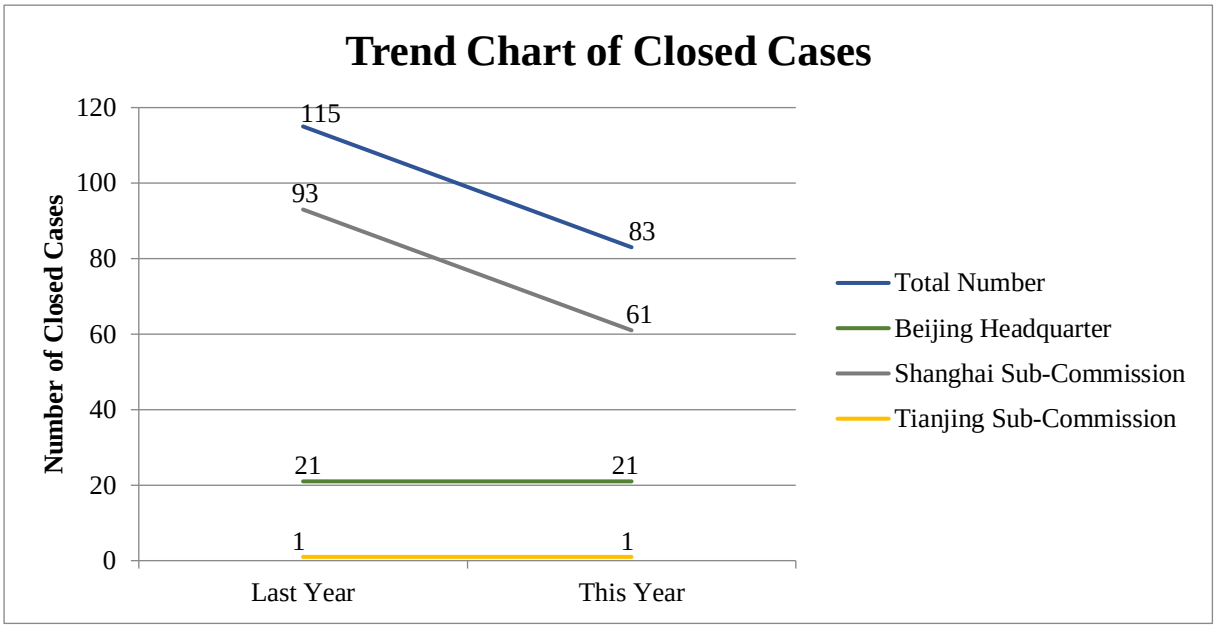
There are 87 summary procedure cases accepted by Shanghai Sub-Commission, among which there are 37 domestic cases and 50 foreign-related cases, taking 86.13% of the overall summary procedure cases accepted. (Chart 12)



(Chart 12)

V. Number of Cases Closed

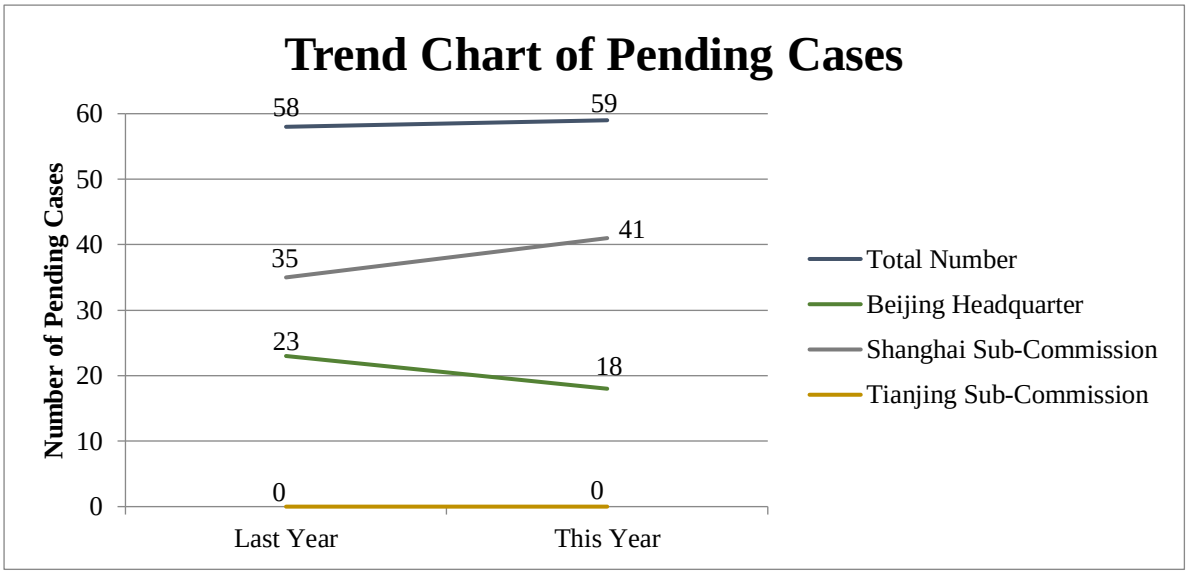
There are 83 cases closed this year with 32 cases decreased (↓ 27.83%), among which there are 21 cases closed at Beijing Headquarter with no increase, 61 cases at Shanghai Sub-Commission with 32 cases decreased (↓ 34.4%), and 1 case closed at Tianjin Sub-Commission with no increase. (Chart 13)



(Chart 13)

VI. Number of Pending Cases

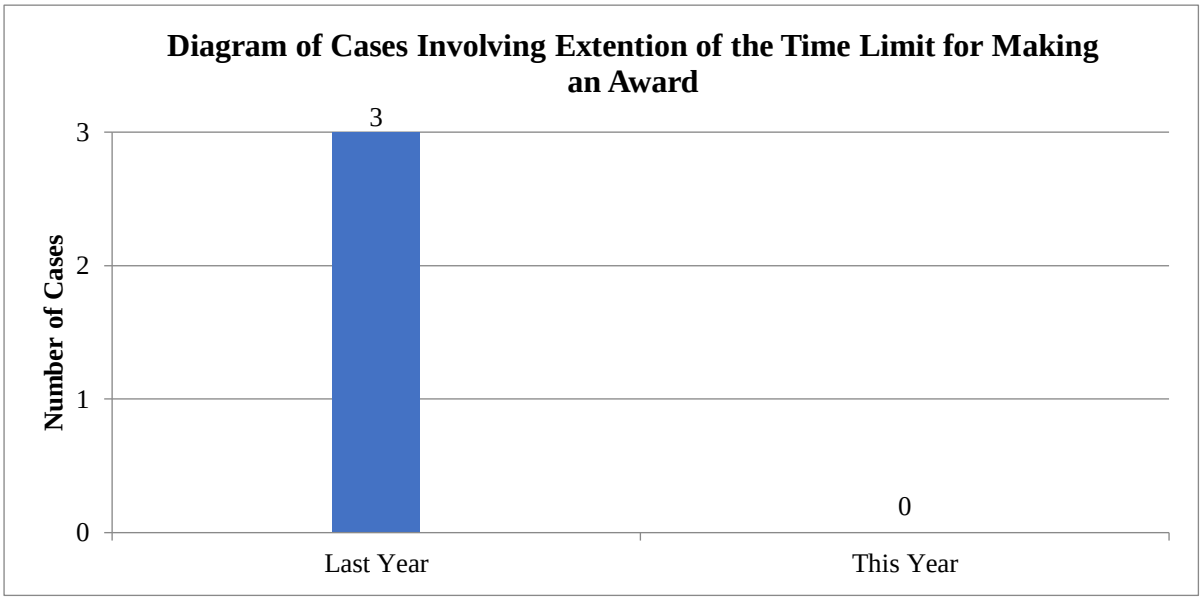
The number of pending cases is 59 this year, with 1 case increased (↑ 1.72%), among which there are 18 cases at Beijing Headquarter with 5 cases decreased (↓ 21.74%), 41 cases at Shanghai Sub-Commission with an increase of 6 cases (↑ 17.1%) and no case pending at Tianjin Sub-Commission with no decrease. (Chart 14)



(Chart 14)

VII. Cases Involving Extension of Time Limit for Making an Award

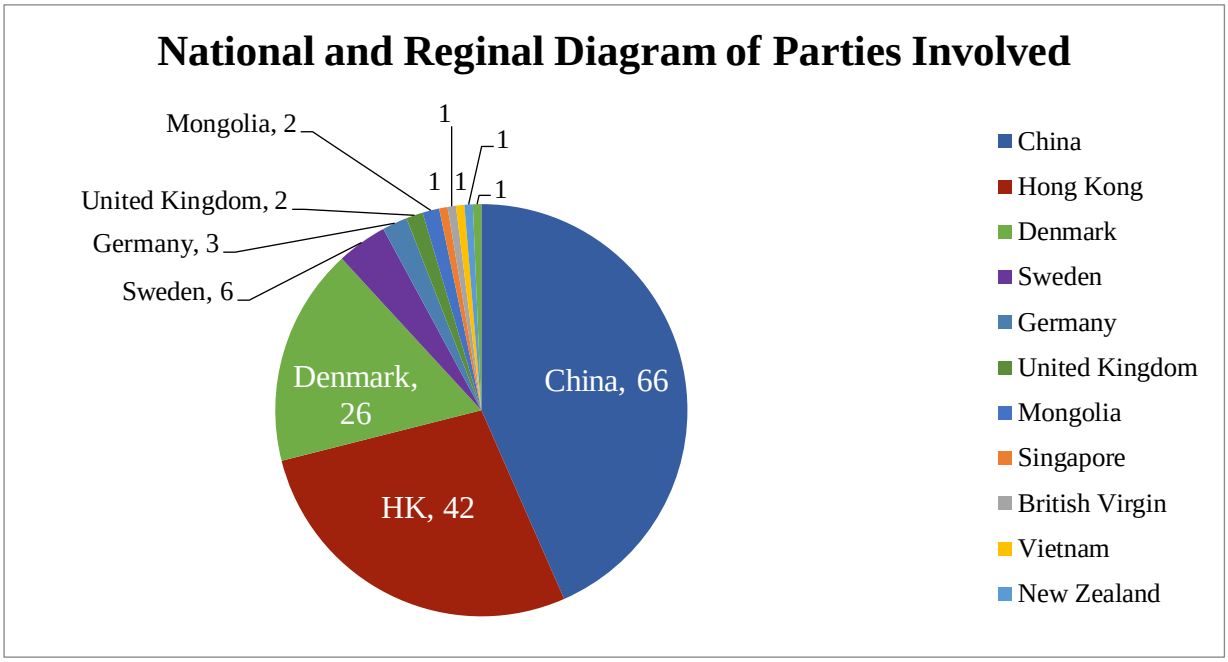
There were 3 cases involving extension of time limit for making an award last year and no case in year 2015. (Chart 15)



(Chart 15)

VIII. Nations and Regions of the Parties

Parties to Arbitration this year are from the following countries and regions: 66 cases from China; 42 cases from Hong Kong Special Administrative Region of PRC (with a 3-case increase this year); 26 cases from Denmark; 6 cases from Sweden; 3 cases from Germany. For other countries and regions, please see Chart 16.

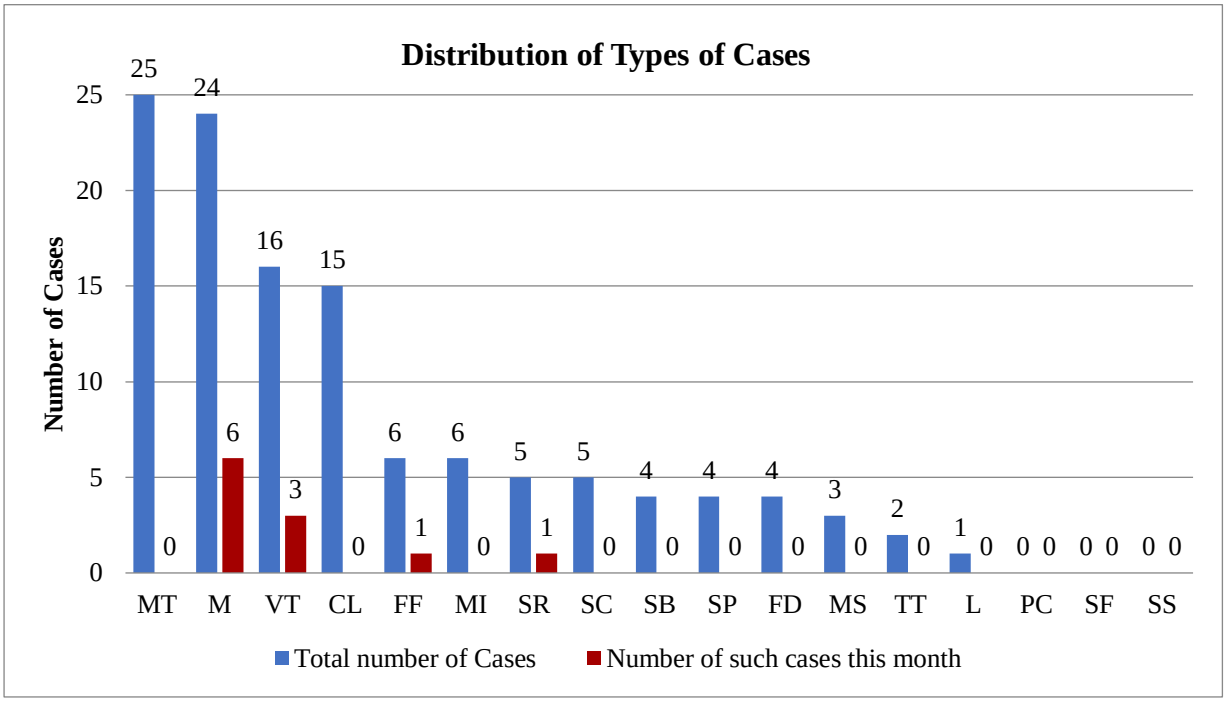


(Chart 16)

IX. Types of Cases

For types and number of cases, please see Chart 17.

As illustrated in the chart below, the types of cases are Multiple Transport (MT), Others (M), Voyage Charter (VT), Crew Labour (CL), Freight Forwarder (FF), Maritime Insurance (MI), Ship's Repair (SR), Ship Collision (SC), Ship Building (SB), Ship Sale and Purchase (SP), Fishing Dispute (FD), Maritime Salvage (MS), Time Charter (TT), Logistics (L), Carriage of Passengers (PC), Ship Financing (SF) and Wreck Removal (WR).



(Chart 17)

X. Conclusion

A. Regarding the overall number of cases, most of the cases are accepted by Beijing Headquarter and Shanghai Sub-Commission. From the geographic distribution of cases, only Shanghai Sub-Commission keeps the highest number of both domestic and foreign-related cases. The number of foreign-related cases is even greater than that of domestic cases. The reason is that even though Beijing and Shanghai are both first-level cities, Shanghai has its unique advantage from the perspective of its location and its internationalization. Therefore, the trend of the number of cases differs among Beijing Headquarter, Shanghai Sub-Commission and Tianjin Sub-Commission. Besides, compared to Beijing Headquarter, there is only one case accepted by Tianjin Sub-Commission this year. Apart from the reason of the location of Tianjin, Beijing, as the capital city of China naturally possesses advantages from all aspects.

B. With respect to the trend of the number of cases accepted, apart from that there is no increase at Tianjin Sub-Commission, the number of cases at Beijing Headquarter and Shanghai Sub-Commission both increased with different causes. Beijing Headquarter has an increase of the overall number of cases; whereas Shanghai Sub-Commission has an increase of foreign-related cases.

C. In respect of the amount in controversy, the increase in the number of cases did not correspondingly increase the amount in controversy, which in fact decreased to a certain degree. One of the reasons for this is the relatively small proportion of large amount disputes, which reflects the fact that most of the amount in controversy in maritime arbitration is not large.

D. With regard to the application of summary procedure, it is becoming one of the most popular approaches in resolving disputes. Summary procedure is widely applied in both domestic and foreign-related cases at Shanghai Sub-Commission. Compared to Beijing Headquarter, 50 out of 54 foreign-related cases at Shanghai Sub-Commission applied summary procedure.

E. With respect to the number of cases closed, the decrease of the total number of cases closed is directly relevant with the number of Shanghai Sub-Commission. In respect of the reason for such decrease at Shanghai Sub-Commission, upon analysis and comparison with the data from last year, the rapid growth in foreign-related cases is rather relevant. In considering that most of the foreign-related cases applied summary procedure, the decrease of the amount in controversy, that the number of pending cases is significant lower than that of closed cases, and that there is no case involving the extension of time limit for making an award, the rapid growth of foreign-related cases is the direct reason for the decrease in the number of closed cases.

F. In respect of the number of pending cases, there is a minor increase. Under the circumstance that there is no increase at Tianjin Sub-Commission and the trend of the number of pending cases at Beijing Headquarter is decreasing, the number of pending cases at Shanghai Sub-Commission has increased to a certain degree. Upon analysis, the reason for this is the rapid growth of foreign-related cases this year.

G. With regard to the countries and regions of the parties involved, the cases accepted are mainly from China, Hong Kong, Denmark, Sweden, Germany, UK and Mongolia, countries close to the main waterways and countries close to China.

H. Regarding the types of cases, the cases accepted mainly involve Multiple Transport, Voyage Charter, Crew Labour, Freight Forwarder, Maritime Insurance, Ship Repairing, Ship Collision and other disputes in the area of carriage at sea and international trade.

Chapter Five: Big Data Analysis of the Judicial Assistance and Supervision of China Maritime Arbitration

In 2015, there are 22 China maritime arbitration cases involving judicial assistance and supervision. Considering that lengthy and tedious legal document would be hard to understand, therefore we provide you with a more direct approach through data presentation. By using multidimensional charts, we presents you with the analysis of trial courts, causes of action, geographic distribution, retaining of lawyers, types of disputes and results in cases involving judicial assistance and supervision.

Review before big data analysis

1. Whether there is data repeatedly analyzed;
2. Whether the aggregate number of the categorized data from the lower level equal to the aggregate number from the higher level;
3. Other factors which might affect the accuracy of the analysis.

Analysis is as below:

I. Case Research

In 2015, there are 22 cases involving judicial assistance and supervision of China maritime arbitration. There are 29 corresponding judicial documents, of which there are 7 final rulings (1 first-instance decision and 4 second-instance decisions). For details please see Table 1.

Case Search					
Civil Order of First Instance	Civil Order of Second Instance		Request Instructions	Lifelong Order	Total
16	Original Judgment Affirmed	Remanded for Retrial	2	7	22
	3	1			

(Table 1)

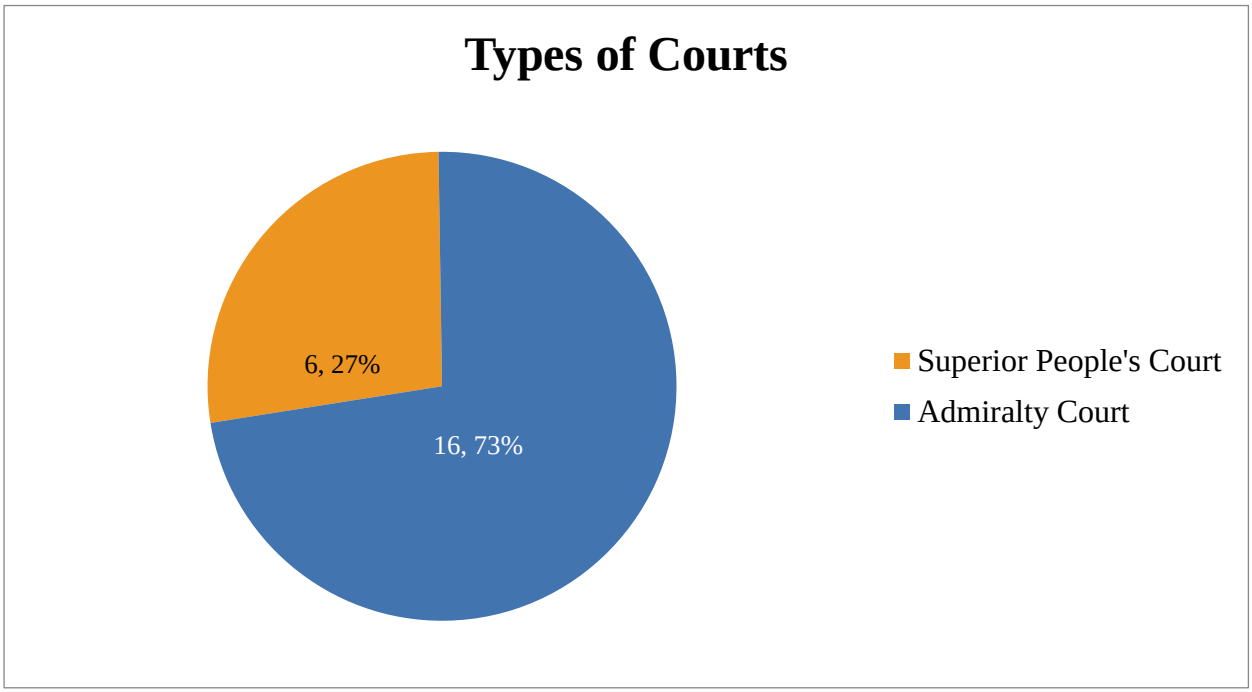
II. General Overview

A. Cases

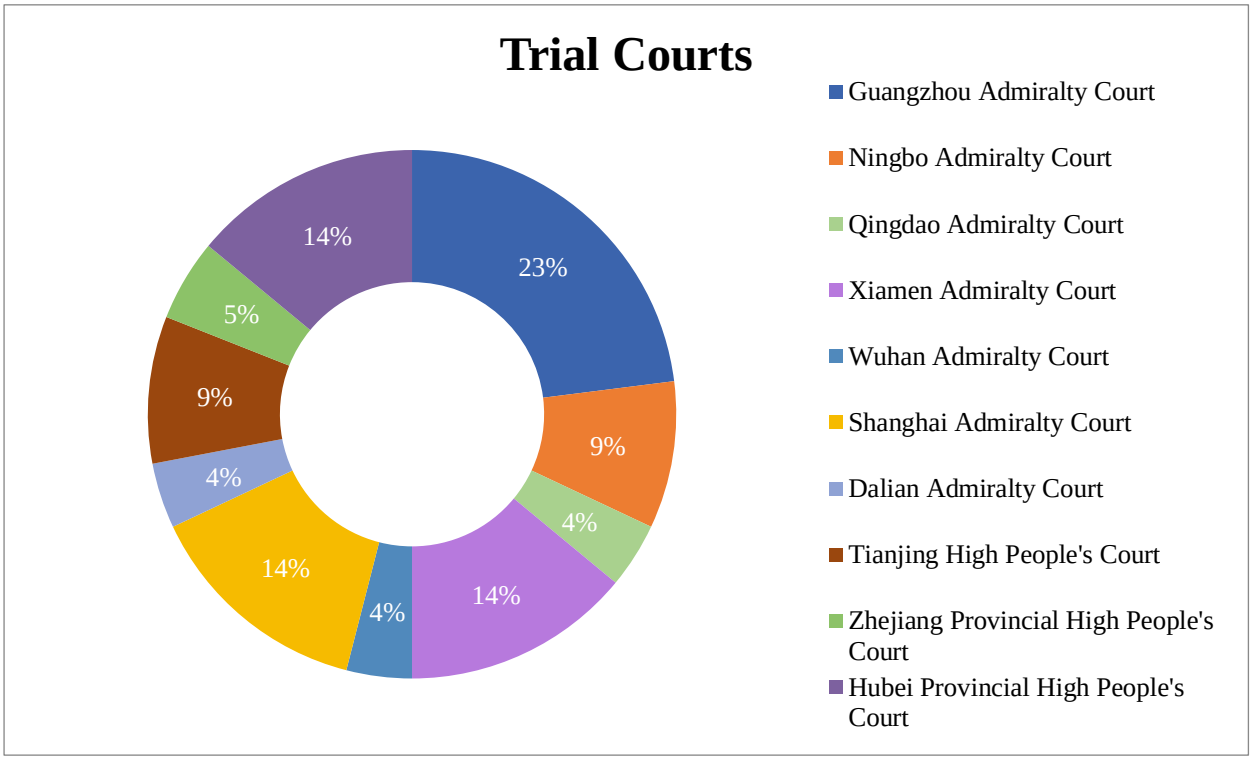
1. Trial Court

In 2015, there are 22 cases involving judicial assistance and supervision of China maritime arbitration. We categorized the data we collected according to the level of trial courts and

geographic distribution of the cases. Most of the cases have been tried and closed by admiralty courts; and a minor of them have been appealed to the Supreme Court. (Chart 1)



(Chart 1)

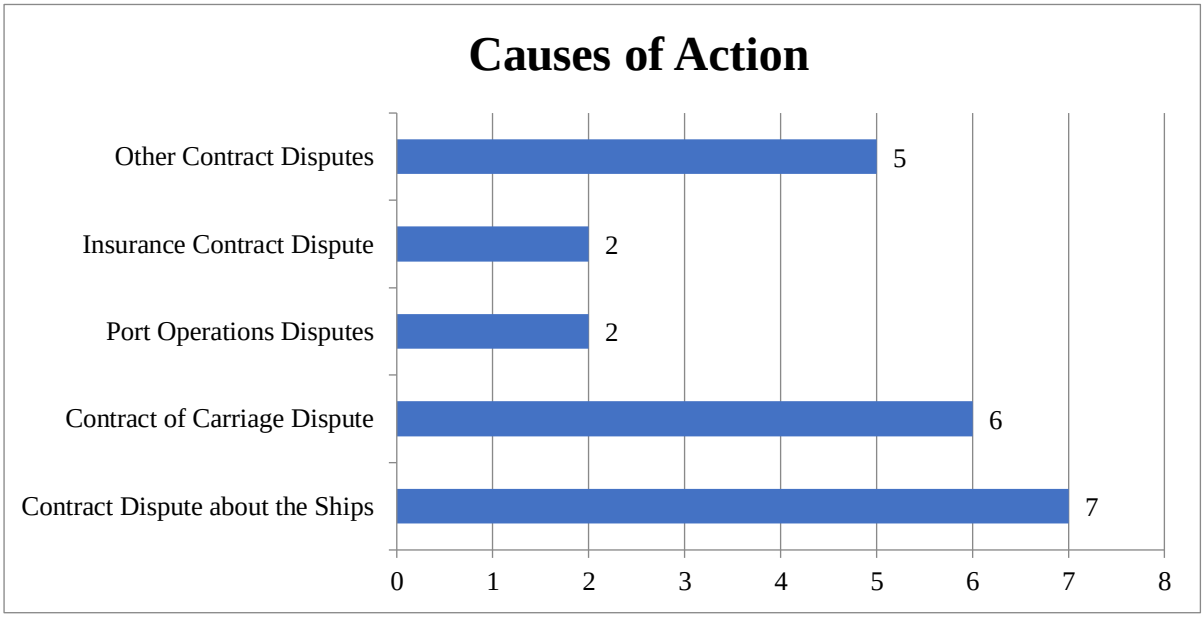


(Chart 2)

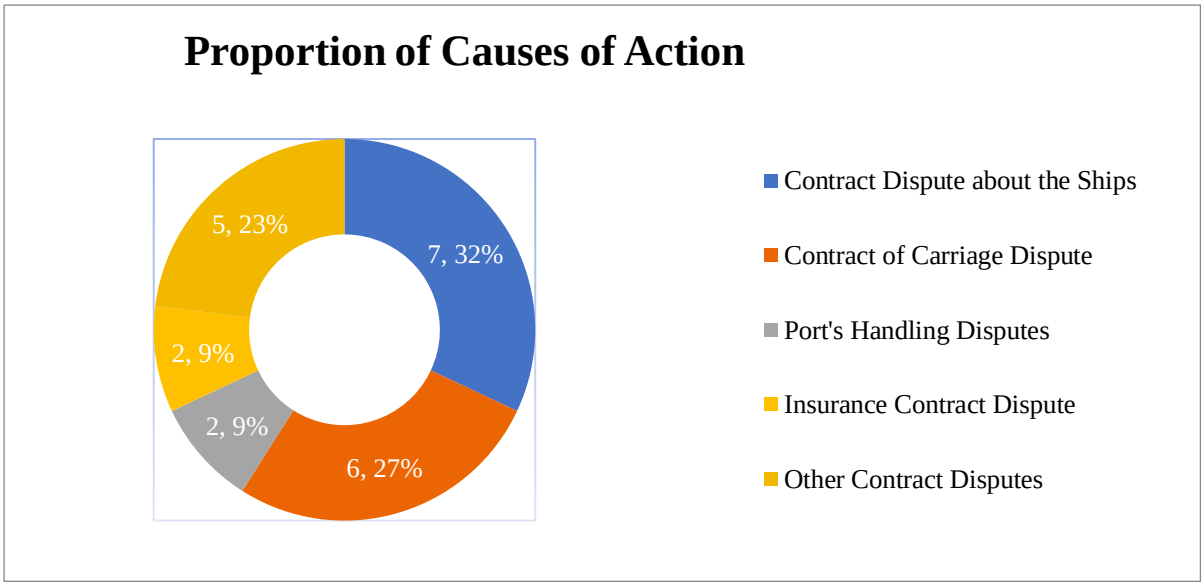
From Chart 2, almost a quarter of the cases are tried at Guangzhou Admiralty Court. Therefore, we can conclude that most of the cases involving judicial assistance and supervision of China maritime arbitration are tried at Guangzhou, of which the reason is that coastal trade at Guangzhou area is very well developed.

2. Causes of Action

In 2015, cases with judicial assistance and supervision of China maritime mainly involve ship contract, transport contract, port operation and insurance contract. Cases involving ship contract have the largest number, which is 7 cases, and take 32% among all causes of action. There are 6 cases involving transport contract dispute, taking 27% of all causes of action. (Chart 3, 4)



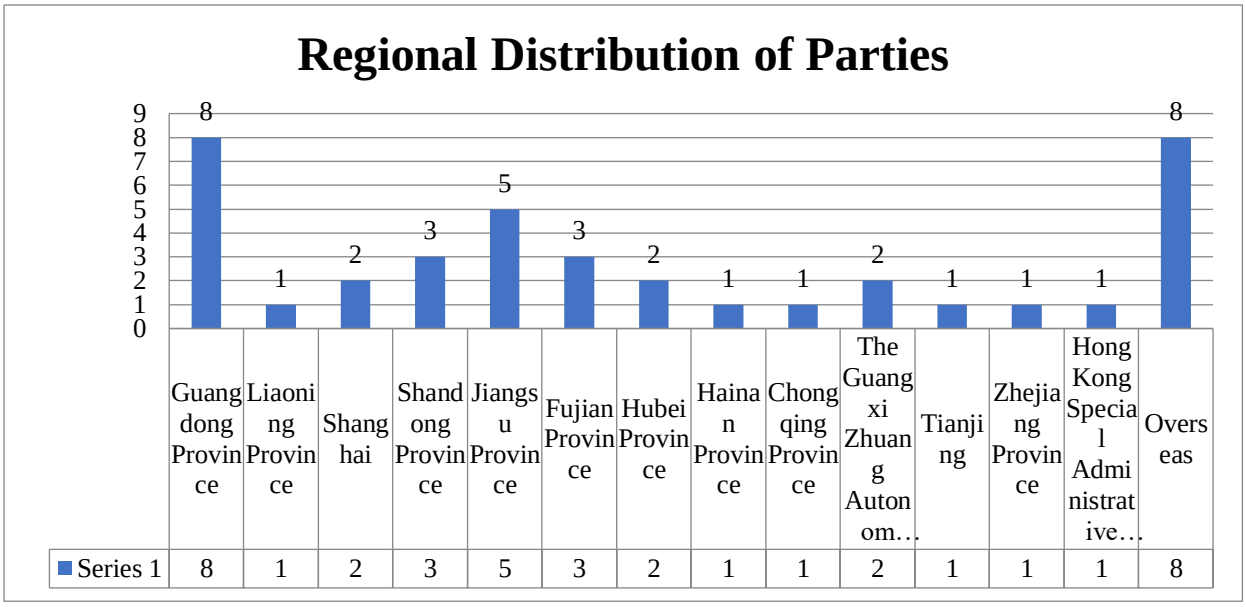
(Chart 3)



(Chart 4)

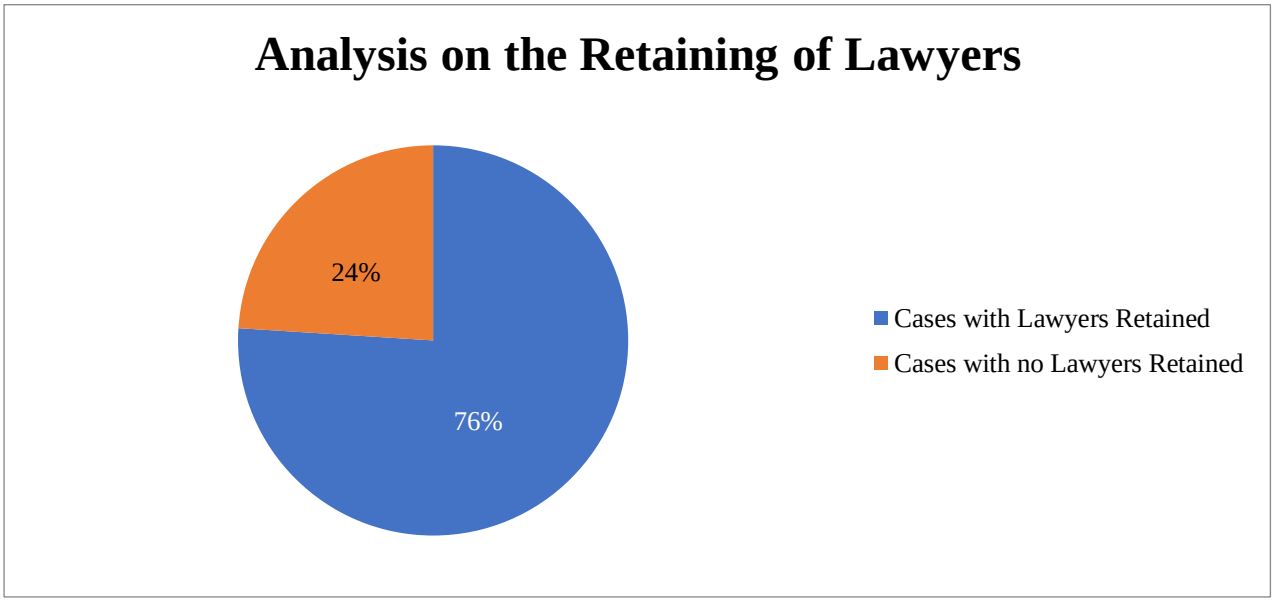
3. Regional Distribution of the Parties

In 2015, there are 41 parties involved in cases with judicial assistance and supervision of China maritime. The regional distribution of the parties involved is rather dispersing. The number of parties from Guangdong Province and foreign countries are both 8. And there are 5 parties from Jiangsu Province. (Chart 5)



(Chart 5)

4. Retaining of Lawyers



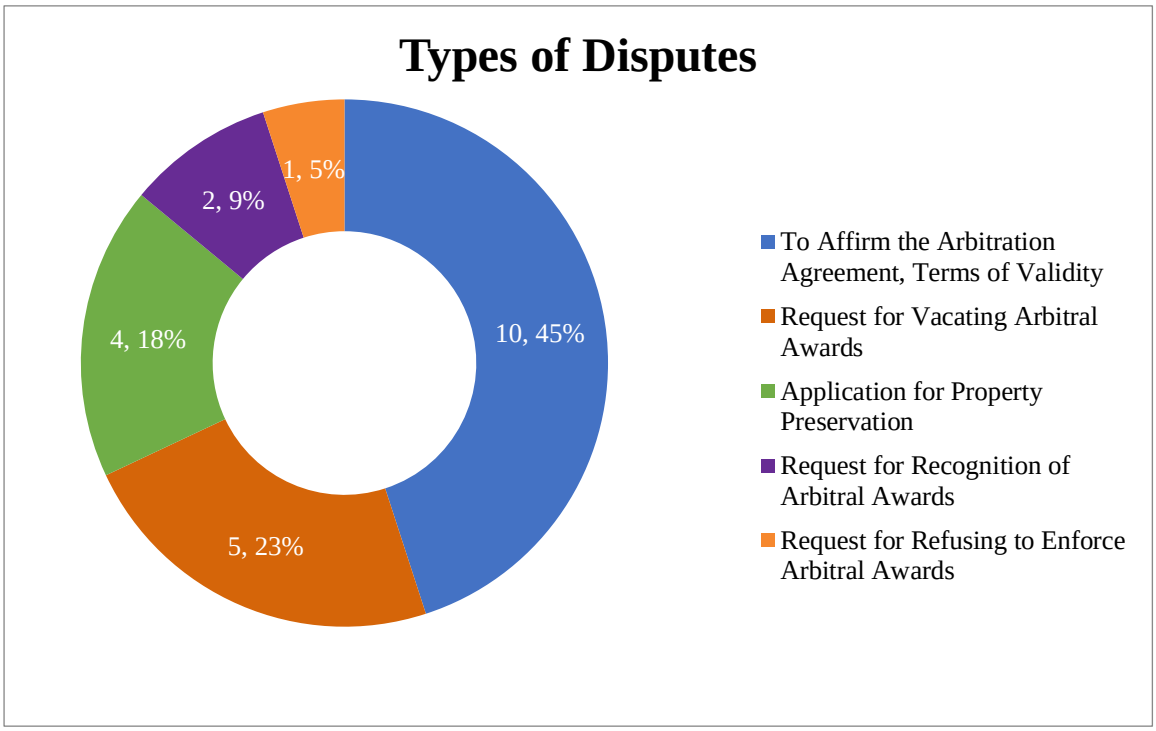
(Chart 6)

In respect of maritime arbitration, 76% of the 41 parties retained lawyers. Only a minor portion of the parties were not represented by lawyers.

B. Types of Cases and Results

1. Types of Cases

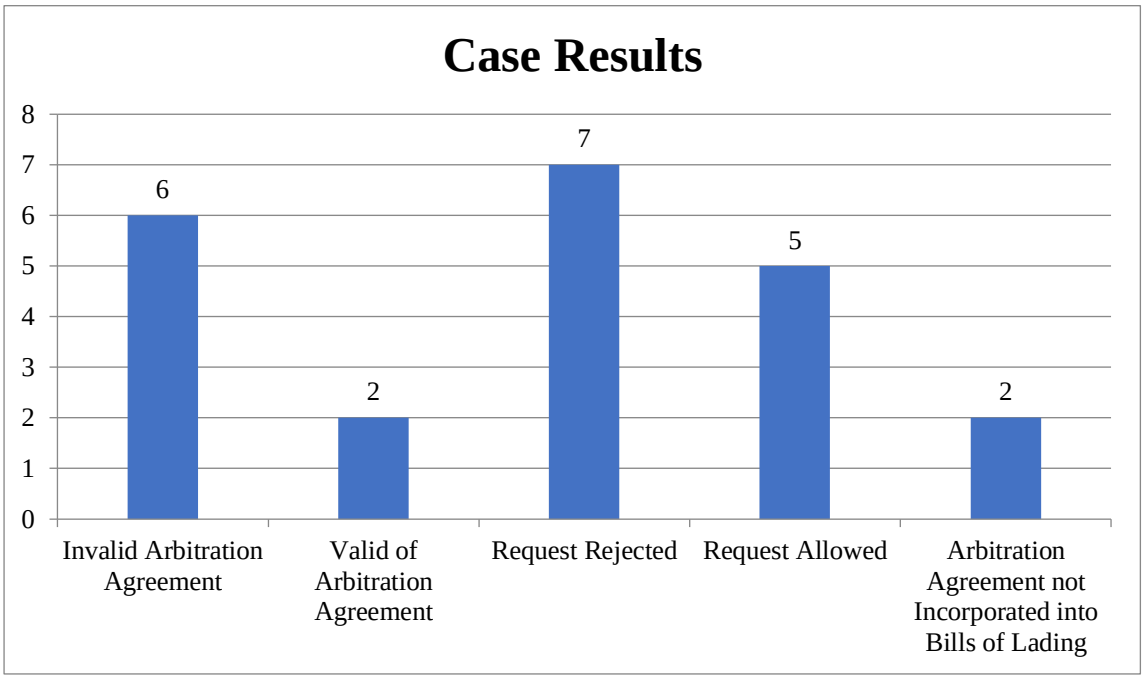
In the cases with judicial assistance and supervision of China maritime arbitration in 2015, there are 10 cases involving the disaffirming of the validity of arbitration agreements and clauses and takes 45% of the overall number, and 5 cases involving the request for setting aside arbitral awards and takes 23% of the overall number of cases. (Chart 7)



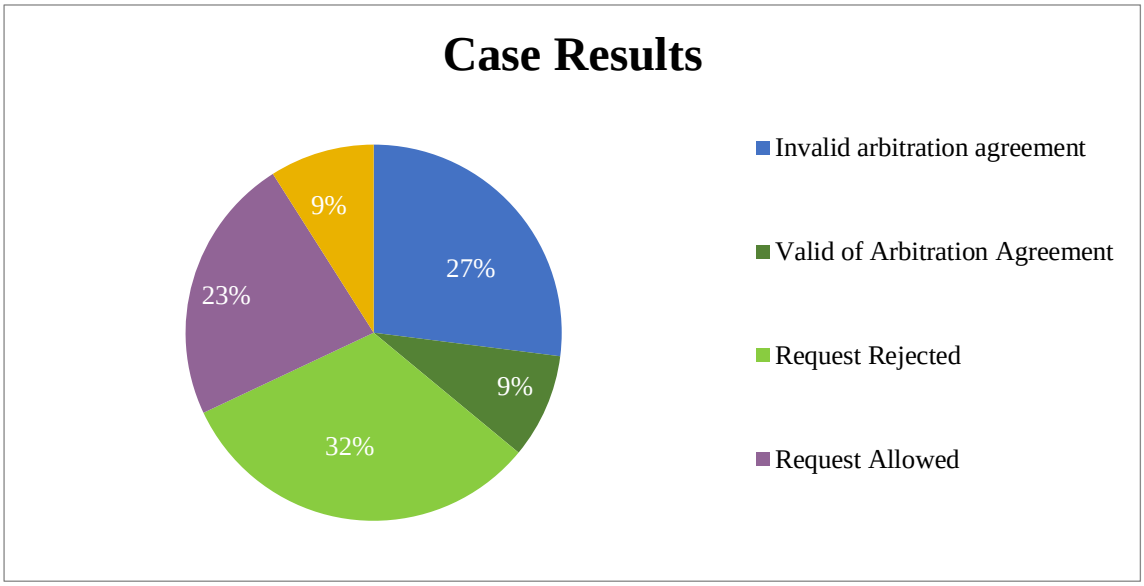
(Chart 7)

2. Results

In the cases with judicial assistance and supervision of China maritime arbitration in 2015, there are five types of results: the arbitration agreement is invalid; the arbitration agreement is valid; applicant's requests rejected; applicant's requests granted; and arbitration agreement was not incorporated into the bill of lading. Among these, cases involving the rejection of applicant's requests have the largest number, which is 7, and takes 32% of the overall number of cases. Next to it are cases involving invalid arbitration agreement, which is 6, and takes 27% of the overall number of cases.



(Chart 8)



(Chart 9)

From Chart 8 and 9, the number negative results outweigh the number of positive results. There are more cases with the result that the applicant's requests are rejected than cases with the result that the requests are allowed. The number of cases involving invalid arbitration agreements is greater than the number of cases involving valid arbitration agreements.

III. Conclusion

A. In 2015, there are 22 cases involving judicial assistance and supervision of China maritime arbitration. There are 29 corresponding judicial documents, of which there is 16 first-instance

decision, 4 second-instance decisions, 3 orders where original judgment are affirmed, 1 order where original judgement is remanded for retrial, 2 requests for instructions, and 7 life-long order.

B. In respect of the level of trial court of the 22 cases, 73% of the cases are tried by admiralty courts and 27 % are appealed to the Supreme Court. There are 23% of the cases tried by Guangzhou Admiralty Court, and others tried by Ningbo Admiralty Court, Qingdao Admiralty Court, Xiamen Admiralty Court, Wuhan Admiralty Court, Shanghai Admiralty Court, Dalian Admiralty Court, Tianjin High Court, Zhejiang Province High Court and Hubei Province High Court.

C. In 2015, cases with judicial assistance and supervision of China maritime mainly involve ship contract, transport contract, port operation, insurance contract and other types of contract. There are 7 cases involving ship contract taking 32%, 6 cases involving transport contract dispute taking 27%, 2 cases involving port operating taking 9%, 2 cases involving maritime insurance taking 9% and 5 cases involving other types of contract disputes taking 23% of all causes of action.

D. There are 41 parties involved in cases with judicial assistance and supervision of China maritime. There are 8 parties from Guangdong Province, 1 party from Liaoning Province, 4 parties from Shanghai, 3 parties from Shandong Province, 5 parties from Jiangsu Province, 3 parties from Fujian Province, 2 parties from Hubei Province, 1 party from Hainan Province, 1 party from Chongqing, 2 parties from Guangxi Province, 1 party from Tianjin, 1 party from Zhejiang Province, 1 party from Hong Kong Special Administrative Region and 8 parties from foreign countries.

E. Among the 22 cases, 76% of the 41 parties retained lawyers and 24 % of the parties were not represented by lawyers.

F. There are five types of disputes: 10 cases involving the disaffirming of the validity of arbitration agreements and clauses and takes 45%; 5 cases involving the request for setting aside arbitral awards and takes 23%; 4 cases involving application for property preservation an takes 18%; 2 cases involving request for the recognition of arbitral awards and takes 9% and 1 case involving request for refusing to enforce arbitral awards and takes 5%.

G. There are five types of results: order of disaffirming the validity of arbitration agreements, order of affirming the validity of arbitration agreements, applicant’s request rejected, applicant’s request allowed and order that the arbitration agreement is not incorporated into the bill of lading. Their amounts are 6, 2, 7, 5, 2, and takes respectively 27%, 9%, 32%, 23% and 9% of the overall number of cases.

Chapter Six: Comments on Cases

I. Setting Aside the Arbitral Award on the Ground of Legal Representative Status Disputes

[Key Issues]

1. Whether the legal representative under status disputes appearing at oral hearings violates the due process of arbitration.
2. Whether there exists withholding of evidence which is sufficient to affect the fairness of arbitral award.
3. Whether there exist circumstances giving rise to the suspension of legal proceedings as provided in Article 150 of the *Civil Procedure law*.

[Facts]

In 2014, Hong Fu Company and Hong Xiang Company concluded a time charterparty (including supplements) with respect to the vessel "New Hong Xiang 88". Under the time charterparty, Hong Fu Company undertakes to hire "New Hong Xiang 88" for a stated period of time. During the performance of the charterparty, Hong Fu Company refused to make payments for the freights and other fees. On March 4, 2015, Hong Xiang Company initiated an arbitration at the CMAC Shanghai. After acceptance of the disputes, CMAC Shanghai issued notice of arbitration to Hong Xiang Company and Hong Fu Company on March 17, 2015. On April 9, 2015, the arbitral tribunal was formed and the notice of oral hearings was duly issued.

On May 5, 2015, an oral hearing was held at Shanghai regarding the disputes between the parties. The agent of Hong Xiang Company, and the legal representative of Hong Fu Company He Weiying, appeared at the oral hearing. At the hearing, He Weiying stated that there were disputes among the shareholders of Hong Fu Company, and he was removed as legal representative of the company in June of 2014. However, the company did not change its registration information at the Administration for Industry and Commerce. As such there was a chaos within Hong Fu Company. With respect to the person to represent the company in this arbitration, He Weiying consulted opinions from another shareholder, Xu Hanxin, who opposed to He Weiying's appearance in this arbitration. He Weiying further confirmed the bills of the 9 voyages of the time charter dispute at issue, and stated that the disputes among the shareholders of Hong Fu Company were to be resolved separately. On June 9, 2015, CMAC Shanghai issued a letter to Hong Fu Company, informing it of He Weiying's appearance in the arbitration, and enquired whether the company had any comment or objection, which may be submitted before June 16, 2015. On July 3, 2015, CMAC Shanghai made the arbitral award "(2015) CMAC SH No.035".

On July 27, 2015, Hong Xiang Company requested for enforcement of the arbitral award at Bei Hai Maritime Court, and the request for enforcement was accepted on the same day, numbered "(2015) Hai Fa Zhi No. 163". During the enforcement procedure, Hong Xiang Company requested to join

third parties He Weiying, Xu Hanxin, Chen Hanwu, Guo Yongfu and Yi Jianbin as persons subjected to execution on the ground that the shareholders did not make full payments with respect to their subscribed capital contribution. Bei Hai Maritime Court issued the enforcement order "(2015) Hai Fa Zhi Yi No.7", allowing the joinder of He Weiying, Xu Hanxin, Chen Hanwu, Guo Yongfu and Yi Jianbin as persons subjected to execution, and ordering that these shareholders shall take responsibilities to Hong Xiang Company to the extent of their unpaid subscribed capital contribution.

Bei Hai Maritime Court further found: The shareholders of Hong Fu Company consisted of Xu Hanxin, Chen Hanwu, Guo Yongfu, Yi Jianbin and He Weiying. Its legal representative was He Weiying. On June 24, 2014, Hong Fu Company convened a shareholders' meeting, and made a resolution with respect to the proportion of shareholding and the change of legal representative. The legal representative was changed from He Weiying to Li Jun; and Li Jun also assumed the position of general manager. On Jun 30 of the same year, Hong Fu Company convened another shareholders' meeting, and made another resolution with respect to the change and transfer of equity and change of legal representative. He Weiying was removed as the legal representative of the company and was replaced by Xu Hanhuai; and Li Jun assumed the position of executive director. The aforesaid resolution was not actually executed, and did not follow the change of registration procedure. The Charter of the company was never amended after these two resolutions. Till the date when this order was made, the registered legal representative of Hong Fu Company was still He Weiying.

In November 2015, Hong Fu Company filed a lawsuit at Qinnan District Court against He Weiying for the returning of the official chop, the Certificate of Business, the Organization Code Certificate, the Tax Registration Certificate and accounting documents. The case number is (2016) Gui 0702 Min Chu No.113. In December 2015, Hong Fu Company filed a lawsuit at Qinnan District Court against He Weiying, requesting to affirm the validity of the resolution made on June 24, 2014, and to order He Weiying to cooperate in the change of registration of legal representative at Administration for Industry and Commerce. The case number is (2016) Gui 0702 Min Chu No.174.

The case of request for setting aside the arbitral award between Applicant, Hong Fu Company, and Respondent, Hong Xiang Company was filed on December 2, 2015 and was accepted by this court on the same day.

Applicant claimed: Applicant was dissatisfied with the arbitral award (2015) CMAC SH No. 035 made by CMAC Shanghai on July 3, 2015. Applicant asserted that the legal representative of Hong Fu Company, who was He Weiying had been removed by the resolution made by the shareholders' meeting, and He Weiying submitted expressly to the arbitral tribunal at the oral hearing that he was not the legal representative of Hong Fu Company. However, CMAC Shanghai allowed He Weiying to execute on the arbitration documents, and to appear at the arbitration as the legal representative of the company. Meanwhile, the legal representative of Hong Fu Company, Guo Yongfu, as one of the shareholders, was aware of the situation. However he chose to withhold the relevant facts. As such, the arbitral award violated Article 58 Section (3) and (5) of the *Arbitration Law*, and should be set aside.

Respondent asserted: a. There were conflicts between the two resolutions made by the shareholders' meeting. Therefore, the resolution to remove the legal representative of Hong Fu Company cannot be executed. The legal representative of Hong Fu Company, Li Jun, as contained in the Applicant's request for arbitration was not qualified. Therefore, the request to set aside the arbitral award should be denied. Li Jun worked at the company established by Xu Hanxin, one of the shareholders of Hong Fu Company. There were interest entanglements between the two individuals, and possibly there were conspiracies between them. The arbitral tribunal, according to the registration information and the Charter of Hong Fu Company, rightfully listed He Weiying as the legal representative of the company, and delivered arbitration documents informing him to appear at oral hearings. (b) The dispute between Hong Xiang Company and Hong Fu Company should be distinguished from the internal dispute within Hong Fu Company. Though the legal representative of Hong Xiang Company, Guo Yongfu, is also one of the shareholders of Hong Fu Company, it does not necessarily mean that Hong Xiang Company was aware of the resolution made by the shareholders' meeting of Hong Fu Company. As such, there did not exist any withholding of evidence by Hong Xiang Company. (c) The arbitral award at issue was under enforcement procedure. Applicant's request for setting aside the arbitral award was merely an effort to delay the procedure and to transfer the assets of those against whom the enforcement is sought. Therefore, Applicant's request to set aside the arbitral award should be denied.

[Decision]

The court denied Hong Fu Company's request for setting aside the arbitral award "(2015) CMAC SH No. 35" made by CMAC Shanghai. In its decision, the court found that the two resolutions of the shareholders' meeting of Hong Fu Company were not supported by any evidence proving they had been publicized through change of registration information at Administration for Industry and Commerce. The order "(2015) Hai Fa Zhi Yi No.7" of Bei Hai Maritime Court also affirmed this point. According to Article 48 Section 2 of the *Civil Procedure Law*, legal persons shall be represented by their legal representatives in the litigation. Further pursuant to Article 13 of the *Company Law of the People's Republic of China*, change of the legal representative of the company shall be subject to the formalities for change of registration. Therefore, the court decided that He Weiying was still the legal representative of Hong Fu Company in its registration at Administration for Industry and Commerce, and that He Weiying's representation at arbitration did not violate the due process of law.

With respect to the withholding of evidence, the court decided that though the legal representative of Hong Xiang Company, Guo Yongfu, was also one of the shareholders of Hong Fu Company, he did not appear at the oral hearing of arbitration. After the oral hearing, considering the facts stated by He Weiying, the arbitral tribunal sent a letter enquiring the corresponding situation on Jun 9, 2015. However, the arbitral tribunal did not receive any response from Hong Fu Company. Meanwhile, taking from He Weiying's submissions at the oral hearing, shareholders of Hong Fu Company were aware of the arbitration proceeding and the oral hearing thereof. The agent of Hong Fu Company confirmed this fact at the oral hearing. As such, it would be difficult to find that there was any withholding of pertinent facts by Hong Xiang Company.

On the suspension of legal proceedings, Hong Fu Company asserted that the legal proceeding should be suspended because the case was to be decided on the basis of the decisions of the aforesaid case (2016) Gui 0702 Min Chu No. 113 and No. 174. The court decided that the issue of case (2016) Gui 0702 Min Chu No. 113 was the returning of certificates and documents, without direct or substantive connection to the case at issue. Case (2016) Gui 0702 Min Chu No. 174 concerned the validity of the resolution of shareholders' meeting and the request that He Weiying should cooperate in the change of registration information at Administration for Industry and Commerce, which were internal disputes within Hong Fu Company. If Hong Fu Company considered that He Weiying's conducts caused damages to the company, it could, according to the provisions of the *Company Law of the People's Republic of China*, upon confirming new facts and following the corresponding procedures required by law, bring the case to the court with proper jurisdiction. Therefore, there does not exist circumstances giving rise to the suspension of legal proceedings provided in Article 150 of the *Civil Procedure law*, and Hong Fu Company's request was denied.

[Comments]

This case concerns the issues of "grounds for setting aside arbitral awards" and "suspension of legal proceedings during civil litigation", which had been two tricky issues in judicial practice.

With respect to the setting aside of arbitral award, the court reasoned from the violation of due process of law and the withholding of pertinent facts which might impair the fairness of arbitral award. In maritime arbitration practice, most of the cases concerning the request for setting aside arbitral awards on the ground of unqualification of parties' status concern the non-existence of legal entities. The situation in this case where the legal representative of the company has been removed whereas registration has not been duly changed is rarely seen in practice. This case reasoned in the first place that the removal of legal representative was subject to change of registration, failing which the removal would be not set up a defense against any bona fide third party and is of no publication effect, and that a legal person shall be represented by its legal representative in litigation or arbitration. The decision, from the legitimacy of the parties' status in arbitration, argued the unreasonableness of the request to set aside the arbitral award, i.e. the arbitral proceedings did not violate any due process of law.

Another issue of this case was whether there existed withholding of pertinent facts which might impair the fairness of arbitral award. The court considered that there was no direct evidence supporting the assertion of withholding of pertinent facts. Applicant failed to fulfill its burden of proof, and therefore, shall bear the ensuing adverse consequences thereof. Besides, the court's order made it clear with respect to this issue from another point of view, i.e. from the statements and conducts of the parties at trial. This provided another approach in deciding on issues alike in practice, and largely increased efficiency of case trying.

II. Request for Affirming the Validity of Arbitration Agreement

[Key Issues]

The parties concluded two separate contracts with respect to one juristic act, providing for arbitration at two different arbitration institutions. The issue was whether the arbitration clause contained in the first contract was valid.

[Key Points]

First, the court found that the two construction contracts had the same subject matter. There was no termination clause contained in the first contract. However, in the second contract, there was an exclusivity clause providing for the termination of all previous agreements, promises or memoranda upon the execution of it. The court admitted Applicant's submission that the two contracts concerned one single legal relationship, and the second contract operated as the modification and substitution of the first contract. The court did not admit Respondent's submission that the two construction contracts are two independent contractual relationships. Second, Article 19 Section 1 of the *Arbitration Law* which provides that "*[A]n arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement*" should be considered as a provision governing the separability of arbitration agreements rather than the relationships between two successive arbitration agreements. Furthermore, with respect to the resolution of the remaining issues of the first contract, the second contract made it clear of its exclusivity. From the expression of the second contract, the validity of the arbitration clause contained in the first contract cannot be affirmed.

[Facts]

The Applicant is Shanghai Zhenhua Industry Qidong Oceaneering Co., Ltd., and the Respondent is Qidong Shunfeng Ocean Fishing Ltd. On February 22, 2016, Applicant submitted its request for determining the validity of arbitration agreement to Shanghai Maritime Court.

Applicant claimed that on November 16, 2012, Jiangsu Daoda Ocean Industry Co. Ltd ("**Daoda Company**") and Respondent entered into the "Construction Contract of 66-Meter Squid Fishing Vessel", providing for the construction of 8 66-meter squid fishing vessel, numbered DD061, DD062,…DD068, for Respondent. The contract further provided "*All disputes shall be resolved by arbitration at Nantong Arbitration Commission.*" In December 2013, Daoda Company concluded with Respondent another 8 "Construction Contract of 66.8-Meter Squid Fishing Vessel", providing for the revised delivery date and arbitration clause. The revised arbitration clause provided for arbitration at CMAC under China law. Besides, the exclusivity clause of the contract provided that "*[U]pon the execution of this contract, all previous agreements, promises or memoranda between the parties with respect to this contract shall terminate. With respect to the squid fishing vessels concerned, all credits or debts between the parties, or the credits or debts between any third party and the parties according to the previous contract, and all legal risks or liabilities shall be settled by the parties through negotiations.*" Afterwards, Applicant consumed its merger of Daoda Company by capital increase. On September 28, 2014, Applicant and Respondent concluded a supplement agreement confirming the delivery date for vessels number DD061 and DD062 as November 30, 2014, terminating the agreement with respect to the other six vessels. In February, 2016, Applicant

received notice of arbitration from Nantong Arbitration Commission, acknowledging that Respondent had brought an arbitration at Nantong Arbitration Commission with respect to the "Construction Contract of 66-Meter Squid Fishing Vessel".

Applicant asserted, since the new agreement between the parties was reached on February 18, 2014, the previous arbitration clause had already become invalid. Nantong Arbitration Commission no longer enjoyed jurisdiction over the disputes at issue. Therefore, Applicant requested the court to disaffirm the validity of the original arbitration clause.

Respondent asserted, the "Construction Contract of 66-Meter Squid Fishing Vessel" and the "Construction Contract of 66.8-Meter Squid Fishing Vessel" were two independent vessel construction contracts. They were different in respect of their terms, and were not two agreements under one single contract. "Construction Contract of 66-Meter Squid Fishing Vessel" was terminated rather than replaced by the second contract. Respondent initiated this arbitration at Nantong Arbitration Commission over the liabilities under the original contract in accordance with the provisions thereof. This arbitration did not involve the legal relationships under the new contract. Even though the two contracts were agreements under one single contract, the arbitration clause contained in the "Construction Contract of 66-Meter Squid Fishing Vessel" was valid. Pursuant to the interpretations of the Supreme Court, as long as the designation of arbitration institutions and courts is clear and exclusive, the parties may agree to resolve disputes under different parts of one contract at different arbitration institutions or courts. Therefore, Applicant's request lacks factual or legal basis, and should be denied.

[Decision]

In the order (2016) Hu 72 Min Te No.53 made by Shanghai Maritime Court, the court found the arbitration clause contained in the "Construction Contract of 66-Meter Squid Fishing Vessel", which was concluded on November 16, 2012, was invalid. First, there was no termination clause contained in the first contract; whereas the exclusivity clause contained in the second contract provides for the termination of all previous agreements, promises and memoranda in relation to this contract. As such, due to the execution of the second contract, new contract clauses came into effect governing the rights and obligations of the parties. The two contracts concerned one single legal relationship, and the second contract operated as the replacement and substitution of the first contract. With respect to Respondent's assertion that the two contracts were independent from each other, because Respondent cannot provide evidence on the termination of the first contract or the agreement with respect to the resolution of conflicts between the contracts, its assertion was thereby denied.

Second, Article 19 Section 1 of *the Arbitration Law*, which provides "*[T]he amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement.*" refers to the separability of arbitration agreements from the underlying contract, rather than the relationship between two successive contracts. As the new contract is a substitution and replacement of the original contract, if the validity of the original arbitration clause is admitted, it would give rise to the situation where both Nantong Arbitration Commission and CMAC enjoy jurisdictions over the dispute. The designation of arbitration institution would not be clear and exclusive. Therefore,

the validity of the original arbitration agreement should be disaffirmed. With respect to the remaining issues of the first contract, it was provided expressly in the second contract that "*Upon the execution of this contract, all previous agreements, promises or memoranda between the parties with respect to this contract shall terminate. With respect to the squid fishing vessels concerned, all credits or debts between the parties, or the credits or debts between any third party and the parties under the previous contract, and all legal risks or liabilities shall be settled by the parties through negotiations.*" From the wording of this exclusivity clause, the validity of the first contract cannot be affirmed. Therefore, the disputes under the first contract should only be settled by the parties according to this clause.

[Comment]

This case provides a reference for the resolution of disputes involving "the determination of the validity of arbitration clauses contained in two contracts concluded with respect to one single juristic act". With respect to the relationships between the two contracts concluded between the parties, this case found that the two contracts had the same subject matter. There was no termination clause contained in the first contract; whereas the exclusivity clause in the second contract provided for the termination of all previous agreements, promises or memoranda between the parties. The court admitted Applicant's submission that the two contracts governed the same legal relationship and that the second contract was the modification and replacement of the first contract. Besides, since Respondent could not produce evidence on the termination of the first contract or the agreement with respect to the resolution of conflicts between the two contracts, its submission that the two contracts are independent from each other was not accepted by the court. This court order reflected its opinion on whether two contracts were independent from each other or whether one contract operated as the modification and replacement of the other in situations where the parties entered into two separate contracts with respect to one single juristic act or specifically in situations where the two contracts provided for arbitration at different arbitration institutions and disputes arose with respect to the validity of the arbitration clauses contained in the two contracts. This case concerns the interpretation of Article 19 Section 1 of the *Arbitration Law*. This article provides that "*[A]n arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement*." In this case, Respondent asserted that the separability rule of this article governed the relationship between two successive arbitration clauses, and that the first contract was not bound by the second one. Respondent further asserted that the first contract was terminated rather than annulled, and that the liabilities clause and other settlement clauses remained in effect. As such, the arbitration clause in the first contract shall be valid and the Applicant's request ought to be denied.

Article 19 Section 1 of *the Arbitration Law* governs the relationship between arbitration clause and the underlying contract, i.e. the separability of arbitration clause. It should not be interpreted as the severability of two successively concluded arbitration clauses. Furthermore, the two contracts in this case governed the same legal relationship, and the second contract was the replacement and substitution of the first one. Affirming the validity of the original arbitration clause would result in the chaos in determining jurisdiction of arbitration institutions, and disputes between the parties would not be effectively resolved. Therefore, the original arbitration clause should be invalidated.

Further, with respect to the effect of the exclusivity clause, the second contract provided that "*[U]pon the execution of this contract, all previous agreements, promises or memoranda between the parties with respect to this contract shall terminate. Regarding the squid fishing vessels concerned, all credits or debts between the parties, or the credits or debts between any third party and the parties according to the previous contract, and all legal risks or liabilities shall be settled by the parties through negotiations.*" The court held that the language of this clause manifested invalidity of the first arbitration clause. Therefore, the court disaffirmed the validity of the arbitration clause contained in the first contract.

In general, Shanghai Maritime Court's admission of the opinion that the second contract operated as the modification and replacement of the first contract and that the arbitration clause contained in the first contract was invalid pursuant to the language of the exclusivity clause contained in second contract, provided reference for the legal practice in same situations, and provided an approach in resolving disputes which involves two successive contracts providing for arbitration at two different arbitration institutions.

III. Setting Aside the Arbitral Award on Grounds of Incorrect Ascertainment of Facts and Incorrect Application of Law

[Key Issues]

1. Whether the arbitral tribunal has the jurisdiction to determine the validity of the agreements under the "Shipbuilding Contract", the effectiveness of the exercise of termination right and the order of repayment; and whether such determination is within the scope of arbitration agreement.
2. Whether there exists the tribunal's misconduct against the law during the evidence examination procedure.
3. Whether there exists incorrect ascertainment of facts or incorrect application of law.

[Facts]

On February 19, 2014, Ningbo Hengrong Century Shipping Ltd. ("**Hengrong Company**") executed a "Shipbuilding Contract" with Zhejiang Zhenghe Shipbuilding Ltd. ("**Zhenghe Company**"). China Construction Bank Co., Ltd. Zhoushan Dinghai Branch ("**CCBC Dinghai Branch**") accepted the request of Zhenghe Company for the issuance of a "Letter of Guarantee on Repayment of Ship Deposit" ("**Repayment Guarantee**") with respect to the repayment of Hengrong Company's ship deposit and the corresponding interests under the Shipbuilding Contract. Article 10 of the Repayment Guarantee provides "*[T]his Letter of Guarantee is governed by China law. Any dispute arising from or in connection with this Letter of Guarantee shall be submitted to CMAC Shanghai Sub-Commission for arbitration which shall be conducted in accordance with CMAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.*"

CMAC Shanghai, in accordance with the arbitration clause contained in the Letter of Guarantee, and

the request for arbitration submitted by Hengrong Company, accepted the case involving disputes over the Letter of Guarantee with respect to the MASH20150058 vessel. On November 3, 2015, CCBC Dinghai Branch filed an application for the preservation of evidence. CMAC Shanghai, pursuant to the *Arbitration Law*, transferred the application to the People's Court of Zhoushan Dinghai District.

On March 29, 2016, the arbitral tribunal made the award that: 1. CCBC Dinghai Branch shall pay to Hengrong Company the ship deposit in the amount of RMB 50400000, and the interests accrued at an annual interest rate of 7% from the date on which Zhenghe Company received the deposit till the date on which Hengrong Company receives the repayment of the amounts at issue. 2. CCBC Dinghai Branch shall bear Hengrong Company's attorney's fees due to its involvement in this case. Hengrong Company's claim with respect to travel expenses and other legal fees is denied. 3. The arbitration fee in the amount of RMB 315,988 shall be borne by CCBC Dinghai Branch. As Hengrong Company prepaid all the fees of this arbitration, CCBC Dinghai Branch shall pay to Hengrong Company the amount of RMB 315,988.

Applicant asserted: The validity of the "Shipbuilding Contract", which was covered by the arbitral award (2016) CMAC SH No. 004 made by CMAC Shanghai, was not within the scope of the arbitration agreement contained in the Letter of Guarantee. The arbitral tribunal had no power to determine whether the underlying contract of the Letter of Guarantee, i.e. the "Shipbuilding Contract", was valid. Decisions made in the arbitral award that whether the amendment regarding the arbitration clause of the "Shipbuilding Contract" constituted significant modification of the Letter of Guarantee, whether Hengrong Company exercised its right of termination contained in the "Shipbuilding Contract", and whether Zhenghe Company should make full or part repayment with respect to the deposit and the interests thereof, were issues covered by the "Shipbuilding Contract" rather than the arbitration agreement contained in the Letter of Guarantee. The arbitral award contained decisions on issues not covered by the arbitration agreement, or issues over which the arbitration commission had no jurisdiction, and thereby should be set aside. Besides, the arbitral tribunal failed to take evidence in accordance with the reply of the court with respect to the preservation of evidence in arbitration, and deliberately neglected the evidence produced by Applicant. The conducts of the arbitral tribunal constituted violation of due process of law. Furthermore, there were misconducts and mistakes regarding the interpretation of law, ascertainment of the name of arbitration institution, ascertainment of the mitigation obligation under the contract, and the calculation of the compounding period, which constituted incorrect ascertainment of facts and incorrect application of law. Therefore, Applicant requested to set aside the arbitral award (2016) CMAC SH No. 004.

Respondent asserted: 1. Pursuant to the arbitration agreement of the Letter of Guarantee, all disputes in connection to the Letter of Guarantee were within the scope of arbitration. The arbitral tribunal's jurisdiction covers the disputes arising from the Letter of Guarantee, as well as the disputes in relation to the Letter of Guarantee. 2. The arbitral tribunal, in accordance with the law and the arbitration rules, transferred the Applicant's request for evidence preservation to the relevant court. The court's issuance of the reply was merely the exercise of its judicial power, which was not enjoyed by the arbitral tribunal. The court had no power to order the arbitral tribunal to take

evidence. The arbitral tribunal duly conducted the evidence production and examination procedure, and provided proper reasoning correspondingly in the arbitral award. 3. The mistakes in the interpretation and application of law, the interpretation of the relevant wordings, the ascertainment of relevant contractual obligations and the ascertainment of interest period was not circumstance for setting aside an arbitral award.

[Decision]

Shanghai Maritime Court denied the Applicant's request to set aside the arbitral award. The court held: The setting aside of arbitral awards shall be decided in accordance with Article 58 of the *Arbitration Law*. The basis of the Applicant's request for setting aside the arbitral were that: (a) issues covered by the arbitral award were outside the scope of the arbitration agreement or the jurisdiction of the arbitral tribunal; (b) the preservation of evidence, and the production and ascertainment of evidence violated the due process of law; and (c) there existed incorrect ascertainment of facts and incorrect application of law.

1. Article 10 of the Letter of Guarantee issued by CCBC Dinghai Branch provides that all disputes arising from or in connection with the Letter of Guarantee shall be submitted to CMAC Shanghai for arbitration. From this provision, the scope of arbitration shall include disputes arising from and also disputes in connection with the Letter of Guarantee. Disputes under the Letter of Guarantee, which is the guarantee of the "Shipbuilding Contract", are in connection with the performance of the "Shipbuilding Contract". As such, the arbitration institution had jurisdiction over the disputes. Second, CCBC Dinghai Branch claimed the validity of the "Shipbuilding Contract", the exercise of termination right and the repayment of the deposit in its defense. It shall produce evidence to support such claims. With respect to the aforesaid claims, the arbitral tribunal's decision, which was made in accordance with the production of evidence, is correct. At last, the arbitral award was made according to the provisions of the Letter of Guarantee and the law. Issues under the "Shipbuilding Contract" are not covered by the award. Therefore, arbitral award did not exceed the scope of the arbitration agreement or the power of the arbitration institution.

2. The arbitral tribunal transferred CCBC Dinghai Branch's request to the local court according to the law. The parties shall bear the burden of proof with respect to their claims; and the arbitration tribunal may, as it considers necessary, collect evidences on its own. Therefore, Applicant's claim that the arbitral tribunal shall investigate and collect evidence according to the court's reply is of no legal basis. There is no violation of mandatory arbitration procedure or arbitration rules, or circumstances impairing the making of arbitral award. Second, the parties produced evidence during the oral hearing, and had the chance to examine evidence and to debate. The arbitral tribunal, according to the law and the arbitration rules, provided reasoning with respect to the evidence produced by the parties in its award. There is no neglect of evidence as claimed by Applicant. Therefore, CCBC Dinghai Branch's claim that the arbitral award should be set aside on the ground that the preservation, production and ascertainment of evidence violated the due process of law, is denied.

3. The interpretation and application of the law, the interpretation and ascertainment of arbitration institution, the ascertainment of mitigation obligation and the calculation of interest period covered by the arbitral award are substantive issues in arbitration, and are outside the scope of review by the court in setting aside arbitral awards. Therefore, CCBC Dinghai Branch's claim that the arbitral award should be set aside on the ground of incorrect ascertainment of facts and incorrect application of law is denied.

[Comment]

This case sets a precedent for issues including procedural restrictions on the collection of evidence by arbitral tribunals, incorrect ascertainment of facts and incorrect application of law in cases where setting aside of arbitral award is sought.

In 2015, "Evidence in arbitration" has become the most common reason for setting aside and refusing to enforce arbitral awards. The court provided a correct interpretation with respect to the provision that arbitral tribunal may collect evidence when it considers necessary. The Applicant's claim that the arbitral tribunal shall collect evidence according to the court's reply is of no legal basis. The collection of evidence shall be the right, rather than the obligation, of arbitral tribunals.

The court held that the interpretation and application of the law, the interpretation and ascertainment of arbitration institution, the ascertainment of mitigation obligation and the calculation of interest period covered by the arbitral award are substantive issues in arbitration, and are outside the scope of review by the court in setting aside arbitral awards. From this reasoning, the basis for setting aside arbitral awards is vested in the 7 grounds as provided by Article 58 of the *Arbitration Law*. Claims outside the aforesaid scope would not be supported by the court. However, this reasoning provided by the court is limited to the review of procedural issues. It would not be precise as Article 58 of *the Arbitration Law* provides for "forge of evidence" and "withholding of evidence which is sufficient to affect the fairness of arbitration" as grounds for setting aside arbitral awards. Review of evidence constitutes the review of substantive issues.

IV. Setting Aside the Arbitral Award on the Ground of Improper Constitution of the Tribunal

[Key Issues]

1. Circumstances for withdrawal of arbitrators.
2. Whether the arbitral tribunal is obligated to make a partial award.

[Facts]

Applicant (Nanjing Yichun Ship Manufacturing Ltd.) asserted that: There was violation of due process of law in the formation of the arbitral tribunal in the arbitration MASH2014068 held by CMAC Shanghai. The presiding arbitrator Yin Dongnian's failure in withdrawal from the panel when he shall withdrawal affected the fairness of the arbitral award. The arbitral tribunal failed to

decide on the Applicant's challenge of arbitrator Huang Shungang. The arbitral tribunal failed to respond to the Applicant's two emergency applications for partial award, and for the unfreezing of its bank account, which constituted inaction in performing its duties. Besides, upon affirming that the termination of contract by CMB Financial Leasing Co., Ltd. ("**CMB Financial Leasing**") was invalid, the tribunal decided that it constituted mandatory termination of contract at another point of time. This decision exceeded the scope of arbitration. Therefore, Applicant requested to set aside the arbitral award (2015) CMAC SH No. 050 in respect of the No.MASH2014068 "79600t Bulk Vessel Building Contract" (IMO No.YC016).

Respondent, CMB Financial Leasing, asserted that: There was no circumstance of withdrawal for Yin Dongnian, and Applicant did not submit its request for withdrawal during the arbitral proceedings. As such, the formation of arbitral tribunal conforms to the applicable arbitration rules. The request for withdrawal by Huang Shungang was submitted by Applicant at the oral hearing, but was later rescinded. Besides, there was no circumstance giving rise to the withdrawal by Huang Shungang. There was no ground for Applicant's submission that Huang Shungang lacked independence and impartiality basing on that the conducts of Huang Shungang did not conform to the Applicant's expectations. CMB Financial Leasing already paid to Applicant the contract price in the amount of RMB 133.8 million, and is entitled to the preservation of Applicant's bank deposit RMB 66.9 million. The arbitral tribunal is not obligated to make intermediate or partial award. The issues exceeding the scope of arbitration as claimed by Applicant, was the reply made in accordance with the Bad Faith Contract Breach Clause and with respect to CMB Financial Leasing's counterclaim. This counterclaim was the key issue of the arbitration, and had been subjected to production and examination of evidence procedure, and therefore did not exceed the scope of arbitration. As such, Applicant's request for setting aside the arbitral award should be denied.

[Decision]

The court denied Applicant's request for setting aside the arbitral award (2015) CMAC SH No.050.

1. Violation of Due Process of Law

(a) The presiding arbitrator Yin Dongnian's failure to withdrawal

Article 34 of the *Arbitration Law* and Article 30 of the *Revised Rules* provide for the same circumstances for withdrawal of arbitrators. As per the evidence produced and the submissions provided, Applicant claimed that there were "other relationship the arbitrator had with a party or his agent in the case which may affect the impartiality of arbitration". Specifically, Applicant claimed: (i) Yin Dongnian had teacher-student and co-teaching relationship with Zhou Qi, who was the agent of CMB Financial Leasing in this case, and that they served as co-agents in another case. (ii) Yin Dongnian served as the co-editor and published books with the signatory of the legal opinion submitted by CMB Financial Leasing. (iii) Yin Dongnian and Lu Zhiming, the former vice-chairman of the board of China Merchants Bank which was affiliated with CMB Financial Leasing, both worked as the outside directors of Shanghai Lansheng Co., Ltd. ("**Lansheng Company**") Upon investigation, Yin Dongnian is a well-known expert in the field of maritime law, and has been

serving as professors in colleges and universities. As such Yin Dongnian has a number of students, colleagues, co-researchers, and persons with co-editing relationships. Besides, as per the evidence produced by Applicant, though they served as co-agents in another case, Yin Dongnian and Zhou Qi are from two different law firms. And this co-agent relationship occurred 20 years ago as of the date of the arbitration at issue. The evidence admitted in this case also suggests that even though both Yin Dongnian and Lu Zhiming served as the outside directors of Lansheng Company, both of them were relieved from the position 8 years ago. Lu Zhiming's holding of board vice chairman position of CMB was even long before that time. Furthermore, CMB and CMB Financial Leasing are two independent legal persons in law. According to the arbitration law and the arbitration rules, any of the arbitrators having other relationship with a party or his agent in the case which may affect the fairness of arbitration must withdrawal from the penal. The relationship between Yin Dongnian and Guo Yu is not the relationship between arbitrator and party to arbitration, which would not provide a ground for withdrawal of arbitrators. The relationships that Yin Dongnian had with Zhou Qi and Lu Zhiming were normal working and social relationships, and existed long before the commencement of the arbitration at issue. There is no evidence proving that beneficial relationship still existed right before or during the arbitration at issue. Neither is there evidence showing that such relationship Yin Dongnian had with Zhou Qi and Lu Zhiming ever affected the fairness of the arbitral award. As such, Applicant's request to set aside the arbitral award on the ground of failure to withdrawal by the presiding arbitrator Yin Dongnian is not grounded.

(b) CMAC's failure to respond to the Applicant's claim that Huang Shungang should withdrawal from the penal

Applicant claimed that CMAC's failure to respond to the Applicant's request that Huang Shungang should withdrawal from arbitrating during the first oral hearing constituted the violation of due process of law. From the evidence admitted and the investigation by the court, the Secretariat of CMAC did receive the application for the challenge of arbitrator from Applicant. However, there was no official chop or signature applied on such application. The Secretariat had returned the application to Applicant after confirming that the Applicant intended no longer to challenge the arbitrator at issue. Should Applicant insist on the withdrawal of one certain arbitrator, it shall challenge the arbitrator during the arbitral proceeding in which the arbitrator participate. However, from the arbitral award at issue and other evidence admitted by this court, there is no such challenge of arbitrator submitted by Applicant throughout the whole arbitral proceeding.

(c) CMAC's failure to make the partial award requested by Applicant

Article 55 of *the Arbitration Law* provides "*[I]n arbitration proceedings, if a part of the facts involved has already become clear, the arbitral tribunal may first make an award in respect of such part of the facts.*" It is also provided in Article 55 of *the Revised Rule* that "*[W]here the arbitral tribunal considers it necessary, or where a party so requests and the arbitral tribunal agrees, the arbitral tribunal may first render a partial award on any part of the claim before rendering the final award.*" Pursuant to these rules, arbitral tribunals have the power to make pre-awards, interlocutory awards or partial awards. The exercise of such power shall be decided by arbitral tribunals independently. In the instant case, that the arbitral tribunal did not make partial award at the

Applicant's request was the exercise of the tribunal's power in making awards. Therefore, the Applicant's request to set aside the arbitral award on the ground that the arbitral tribunal did not make partial award at its request cannot be granted.

[Comment]

This case provides a reference for cases involving the issue of "challenge of arbitrators".

Fairness is one of the value orientations of arbitration; whereas the independence and qualification of arbitrators are the basis in achieving fairness. The independence of arbitrators has become one the fundamental principles of, and is the basis for the continuing existence and development of international commercial arbitration. Lack of independence of arbitrators is one of the most crucial aspects in judicial review, and has become one of the most frequently used grounds in requests for setting aside and for refusing to recognize and enforce arbitral awards. The standards for deciding on the independence of arbitrators are mostly vested in the principles of the arbitration laws in other countries, and therefore are subject to arbitral tribunals' discretion in arbitration practice.

The issue of this case is the circumstances for challenging arbitrators. The grounds for challenging arbitrators claimed by the party in this case are quite typical, such as teacher-student relationship and co-agent as lawyers in another case. The close relationship between an arbitrator and one party or its agent may be a ground for the other party to challenge the arbitrator. Though such close relationship would not necessarily result in the impartiality of the arbitrator, it would give rise to reasonable doubts for the other party with respect to the independence and impartiality of the arbitrator. Such close relationship includes friends, classmates, colleagues, teacher-student relationship and apparent hostility. The teacher-student relationship would be very difficult to decide on, especially in the circumstance where college professors, more specifically law school professors, are frequently appointed as arbitrators in arbitration practice. Therefore, the teacher-student relationship has been used very frequently in challenging arbitrators. If there exists teacher-student relationship between one arbitrator and one party or its agent and there is no clear evidence proving existence of close relationship between the two, it would not give rise to the ground for challenging the arbitrator. Otherwise, most of the arbitrators in arbitration practice would have to withdrawal from arbitrating.

Chapter Seven: Review on 2015 China Maritime Arbitration

In recent years, shipping industry in China has experienced a period of fast development with remarkable achievements. Statistically, containers throughput of China ranks the first place in the world and the size of the fleet ranks the third place in the world. These figures manifest that China has become one of the world biggest shipping countries, which brings numerous opportunities for the development of china maritime arbitration. Especially under the circumstances where shipping industry is still under the influence of the financial crisis, shipping economic growth is stalled and risk factors and defaults of the shipping market have largely increased, both caseload and the amount in controversy in maritime law disputes reflected an increasing trend.

The current domestic and overseas environments have presented new requirements and have brought with opportunities for the development of china arbitration. Since its establishment, CMAC undertakes a large amount of legal service functions to serve our country, the government and enterprises. In 2015, CMAC was devoted to improve the arbitration regimes, to improve public faith in arbitration, to serve the shipping market and to enhance the soft power of shipping industry, and especially achieved positive results in extending its public service functions. CMAC is also committed to intensifying theory study on arbitration, proposing innovations, stimulating vitality by new regimes, new mechanisms and new methods, improving its core competence, promoting development of maritime arbitration, expanding international influence and enhancing the discourse power of China.

As a representative of high-end shipping industry, Maritime Arbitration is a significant aspect of enhancing soft power of shipping industry in China. In the meanwhile, maritime arbitration is also facing a historic opportunity for the construction of international discourse right. In the industry of maritime arbitration, China has been geared to international standards in aspects such as arbitration rules, standards and talents reserve, although we are not yet capable of leading the international discourse right. We should continue to promote the establishment of Chinese brands of maritime arbitration, to actively involve in the formulation of industry regulations and to enhance discourse right of Chinese shipping industry. Meanwhile, we are supposed to promote the modification and perfection of the arbitration legislation, enhance judicial supervision and assistance, strengthen theory study, cultivation of talents and cultural construction of maritime arbitration, continue to improve regulations and practice, persist in the course of the combination of internationalization and localization, actively participate in important international seminars, follow international hotspot issues, and publicize china maritime arbitration. In addition, we should organize domestic experts and lawyers in maritime arbitration to participate in the International Congress of Maritime Arbitrators to speed up the internationalization of CMAC, make full use of our advantage of institution management to improve the level of service and the public trust in arbitration. By following tightly the trend of market, working efficiently and providing high-quality service, we are supposed to give full play to the significant role of china maritime arbitration in international maritime law disputes, and to devote ourselves in building China into the center of international maritime arbitration.

Chapter Eight：Memorabilia of CMAC 2015

- On January 1st, 2015, the new Arbitration Rules of CMAC was officially implemented.
- On January 7th, 2015, the Deputy Director and Secretary General of CIETAC, the Deputy Director or CMAC Yu Jianlong attended the Singapore Shipping Seminar and the launch press of "*Major issues of shipping act (comparative study of legal system in China and Britain)(first edition)*", and gave speeches.
- On March 12th, 2015, CMAC held discussions with China International Freight Forwarders Association.
- On March 19th, 2015, the Secretary General of CMAC Shanghai Sub-Commission Jiang Hong was invited to attend the launch meeting of "Bluebook of Shanghai International Shipping Center Construction (2015)".
- On March 27th, 2015, CMAC held in Beijing the Arbitrators Training Conference: First Session.
- On April 20th, 2015, delegations of CIETAC and CMAC attended Chinese Enterprise Symposium in Dubai.
- On April 23rd, 2015, the Vice President of CMAC Court of Arbitration, Chen Bo and delegations attended the Annual International Arbitration Conference held by ICC Russia. More than 100 delegations, lawyers, and enterprise representatives from Russia, UK, France, Sweden, Switzerland, Japan, Malaysia, the United Arab Emirates, China, China Hong Kong and other counties and regions appeared at the conference.
- On April 24th, 2015, the Vice President of CMAC Court of Arbitration, Chen Bo and the team of delegations attended the Chinese Enterprise Seminar at Moscow and gave speeches.
- On May 11th, 2015, the Deputy Director of CMAC, Yu Jianlong, and the team of delegations attended the opening ceremony and the congress of the 19th International Congress of Maritime Arbitrators at Hong Kong, and presented speech.
- On June 20th, 2015, CMAC Shanghai Sub-Commission was invited to the International Summit of Chinese Fishing Boats and Equipment Technology 2015.
- On June 24th, 2015, CMAC was invited to the Third Strategy Forum for Chinese Shipping Companies, and the 2015 Annual Conference of the Shipping Management Committee of CIN

and the council of "Shipping Management" and "Containerization".

- On July 9th, 2015, CMAC entered into a cooperation agreement with Dalian Maritime University.
- On July 24th, 2015, CMAC Shanghai Sub-Commission was invited to the Press Conference on the Launch of 2015 Xinhua-Baltic International Shipping Centers Development Index and the 2015 Shanghai International Shipping Center Construction Blue Book.
- On August 21st, 2015, the Vice President of CMAC Court of Arbitration, Chen Bo attended the 2015 China International Freight Forwarder Forum.
- On September 14th, 2015, CMAS attended the Sino - British Maritime Law Forum and the Law Forum of International Shipping and the Silk Road held at Pudong, Shanghai.
- On September 21st, the Deputy Director of CMAC, Yu Jianlong, and the Deputy Commissioner of Changjiang Maritime Safety Administration attended and presented speeches at the opening ceremony of Changjiang Maritime Mediation Centre.
- October 10th – 11th, 2015, CMAC was invited to the 2015 Annual Academy Conference of Chinese Society for Oceanography held at Yinchuan.
- On November 7th, 2015, CMAC Shanghai Sub-Commission was invited to the South China Maritime Law Forum 2015.
- On November 9th, 2015, CMAC Shanghai Sub-Commission was invited to the Marine and Insurance Seminar 2015, Guangzhou and gave speech.
- On December 29th, 2015, CIETAC Fujian Sub-Commission and CMAC Fujian Sub-Commission held the opening ceremony at Taiwan Innovation Park Conference Centre, Pingtan, Fujian.