China Maritime Arbitration

Annual Report 2016

China Maritime Arbitration Commission

June, 2017

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Chapter One: China Maritime Arbitration Overview 2016

In 2016, the growth of China maritime arbitration industry has been boosted by opportunities and supports. The Supreme People's Court of China highly values the development of arbitration and has enhanced the interaction between courts and arbitration institutions, promoted the reform of alternative dispute resolution mechanism and supported the reform of arbitration regime. Based on the arbitration law and other domestic laws, in adherence to their duties under international treaties, courts in China enacted judicial interpretations and regulatory documents to complete the regime of judicial review in respect of arbitration, created an amicable environment of judicial review for arbitration, and promoted the growth of the arbitration industry. Maritime arbitration is a significant component of maritime law legal services. As proposed in 2016 by JIANG Zengwei, the Chairman of China Council for the Promotion of International Trade and the President of China Maritime Arbitration Commission (hereinafter "***CMAC***"), China will be built into the "International Arbitration Centre". In the vision of building the "International Arbitration Centre", as generally agreed in the industry, it would be crucial to keep building "International Maritime Arbitration Centre" a separate task, which would be an important support for the international maritime justice center.

In 2016, China maritime arbitration has become more interconnected. As the most specialized maritime arbitration institution in China, basing on the Sub-Commissions set up in Shanghai, Tianjin, Southwest, Fujian and Hong Kong and the Liaison Offices in Tianjin, Dalian, Guangzhou, Qingdao and Ningbo, CMAC then established South China Sub-Commission (Guangdong Pilot Free Trade Zone Arbitration Centre), China (Shanghai) Pilot Free Trade Zone Arbitration Centre, China (Tianjin) Pilot Free Trade Zone Arbitration Centre and Zhoushan Liaison Office. Gradually, CMAC has formed a service network covering the whole country, providing more convenient arbitration services, and will provide unique arbitration services for the building of pilot free trade zones.

In 2016, CMAC has been committed in providing extended arbitration services, preposing arbitration services before litigation and promoting the role of arbitration in alternative dispute resolution mechanism. After several years of development, CMAC has achieved outstanding achievements. In 2011, Shanghai Supreme Court and CMAC executed "*the Minute of Cooperating in the Establishment of Entrusted Mediation Mechanism in Maritime Disputes*", marking the start of the first entrusted mediation mechanism of maritime disputes in China. Upon the consent by the parties, this mechanism operates to entrust the disputes in maritime industry submitted to maritime courts to CMAC Shanghai Sub-Commission for mediation, which could, to some degree, lessen and control the caseload at maritime courts, and transfer cases from litigation system to non-litigation system. It has been proved that this mechanism promotes the complementation between judicature and professional mediation, the resolution of social disputes, and the provision of inexpensive, efficient and qualified dispute resolution mechanisms. The entrusted mediation mechanism is revolutionary with distinct Chinese character and is replicable and generalizable in

the reformation of Chinese judicial regime.

In 2016, the service of CMAC has become more diversified. On the basis of providing traditional arbitration law services, CMAC held various trainings and seminars in publicizing China maritime arbitration, including the "*Seminar on the Practice and Legal Issues in Foreign-related and Hong Kong-related Shipping Financialleasing*", the "*Release Press for International Freight Forwarding Model Agreement and the Seminar on the Legal Practice of Freight Forwarding*", the "*China SCR Seminar*", etc. CMAC is committed in serving the market, holding promotion events and implementing arbitration clauses. CMAC and its Sub-Commissions had visited shipping companies, shipping associations and maritime law firms and had encouraged them to insert CMAC model clause in the contracts by holding seminars, forums and other events. CMAC has successfully expanded its influence and promoted maritime arbitration in China.

Chapter Two: Comments on the New Laws and Regulations on Arbitration

In 2016, the Supreme People's Court issued five judicial interpretations and provisions in respect of maritime arbitration, which includes "*Opinions of the Supreme People's Court on Providing Judicial Safeguard to the Construction of Free Trade Zones*", "*Provisions of the Supreme People's Court on Mediation Invited by People's Courts*", "*Opinions of the Supreme People's Court on Further Deepening the Reform of the Diversified Dispute Settlement Mechanism by People's Courts*", "*Provisions of the Supreme People's Court on Several Issues Concerning Cases of Property Preservation Handled by People's Courts*" and "*Provisions of the Supreme People's Court on the Jurisdiction of Maritime Litigations*". These interpretations and provisions will provide solid foundation and clear guidance for the development of maritime arbitration.

I. "*Opinions of the Supreme People's Court on Providing Judicial Safeguard to the Construction of Free Trade Zones*"

On December 30, 2016, the Supreme People's Court of China enacted the "*Opinions of the Supreme People's Court on Providing Judicial Safeguard to the Construction of Free Trade Zones*" (Fa Fa (2016) No. 34) (hereinafter the "***Opinion***"). The Opinion purports to exercise the Supreme Court's function of providing guidance in practice, to refresh the ideology of trial practice, to support the implementation of the reformation in free trade zones, and to solve problems with and compelling need and generality in judicial practice within the free trade zones. There are 12 articles in the Opinion, of which there are 9 articles designated for the judicial review within the free trade zones. The Opinion will have enormous impact on the ad hoc arbitration regime and the finding of foreign elements in China arbitration practice.

A. The Standard on the Finding of Foreign Elements

Section 1, Article 9 of the Opinion provides, "*[C]orrectly determine the validity of arbitration agreements and regulate the judicial review of arbitration cases. Where a foreign enterprise registered in the free trade zones is bound to submit for overseas arbitration of commercial disputes, the relevant arbitration agreement shall not be invalidated only on the ground that the dispute does not involve foreign elements.*"

Section2, Article 9 stipulates, "*[W]here one party or both parties concerned which are foreign-funded enterprises registered in the free trade zones have agreed to submit commercial disputes for overseas arbitration, after the occurrence of a dispute, the parties concerned submit the dispute for arbitration abroad but then claim to not acknowledge, recognize or execute the award on the ground of invalidity of the arbitration agreement after the relevant award is made, the people's court shall not uphold such request; where the other party concerned did not raised an objection to the validity of the arbitration agreement in the arbitration procedure, but claims that the arbitration agreement is invalid and refuses to acknowledge, recognize or execute the award*

therefor on the ground that the relevant dispute does not involve any foreign element after the award is made, the people's court shall not support the request."

Pursuant to Article 271[1] of the "*Civil Procedure Law of the People's Republic of China*" (hereinafter "***Civil Procedure Law***"), and Section 2, Article 128[2] of the "*Contract Law of the People's Republic of China*" (hereinafter "***Contract Law***"), only the parties to a contract involving foreign elements may apply for arbitration to a Chinese arbitration institution for foreign-related disputes or other arbitration institutions. Therefore, whether an arbitration case involves foreign elements has become one hot issue in recent years. Article 522 of the Interpretations of the Civil Procedure Law followed the principles embedded in the "*Judicial Interpretations to the 'Law of the People's Republic of China on Application of Law in Foreign-related Civil Relations'*", and provides that "*[T]he people's court may find a foreign-related civil case should one of the following circumstances occurs:*

a. *a party or both parties involved in the case are foreigners, stateless persons, foreign enterprises or organizations;*
b. *a party or both parties involved in the case have their habitual residence outside the territory of the People's Republic of China;*
c. *the subject matter involved is outside the territory of the People's Republic of China;*
d. *the legal fact that establishes, changes or terminates the civil relation occurs outside the territory of the People's Republic of China; or*
e. *other circumstances under which a case may be deemed a foreign-related civil case.*"

It is obvious that all wholly foreign owned entities (hereinafter "***WFOE***") incorporated within the free trades zones are Chinese legal persons; and disputes between such WFOEs would not involve foreign elements, and therefore shall not be submitted for overseas arbitration. However, following the principle that free trade zones may attempt with innovation, in November 2015, Shanghai First Intermediate People's Court varied the rule aforesaid in finding foreign element in *Siemens v. Golden Landmark*[3] case. In *Siemens v. Golden Landmark* case, the court decided that commercial disputes between two WFOEs involves foreign elements and therefore expanded the scope of foreign elements determination.

Article 9 of the Opinion establishes the rule applied in *Siemens v. Golden Landmark* case as

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[1] "*Where disputes arising from economic, trade, transport or maritime activities involve foreign parties, if the parties have included an arbitration clause in their contract or subsequently reach a written arbitration agreement that provides that such disputes shall be submitted for arbitration to an arbitration institution of the People's Republic of China for foreign-related disputes or to another arbitration institution, no party may institute an action in a people's court.*"

[2] "*The parties may, if unwilling to resolve their disputes through reconciliation or mediation or if the reconciliation or mediation fails, apply to an arbitration institution for arbitration in accordance with their arbitration agreement. The parties to a contract involving foreign elements may, in accordance with their arbitration agreement, apply for arbitration to a Chinese arbitration institution or other arbitration institutions. If there is no arbitration agreement between the parties or the arbitration agreement is invalid, they may bring a lawsuit before a people's court. The parties shall perform any judgment, arbitration award or mediation agreement that is legally effective; in case of any refusal to perform the same, the other party may petition the people's court for enforcement.*"

[3] The Request for Recognition and Enforcement of Foreign Arbitral Award Case between Siemens International Trade (Shanghai) Ltd. and Shanghai Golden Landmark Ltd. ((2013) Hu Yi Zhong Min Ren (Wai Zhong) Zi No. 2).

regulatory provision, of which Section 1 allows the commercial disputes between WFOEs incorporated within the free trade zones to be submitted for overseas arbitration; and Section 2 expanded the rule aforesaid to "at least one party is a WFOE incorporated in free trade zones", provided that no party objects to the validity of arbitration agreements in the arbitration procedure. Following the rule of Section 2, after the arbitral award is rendered, Claimants to arbitration may not apply for the refusal of recognizing, acknowledging or enforcing the arbitral award on the ground of invalidity of the arbitration agreement; and Respondents to arbitration may not apply to refuse to recognize, acknowledge or enforce the arbitral award on the ground of invalidity of the arbitration agreement should the Respondent fails to object to the validity of the arbitration agreement during arbitration procedure. Section 2, through the application of the principle of estoppel, expanded the scope of application of the rule embedded in Section 1. The term of estoppel is not used in the laws and judicial interpretations. However, judicial interpretations in China have made clear the rule of application of such principle in various circumstances. The application of estoppel would help to achieve procedural justice, and promote fairness and efficiency of arbitration. Through the application of estoppel principle, it would be effective in preventing the abuse of right of the parties and protecting the arbitration procedure. Such application demonstrates the principle of efficiency of judicial system.

B. Domestic Ad Hoc Arbitration

Section 3, Article 9 of the Opinion provides, "*[W]here enterprises registered in the free trade zones have agreed with each other to settle relevant disputes by a specific arbitrator in accordance with the specific arbitration rules at a specific place in the mainland, the arbitration agreement may be deemed valid. Where the people's court determines that the arbitration agreement is invalid, the aforesaid agreement shall be submitted to the court at a higher level for review. Where the court at a higher level agrees with the court of lower level, it shall file the review opinion with the Supreme People's Court and make a ruling based on the reply of the Supreme People's Court.*"

Section3, Article 9 is deemed as a lift of restrictions on domestic ad hoc arbitration within a limited scope for the first time. The reason of using the term "lift of restrictions" is that Article 16 of the "*Arbitration Law of the People's Republic of China*" (hereinafter the "***Arbitration Law***") provides that arbitration commission is one of the prerequisite for a valid arbitration agreement; and Article 18 of the Arbitration Law would make an arbitration agreement invalid should there is no agreement reached on the arbitration commission, or such agreement is too vague to be executed, to which the parties are unable to reach a supplement afterwards. After the implementation of the Arbitration Law, most of the invalid arbitration agreements found by the courts were found invalid due to the violation of the rules aforesaid. As such, though in international practice institution arbitration and ad hoc arbitration are paralleled regimes, only institution arbitration regime was established in our country. Under the circumstance that it is impossible to amend the Arbitration Law, it is a breakthrough that Section 3 of Article 9, to some degree, modified the rule of the Arbitration Law. In the press conference held on January 1, 2017 by the Supreme People's Court, a journalist asked whether the adoption of Section 3, Article 9 of the Opinion would mean that ad

hoc arbitration was to be recognized in China. The President of the Supreme People's Court Fourth Civil Chamber, ZHANG Yongjian, replied:

"Ad hoc arbitration is widely used in commercial dispute resolution in the world. Currently, Courts in China would recognize and enforce foreign ad hoc arbitral awards following the rules in the New York Convention[4]. However, ad hoc arbitration has not been stipulated in Arbitration Law. Pursuant to the innovation and pilot principle of the free trade zones, the directing opinion requires the people's court to respect the autonomy of the enterprises incorporated within the free trade zones. As such, should there are mutual consents in respect of arbitration and the particular form of arbitration, such consents shall be recognized. Meanwhile, this particular form of arbitration is limited to be implemented in disputes between enterprises incorporated within the free trade zones. This innovation and attempt will be tested and reviewed by local courts and will promote the modification of the relevant law."

The reason why we phrase it as the "lift of restrictions on domestic ad hoc arbitration within a limited scope for the first time" is that Section 3 of Article 9 sets very strict prerequisites for the application of ad hoc arbitration:

First of all, it limits the entity to which ad hoc arbitration may apply. According to Section 3 of Article 9, the parties to the arbitration agreement shall be enterprises incorporated within free trade zones, i.e. ad hoc arbitration shall not apply to entities incorporated outside the free trade zones, nor shall it apply to disputes between an entity incorporated within the free trade zone and an entity incorporated outside the area.

Second, the Opinion limits the content of arbitration agreements providing for ad hoc arbitration. Arbitration agreements between qualified entities shall carry three particular elements, i.e. a specific domestic place for arbitration, particular arbitration rules and particular persons to arbitrate. However, the Opinion left it unclear how to understand these three elements. Therefore, for purpose of implementing this attempt of ad hoc arbitration, it would be necessary that the Supreme Court releases judicial interpretations to further clarify those issues.

Last, the Opinion expanded the regime of internal report in foreign-related arbitrations to qualified ad hoc arbitration agreements. The court "may" find the arbitration agreement valid, which means the courts enjoy certain discretion in finding a valid arbitration agreement providing for ad hoc arbitration. Should the court find an arbitration agreement invalid, before it issues an order, it shall report to the Supreme People's Court for reply.

Therefore, it is a breakthrough of arbitration in China to release the restrictions on ad hoc arbitration. However, the Supreme People's Court is also very discreet in implementing this regime.

II. "*Provisions of the Supreme People's Court on Several Issues concerning Cases of*

[4] "*United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*"

***Property Preservation Handled by People's Courts*"**

On October 17, 2016, the Supreme People's Court released the "*Provisions of the Supreme People's Court on Several Issues concerning Cases of Property Preservation Handled by People's Courts*" (Fa Shi (2016) No.22) (hereinafter the "***Provisions***"), which became effective on December 1, 2016. The Provisions made clear several issues in cases of property preservation and provided direct guidance for the practice of property preservation.

A. Reiterating the Application for Property Preservation Shall be submitted to People's Courts through Arbitration Institutions

Article 3 of the Provisions provides, "*[W]here a party applies for property preservation in the course of arbitration, it shall submit to a people's court via the arbitration institution an application, notice of accepting an arbitration case, and other relevant materials. Where the people's court rules to take property preservation measures or reject an application, it shall serve a ruling on the party and notify the arbitration institution.*" The Provisions reiterated that the application for property preservation in arbitration shall be submitted to people's courts via arbitration institutions, and made this rule clear for arbitration practice.

B. Making Clear the Time Limit for the Courts in Ruling on the Application for Property Preservation in Arbitration

Article 4 of the Provisions provides, "*[W]here a people's court accepts an application for property preservation, it shall make a ruling within five days; if a guarantee needs to be provided, it shall make a ruling within five days upon provision of the guarantee; if it rules to adopt preservation measures, such measures shall be implemented within five days. In the case of emergency, a ruling shall be made within 48 hours; if preservation measures are ruled to be adopted, such measures shall be implemented forthwith.*"

There is no clear rule in respect of the time limit for courts to rule on the application for property preservation in arbitration, either in the Arbitration Law, or the Civil Procedure Law, including the judicial interpretations thereof. The Provisions restrict the time limit for courts to make a ruling and to enforce the ruling to 5 days, which would improve the efficiency of arbitration.

C. Pre-litigation Preservation May be Automatically Converted to Preservations in the Course of Arbitration or Enforcement

Article 17 provides, "*[W]here an interested party applying for pre-litigation property preservation lodges a lawsuit in accordance with the law or applies for arbitration within 30 days after a people's court adopts preservation measures, the pre-litigation property preservation measures shall be automatically converted to preservation measures in the course of litigation or arbitration; after entry into enforcement procedures, preservation measures shall be automatically converted*

to measures of sealing up, distraining, or freezing property in the course of enforcement. Where preservation measures are automatically converted to preservation measures in the course of litigation or arbitration, or to measures of sealing up, distraining, or freezing property in the course of execution, in accordance with the provisions of the preceding paragraph, the period of such measures shall be counted on a consecutive basis, and a people's court need not prepare a new ruling." The Provisions made clear that pre-litigation preservation may be converted to preservations in the course of arbitration or enforcement, which would make trial course more expedient and gradually complete the regime of property preservation in arbitration.

D. Making Clear the Amount of Guarantee in Property Preservation

Section 1, Article 5 of the Provisions provides, "*[W]here a people's court orders a preservation applicant to provide a guarantee in accordance with Article 100 of the Civil Procedure Law, the amount of the guarantee shall not exceed 30% of the claimed preservation amount; if the property involved in an application for preservation is the subject matter of a dispute, the amount of the guarantee shall not exceed 30% of the value of the subject matter of the dispute.*"

Section 2 of Article 5 provides, "*[W]here an interested party applies for property preservation before litigation, it shall provide a guarantee equivalent to the claimed preservation amount; under special circumstances, a people's court may handle it at its discretion.*"

Section 3 of Article 5 provides, "*[D]uring the property preservation period, where the guarantee provided by a preservation applicant is insufficient to compensate the possible losses caused to the person against whom preservation is adopted, a people's court may order the applicant to provide additional guarantees accordingly; if the applicant refuses to do so, the court may order release of the preservation wholly or partially.*"

In respect of the amount of guarantee in applying for property preservation in arbitration, it has always been required in China that the amount of guarantee shall be equivalent to the value of the property to be preserved. Article 98 of the "*Opinions of the Supreme People's Court on Several Issues concerning the Application of the Civil Procedure Law of the People's Republic of China*" (hereinafter the "***Opinions of the Civil Procedure Law***") provides, "*[W]here the people's court orders an applicant to provide guarantee when adopting the measure of property preservation before the institution of an action or during the course of an action in accordance with Article 92 or 93 of the Civil Procedure Law, the amount of guarantee shall be equivalent to the amount asked for preservation.*" The "*Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*" (hereinafter the "***Interpretation of the Civil Procedure Law***") did not fundamentally change the regime that the amount of guarantee shall equal to the amount of the property to be preserved; instead, it added a circumstance for where courts may exercise their discretion. According to Section 2 of Article 152, "*[W]here an interested party applies for property preservation before the institution of an action, the interested party shall provide guarantee equivalent to the amount of the property under the preservation*

application; in a special situation, a people's court may deal with the application at its discretion." The requirement that the amount of guarantee shall equal to the value of the property preserved has been criticized in practical and academic world for years. The rationale for this requirement is to protect the interests of the party of whom the property was preserved in circumstances of wrongful preservation and to prevent the applicants from abuse of rights. In practice, property loss due to wrongful preservation is normally far lower than the value under preservation. In some cases, there would even be no loss of property. Therefore, it would not be necessary or reasonable to require the applicants to provide equivalent guarantee. The Provisions lowered the strict requirement of equivalent guarantee to not exceeding 30% of the value of the property preserved, or the value of the subject matter in dispute.

To provide prompt compensation and remedy in circumstances of wrongful preservation, the Provisions introduced the rule of additional guarantee. Section 3, Article 5 of the Provisions provides that, the people's court may order the applicant to provide additional guarantees and may order release of the preservation wholly or partially should the applicant refuse to provide additional guarantee accordingly.

In addition, the Provisions introduced rules under which a court need not require guarantee. Article 9 provides, "*[W]here a party falls under any of the following circumstances when applying for property preservation in the course of litigation, a people's court need not require the provision of a guarantee:*

a. *where the party claims for costs of support, maintenance or upbringing, pension, medical costs, labor remuneration, compensation for a work-related injury, or damages for a personal injury due to a traffic accident;*
b. *where the party suffers domestic violence and financial hardship in a marriage and family dispute;*
c. *where a people's procuratorate files a public interest lawsuit which involves damages;*
d. *where the party is injured for his/her brave deeds;*
e. *where the case has clear facts, definite rights and obligations, and less possibility of preservation errors; or*
f. *where the preservation applicant is a financial institution and its branch, i.e. commercial bank, insurance company with dependent solvency as approved to be established by financial regulators thereof.*

Where a creditor applies for property preservation after entry into effect of a legal document and before entry into execution procedures, a people's court need not require the provision of a guarantee."

Article 9 of the Provisions lists several circumstances where a court need not require guarantees, among which (a) through (d) are not designated for arbitration. Article 9 manifests that our country, on the basis of the preservation regime already existing, has established a rule of preservation with guarantees, accompanying with exceptions and discretion of courts.

E. Introducing Liability Insurance to Property Preservation

Section 1, Article 7 of the Provisions provides, "*[W]here an insurer provides a guarantee for property preservation by signing a property preservation liability insurance contract with the preservation applicant, it shall issue a letter of guarantee to a people's court. The letter of guarantee should state that the insurer shall compensate the person against whom preservation is adopted for any loss suffered due to property preservatio and attach relevant evidences.*"

Property preservation liability insurance is an innovative form of guarantee in practice and has been applied to some extent. The foremost obstacle for the applicant of property preservation is the economic burden along with the provision of guarantee. In maritime disputes, and especially in cases involving ship arrest, the value of subject matter would normally be huge. Where the court requires the applicant to provide guarantee in ship arrest cases, it generally takes the amount of compensation the applicant seeks in litigation and the fees accompanied with the arrest of ship into account. Therefore, such cases would usually involve huge amount of guarantee. As the premium for property preservation liability insurance is considerably lower as compared to the amount of guarantee, introducing such liability insurance to the practice of property preservation could reduce the applicant's economic burden. As such, the Provisions took a further step to expand the scope of guarantees in property preservation and provided a legal basis for the courts to accept the guarantee letter issued by insurers.

F. Specifying the Circumstances for the Release of Preservation

Article 23 of the Provisions provides, "*Under any of the following circumstances after a people's court takes property preservation measures, the preservation applicant shall apply for release of preservation in a timely manner:*

a. *where no lawsuit is lodged in accordance with the law or no request for arbitration is filed within 30 days after property preservation measures before litigation are taken;*
b. *where an arbitration institution does not accept the arbitration request, approve the withdrawal of the arbitration request, or handle it as per the withdrawal of the arbitration request;*
c. *where the arbitration request or claim is overruled by an arbitration award;*
   ...

A people's court shall order release of preservation within five days or, in the case of emergency, within 48 hours upon receipt of an application for release of preservation. Where the preservation applicant fails to apply to a people's court for release of preservation in a timely manner, it shall compensate the person against whom preservation is adopted for any loss suffered due to property preservation. Where the person against whom preservation is adopted applies for release of preservation, a people's court, if it deems upon examination that the application complies with legal provisions, shall order release of preservation within the period specified in Section 2 of the present article."

Article 23 of the Provisions empowers the creditor with remedies in respect of the properties preserved and would be effective in protecting the parties' legitimate rights. According to Article 23, entities entitled to release preservation include the applicant and the person against whom preservation is adopted. The applicant's request to release preservation is not subject to the review of court, contrary to which the request to release preservation submitted by the person against whom the preservation is adopted shall be reviewed by the court. Either in cases of pre-arbitration preservation or preservation in the course of arbitration, the request to release preservation shall be submitted to the court by which the preservation is ordered. In respect of the preservation adopted in the course of arbitration, instead of asking the arbitration institution to transfer its request, the applicant may directly submit the request to release preservation to the court. Article 23 specifies the grounds for release of preservation, which include circumstances where no lawsuit is lodged in accordance with the law or no request for arbitration is filed within 30 days after property preservation measures before litigation are taken, where the arbitration institution refuse to accept the arbitration request, approve the withdrawal of arbitration request, or handle it as per the withdrawal of the arbitration request, or where the arbitration request or claim is overruled by an arbitration award.

III. "*Opinions of the Supreme People's Court on Further Deepening the Reform of the Alternative Dispute Resolution Mechanism by People's Courts*" and "*Provisions of the Supreme People's Court on Mediation Invited by People's Courts*"

On June 29, 2016, the Supreme People's Court released the "*Opinions of the Supreme People's Court on Further Deepening the Reform of the Alternative Dispute Resolution Mechanism by People's Courts*" (Fa Fa (2016) No.14) (hereinafter the "***Opinions***"), a regulatory document, and "*Provisions of the Supreme People's Court on Mediation Invited by People's Courts*" (Fa Shi (2016) No.14) (hereinafter the "***Provisions***"), a judicial interpretation, which will be implemented beginning from July 1, 2016. The Opinions and the Provisions will play a decisive role in promoting the reformation of alternative dispute resolution mechanism, strengthening the interaction between litigation and non-litigation dispute resolution mechanisms, and protecting the parties' legitimate rights. The Opinions and the Provisions specified the role, mechanism and scope of arbitration in participating in the alternative dispute resolution. There are 9 articles designated for arbitration.

A. Specifying the Status of Arbitration in Diversified Dispute Resolution System

Article 2 of the Opinions provides, "*...construct a coordinated litigation and mediation platform featured complete functions, diversified forms and standardized operation, clear the dispute resolution channels, and guide the parties concerned to choose the appropriate dispute resolution means. We shall also rationally allocate social resources for dispute resolution, perfect the alternative dispute resolution mechanism featured the organic collaboration and coordination of reconciliation, mediation, arbitration, notarization, administrative adjudication, administrative reconsideration and litigation.*" This provision made it clear that in addition to litigation,

alternative dispute resolution mechanism also includes reconciliation, mediation, arbitration, notarization, administrative adjudication, and administrative reconsideration, and recognized the role which arbitration plays in the alternative dispute resolution system of China.

Article 4 of the Opinions provides, "*[T]he people's courts shall…, and based on the types of cases accepted within their respective jurisdictions, guide the relevant mediation, arbitration and notarization institutions or organizations to set up mediation offices or service windows in the litigation service centre, or dispatch personnel to the dispute-prone areas and basic-level towns (streets) and villages (communities) to guide the work of litigation and mediation coordination.*" Since the "Second Five-Year Reform Outline of the People's Court" was released in 2005, proposing for the first time the formation of alternative dispute resolution mechanism, though the alternative dispute resolution mechanism has been gradually perfected and improvised, it lacked provisions in respect of the scope of application and procedural requirements for arbitration. This article provides that arbitration institutions may set up mediation offices or service windows in the litigation service centre, which makes clear a feasible way for arbitration to participate in alternative dispute resolution. Article 37 of the Opinions provides, "*[W]e shall support commercial mediation organizations, trade mediation organizations, law firms and other organizations, according to market-oriented operation patterns, to provide dispute resolution services to the parties concerned based on their needs and charge appropriate fees.*" Article 29 of the Provisions provides, "*[S]ubsidy for loss of working time or transportation shall be given by the people's court to invited mediators engaging in mediation work according to the actual situations; outstanding invited mediation organizations and invited mediators shall be given material or honorary rewards. Subsidy expenditure shall be included in the special budget of the people's court.*" Therefore, charge of appropriate fees is allowed in participating in alternative dispute resolution. The determination of the appropriateness of the fees and the undertaking thereof shall be further tested in practice.

Article 10 of the Opinions provides, "*[S]trengthening connection with arbitration institutions. We shall actively support the reform of the arbitration system, and strengthen communication with commercial arbitration institutions, labour and personnel dispute arbitration institutions, and rural land contract arbitration institutions. We shall respect the rule of commercial arbitration and arbitration rules, duly handle arbitration institutions' applications for preservation, legally handle the cases in which the arbitral awards have been set side or shall not be enforced and standardize the judicial review procedures for cases involving foreign affairs or foreign commercial arbitral awards.*" This article is purported to strengthen the interaction between arbitration institutions and courts and manifests the support of judicature for arbitration.

B. Specifying that Arbitrator May Act As Invited Mediators

Article 17 of the Opinions provides, "*[T]he people's courts may … include qualified individuals as specially invited mediators, such as NPC representatives, CPPCC members, the people's jurors, experts and scholars, lawyers, arbitrators, and retired legal workers. We shall clearly define the*

responsibilities of the invited mediation organizations or mediators, formulate special mediation provisions, improve the special mediation procedures, improve the management of the registeration of specially invited mediation organizations or mediators, and strengthen construction of specially invited mediators and mediation organizations." Similar provision has been included in Article 6 of the Provisions. Article 1 of the Provisions provides, "*[I]nvited mediation shall refer to mediation activities of people's courts in promoting the parties concerned to reach mediation agreements and resolve disputes through consultation on the basis of equality by absorbing eligible mediation organizations and individuals of civil mediation, administrative mediation, commercial mediation, and industry mediation to be invited mediation organizations or invited mediators to conduct mediation under people's courts' appointment before filing a case or entrustment after filing a case.*" In respect of maritime disputes, in 2016, the maritime cases decided by maritime courts reached 16,000. Maritime arbitrators possess the professional knowledge and particular practical ability in maritime industry, better understanding of the circumstances and characteristics of maritime industry. Appointing maritime arbitrators as invited mediators would solve the lack of authority problem in non-litigation practice and would be more professional and efficient compared to judicial mean of dispute resolution.

Article 28 of the Opinions provides, "*[W]ith regard to cases submitted to the people's courts which are suitable for mediation, the people's courts may, before registering the cases, appoint specially-invited mediation organizations or mediators to conduct mediation. Where a mediation agreement is reached through appointed mediation, the parties concerned may apply for judicial confirmation of the mediation agreement. If the parties concerned explicitly refuse the mediation, the people's courts shall register the cases according to law. After the case filing registration or during the course of hearing, if the people's court believes that a case is suitable for mediation, it may, with the consent of the parties concerned, entrust a specially-invited mediation organization or mediator with the mediation. If a mediation agreement is reached through entrusted mediation, the mediation document shall be issued according to law after the mediation agreement is reviewed by a judge.*" This article made clear the difference between appointed mediation and entrusted mediation and provided a guidance in implementing the regimes. Article 11 of the Provisions has the similar rule. Under the framework of the Opinions and the Provisions, appointed mediation merely refers to mediations before the registration of cases, where the court would have to obtain the consent of the plaintiff; while entrusted mediation would refer to mediations after the registration of cases, where consents of both parties would have to be obtained.

Article 27 of the Provisions provide, "*[T]he mediation period for a case for which mediation is assigned by a people's court shall be 30 days, provided that the foregoing restrictions shall not apply if both parties consent to extending the mediation period. The mediation period for a case for which mediation is entrusted by a people's court shall be 15 days according to ordinary procedures, and 7 days according to summary procedures, provided that the foregoing restrictions shall not apply if both parties consent to extending the mediation period. The extended mediation period shall not be included in the adjudication period. The period of mediation upon assignment or entrustment shall commence from the date when a specially-invited mediation*

organization or specially-invited mediator acknowledges, by signature, the receipt of the materials transferred thereto by the relevant court."

This Article made clear the time limit for different types of mediation, which would ensure the efficiency of mediation practice.

C. The Validity of the Mediation Agreement Issued by Arbitrators

Article 23 of the Opinions provides, "*[A]t the end of the mediation proceedings, if the parties concerned fail to reach a mediation agreement, the mediator may, with the consent of the parties concerned, record in written form the facts on which the parties have no dispute during the mediation process, which shall be confirmed by the parties and affixed with the signatures of the parties concerned. In the proceedings, the parties do not need to produce evidence for uncontested facts that have been confirmed during the mediation process unless such facts involve national interests, social and public interests or the legitimate rights and interests of others.*" Recording of undisputed facts shall obtain the consents of the parties. The reason is that to make a statement against interest binding on the parties, such statement shall be made during the civil procedure, including pre-trial preparation and trial course. The statement against interest made by the parties during mediation is made for purpose of reaching an agreement, which by its nature is a statement against interest outside the scope of civil procedure. Such statement against interest, under limited conditions may be used as evidence in trial, which may facilitate further trial procedure and shorten the course of litigation.

Article 24 of the Opinions provides, "*[I]f the parties concerned fail to reach a mediation agreement through conciliation, but have no major disagreement on the facts of the dispute, the mediator may, with the consent of the parties, propose a mediation scheme and serve the same on the both parties in writing. If the parties do not submit a written objection within seven days, the mediation scheme shall be regarded as a mediation agreement voluntarily reached by the two parties; if either party raises an objection in writing, the mediation shall be deemed to have failed. If the parties concerned apply for judicial confirmation of the mediation agreement, the people's court shall confirm it in accordance with the relevant provisions.*" If a party fails to submit a written disagreement after the 7-day period for disagreement collapses, it would be deemed to have agreed to the mediation agreement. Upon the application of one party, the mediation agreement, which has been deemed to have been concluded, may be confirmed by courts. This provision enhanced the justice of mediation, efficacy of agreements and the authority of non-litigation dispute resolution mechanisms.

Article 31 of the Opinions provides, "*[W]ith regard to an agreement that is in the nature of a civil contract and is concluded through the mediation by an administrative organ, the people's mediation organization, commercial mediation organization, trade mediation organization or other organization with mediation functions, the parties concerned may apply with the basic people's court or tribunal of the place where the mediation organization is located to confirm the*

validity of the agreement. With regard to an agreement reached before case filing registration through mediation by a specially invited mediation organization or mediator appointed by the people's court, the application of the parties concerned for the judicial confirmation thereof shall be under the jurisdiction of the basic people's court of the place where the mediation organization is located or the court that has appointed the mediation organization." This provision clarified the jurisdiction of "judicial confirmation" and manifests the guiding and supporting function of judicature in respect of non-litigation dispute resolution. This will undoubtedly resolve more disputes before they are submitted to courts.

IV. "*Provisions of the Supreme People's Court on the Jurisdiction of Maritime Litigations*"

On February 24, 2016, the Supreme People's Court released the "*Provisions of the Supreme People's Court on the Jurisdiction of Maritime Litigations*" (Fa Shi (2016) No.2) (hereinafter the "***Provisions***"), which became effective since March 1, 2016. The implementation of the Provisions would be meaningful in ensuring that jurisdiction of maritime disputes are correctly exercised, maritime cases are tried according to the law, the strategy to build a powerful country in maritime industry, and that the parties legitimate rights are properly protected.

A. Adjusting the Area of Maritime Court's Jurisdiction

Section 1, Article 1 of the Provisions provides, "*[I]n line with the development of the shipping economy and the needs of maritime judicial work, adjustments to the areas under the jurisdiction of Dalian Maritime Court and Wuhan Maritime Court are made as follows:*

a. *The following areas shall be under the jurisdiction of Dalian Maritime Court: the areas from the borderline between Liaoning Province and Hebei Province in the south to the extending sea area of the Yalu River Estuary and the waters of the Yalu River in the east, including part of the Yellow Sea, part of the Bohai Sea and the islands on the sea; the Songhua River, the Tumen River and other navigable waters and ports leading to the sea in Jilin Province; and the Heilongjiang River, the Songhua River, the Wusuli River and other navigable waters and ports leading to the sea in Heilongjiang Province.*
b. *The following areas shall be under the jurisdiction of Wuhan Maritime Court: the waters of the main streams and the branches of the Yangtze River from Hejiangmen of Yibin City of Sichuan Province to Liuhekou of Jiangsu Province, including Yibin, Luzhou, Chongqing, Fuling, Wanzhou, Yichang, Jingzhou, Chenglingji, Wuhan, Jiujiang, Anqing, Wuhu, Ma'anshan, Nanjing, Yangzhou, Zhenjiang, Jiangyin, Zhangjiagang, Nantong and other major ports.*"

The Provisions expanded the jurisdiction of Dalian Maritime Court's. "*[P]rior to the implementation of the Provisions, the jurisdiction of Dalian Maritime Court covers only the maritime cases occurred in the navigable waters in Liaoning and Heilongjiang Provinces. Songhua River and Tumen River in Jilin Province were never included in its jurisdiction; whereas*

these cases would be under the jurisdiction of local courts. To better exercise the trial advantage of maritime courts as specialized courts, and to make sure that maritime case are specially tried, the Provisions adjusted the area of jurisdiction of Dalian Maritime Court and made clear that cases occurred on the navigable waters leading to the sea in Jilin Province are to be tried by Dalian Maritime Court. This adjustment would achieve the specialized jurisdiction of Dalian Maritime Court in respect of the maritime cases on the main waters in Northeast provinces."[5]

The Provisions made clear the jurisdiction over the mainstream and branches of Yangtze River of Wuhan Maritime Court, which would provide unity for the maritime judicature and a judicial environment with quality along Yangtze River.

This adjustment of jurisdiction would greatly affect the practice of maritime arbitration. For instance, Article 12 of the "*Interpretation of the Supreme People's Court on Certain Issues Concerning the Applicability of the Arbitration Law of the People's Republic of China*" (hereinafter the "***Interpretations of the Arbitration Law***") provides, "*[A]s regards a case on the validity of an arbitration agreement of a maritime dispute, it shall be under the jurisdiction of the maritime court where the arbitration institution agreed upon in the arbitration agreement is located, where the arbitration agreement is concluded, or where the applicant or object of the applicant resides; if there is no maritime court at the aforesaid places, it shall be under the jurisdiction of the nearest maritime court.*"

B. Clarifying the Handling of Cases Involving Challenges to Jurisdictions in Maritime Disputes

Section 1, Article 3 of the Provisions provides, "*[C]ases on appeal brought by a party against the ruling of a maritime court on challenges to the right of jurisdiction shall be heard by the tribunal of the high people's court in charge of maritime cases at the place of the maritime court.*"

"*In cases where the parties challenge the order of jurisdiction made by a maritime court and appeal accordingly, it is not unified in practice that which court room shall hear such cases. Some of the cases were heard by the court room responsible for registration of cases, and others heard by court rooms responsible for maritime trials. Considering the specialty of maritime procedural disputes, the Provisions, through the form of judicial interpretation, unified and located the responsibility for hearing such cases to the high people's court.*"[6]

Section 2, Article 3 of the Provisions provides, "*[W]here a legally effective ruling on objection to the right of jurisdiction violates the provisions on the specialized jurisdiction over maritime cases and needs to be corrected, the people's court shall retrial the case in accordance with Article 198 of the Civil Procedure Law of the People's Republic of China.*" Article 381 of the "*Interpretation*

[5] "*Understanding and Application of the 'Provisions of the Supreme People's Court on the Jurisdiction of Maritime Litigations'*", ZHANG Yongjian, WANG Shumei & FU Xiaoqiang, "The People's Judicature", Oct, 2016.
[6] "*Understanding and Application of the 'Provisions of the Supreme People's Court on the Jurisdiction of Maritime Litigations'*", ZHANG Yongjian, WANG Shumei & FU Xiaoqiang, "The People's Judicature", Oct, 2016.

of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China" provides that a party who believes that an inadmissibility or dismissal ruling which is legally effective is erroneous may request a retrial. This excludes the situation where a party applies for retrial on the ground of erroneous ordering on objections of jurisdiction. "*To facilitate the implementation of the maritime specialized jurisdiction regime contained in the 'Special Procedure Law of the People's Republic of China on Admiralty', the Provisions made clear that the people's court may, in applying Article 198 of the Civil Procedure Law, retrial the case, and correct the erroneous orders in violation of the maritime specialized jurisdiction.*"[7] The Provisions takes sufficient consideration into the specialty of cases involving objections to jurisdictions in maritime cases, and would promote the correct application of maritime laws and regulations.

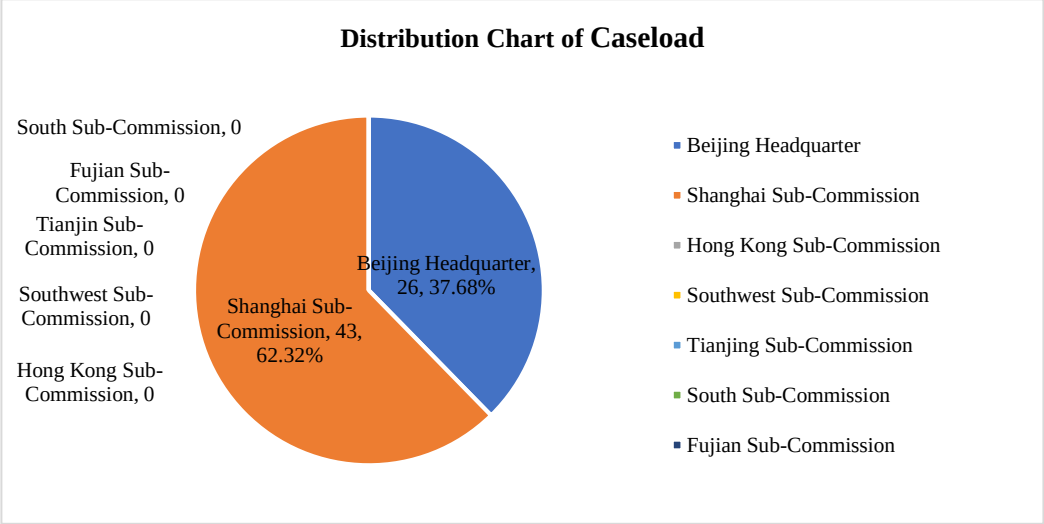
[7] "*Understanding and Application of the 'Provisions of the Supreme People's Court on the Jurisdiction of Maritime Litigations'*", ZHANG Yongjian, WANG Shumei & FU Xiaoqiang, "The People's Judicature", Oct, 2016.

Chapter Three: Data Analysis of CMAC in 2016

The editor has reorganized, classified and analyzed the case in 2016 (as of December 31, 2016) in respect of the number of cases accepted, the amounts in dispute, the adoption of summary procedure, the number of cases closed, the number of pending cases, cases involving extension of time limit, the countries and regions of the parties involved and the types of the cases.

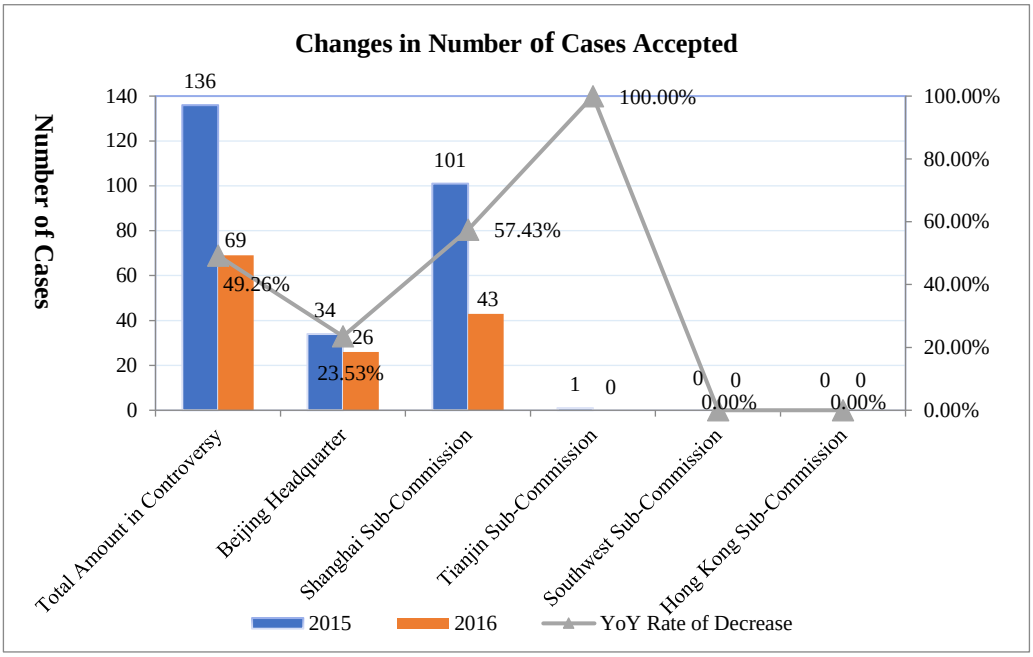
I. The Caseload

In 2016, the total number of the cases received by the CMAC was 69, and the breakdown of which is as of follows.



(Chart 1)

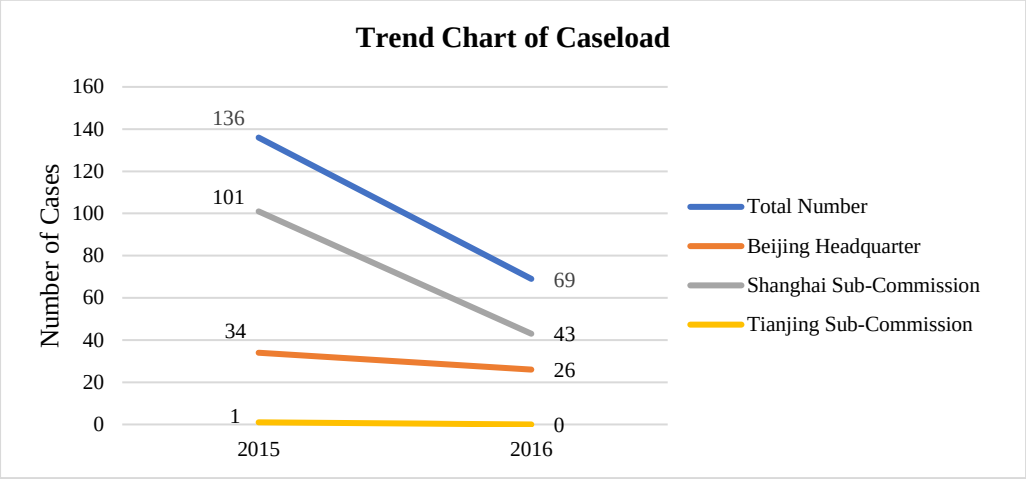
The cases received by CMAC are not evenly distributed, most of which were accepted by Beijing Headquarter and Shanghai Sub-Commission.



(Chart 2)

In terms of the changes in respect of the number of cases, the number of cases accepted in 2016 have greatly decreased as compared to that in 2015. The total number of cases decreased by 67 (49.26%), which almost reached 50%. In respect of the regional distribution, the change in the caseload at Beijing Headquarter is the smallest with a decrease of 8 cases (23.53%). The caseload at Shanghai Sub-Commission has the largest decrease, which is more than 50% (58 cases); and the rate of decrease is 57.43%. (Due to the caseload in 2015 at Tianjin Sub-Commission was one and there was no case received in 2016, it would be pointless to analyze and compare. The same would apply to Southwest Sub-Commission and Hongkong Sub-Commission.) (Chart 2) It could be seen that the decrease in the caseload could be attributed to the decrease at Shanghai Sub-Commission (Chart 3).

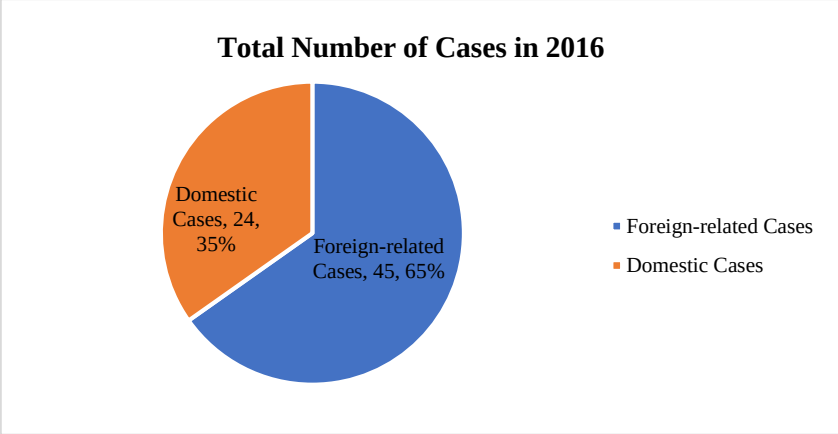
See Chart 3 for the total number of cases and the trend of change in each sub-commission.



(Chart 3)

A. Foreign-Related Cases

The proportion distribution of foreign-related cases and domestic cases received by CMAC in 2016 is shown in Chart 4.



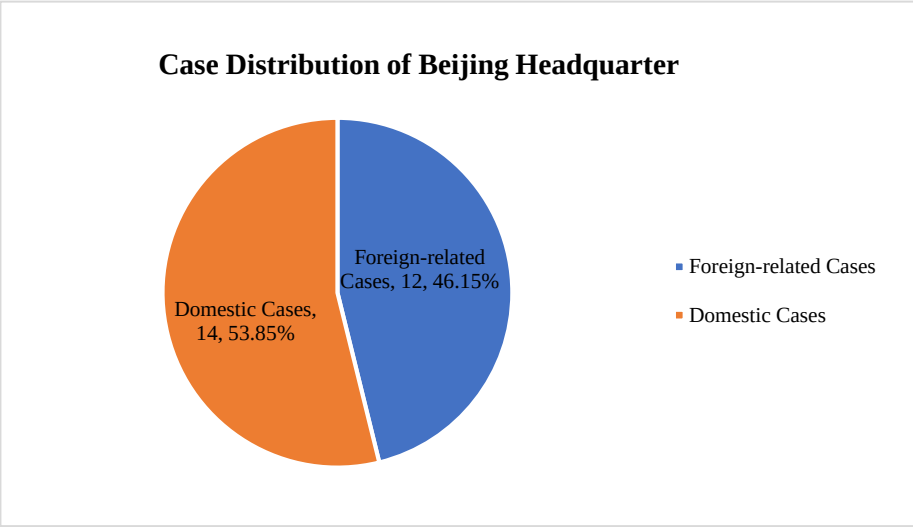
(Chart 4)

In 2016, CMAC accepted 69 cases, most of which are domestic cases, which take more than 50% of the total number. On the other hand, foreign-related cases still take a significant proportion (Chart 4).

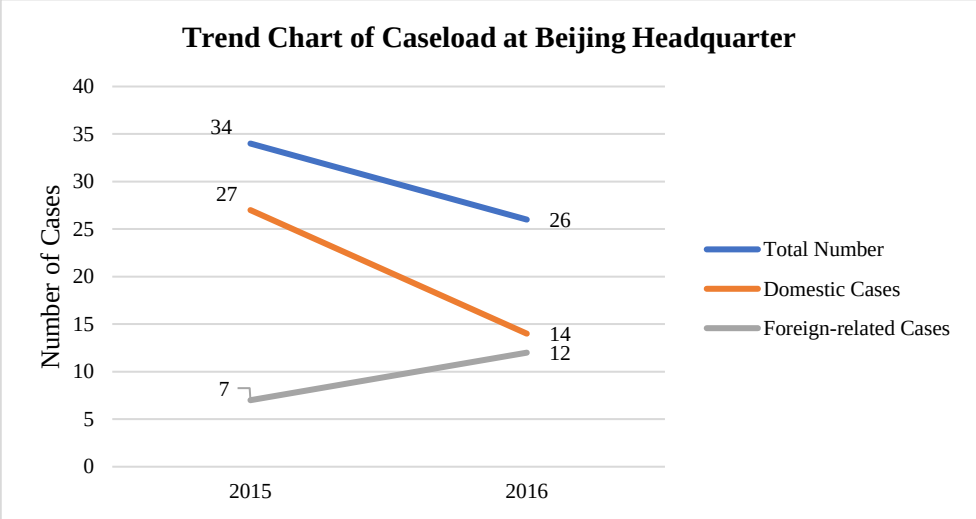
B. The Number of Cases Accepted by Beijing Headquarter

The cases accepted by Beijing Headquarter are mostly domestic cases. The proportion of domestic cases and foreign-related cases is shown in Chart 5. The number of foreign-related cases has increased; while the number of domestic cases has decreased. The total number of the cases has

decreased due to the decrease in the number of domestic cases (Chart 6).



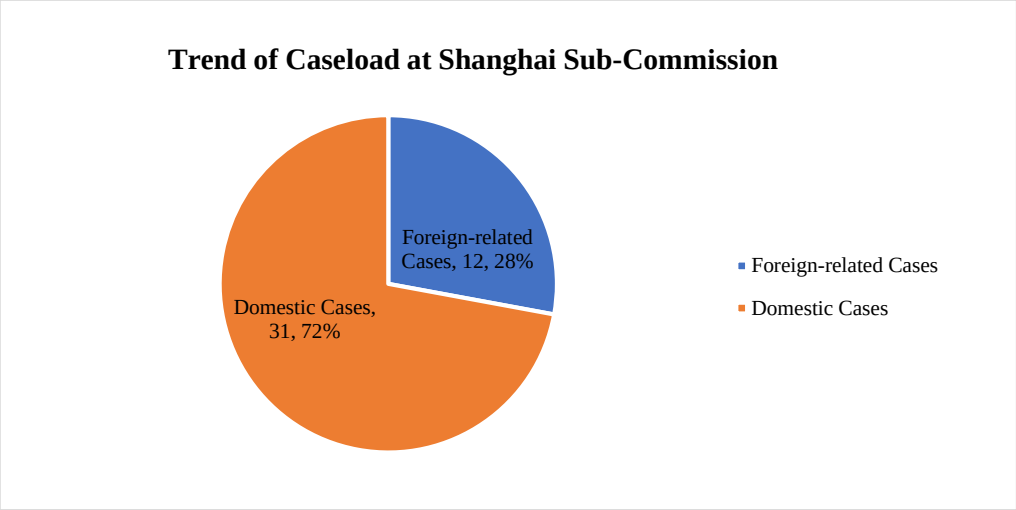
(Chart 5)



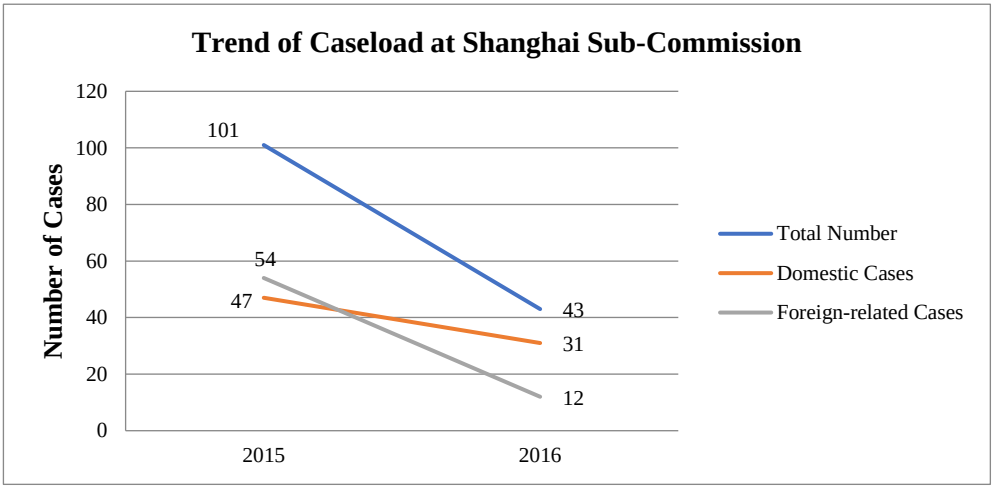
(Chart 6)

C. The Number of Cases Accepted by Shanghai Sub-Commission

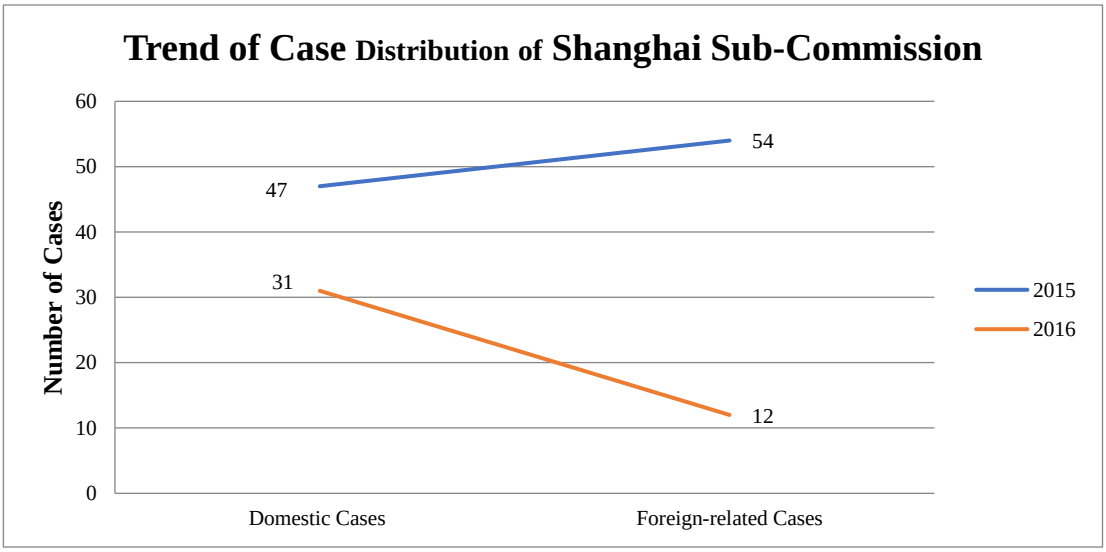
In 2016, the cases accepted by Shanghai Sub-Commission were mainly domestic cases (Chart 7, which is different from the figure in 2015, during which foreign-related cases took most of the proportions. The proportion of domestic cases in Shanghai Sub-Commission increased in 2016, which took 2/3 of the total number this year. Meanwhile, it should be noticed that the decrease in the number of foreign-related cases resulted in 58 cases (57.43%) decreased at Shanghai Sub-Commission.



(Chart 7)

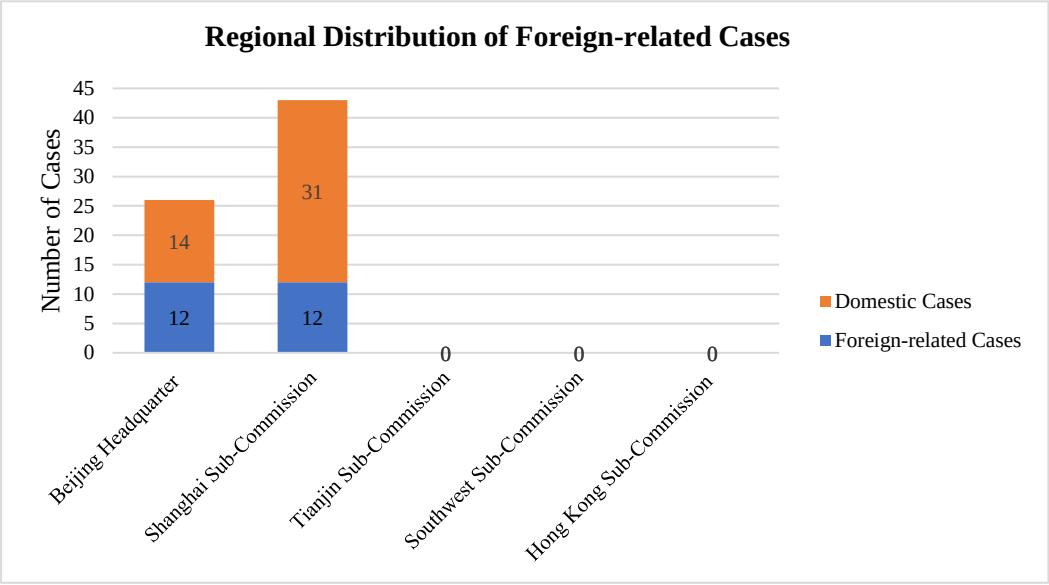


(Chart 8)



(Chart 9)

From the changes in the caseload of domestic cases and foreign-related cases, year 2016 has demonstrated an opposite trend as compared to year 2015. The number of domestic cases exceeded the number of foreign-related cases, and there is an increasing difference between the two. From the number of cases accepted, although the numbers of both domestic and foreign-related cases are decreasing, the number of foreign-related cases has decreased with a greater amplitude (42 cases, 77.78%).

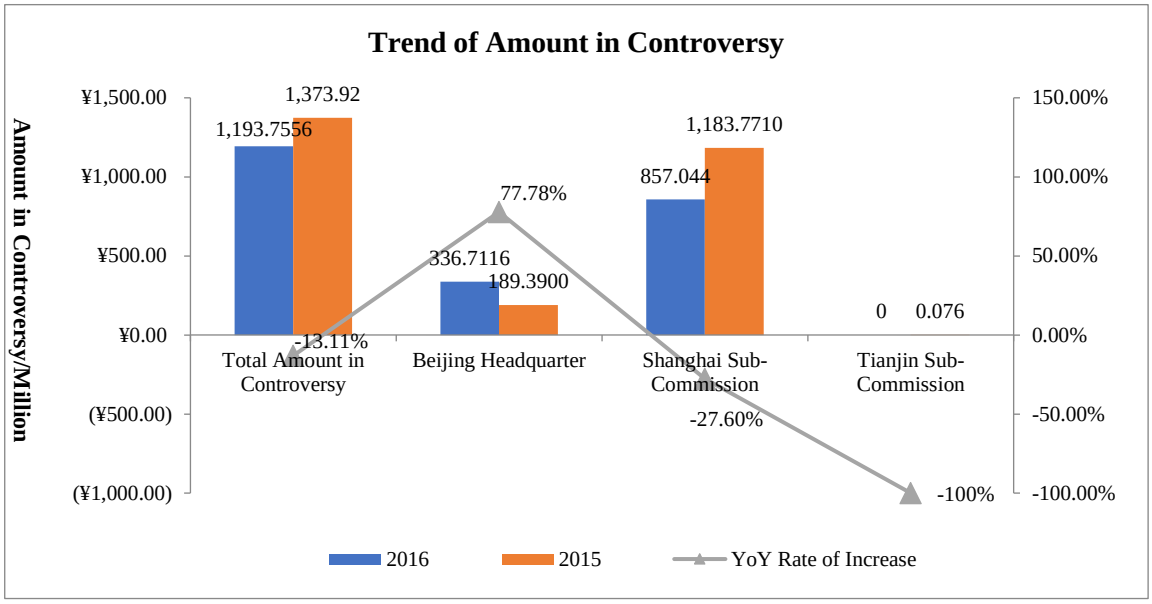


(Chart 10)

In 2016, the caseloads of Beijing Headquarter and the Shanghai Sub-Commission are the same. Shanghai Sub-Commission accepted more domestic cases. (Chart 10).

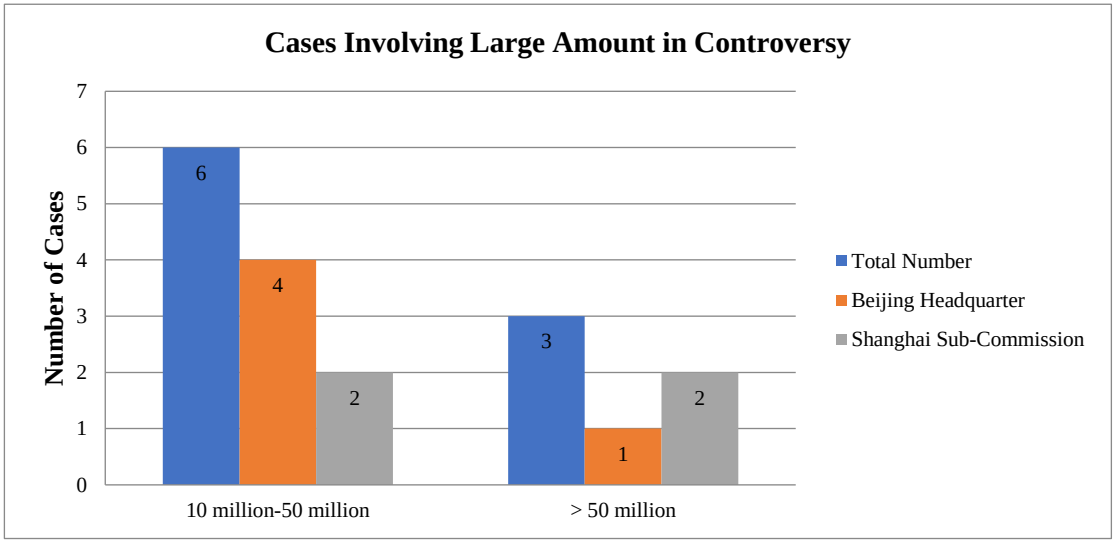
II. Amount in Dispute

In 2016, the overall amount in dispute is RMB 1,193.7556 million with a trend of decreasing. Only the figure of Beijing Headquarter has increased among all regions (Chart 11).



(Chart 11)

As demonstrated in Chart 12, the numbers of cases accepted by Shanghai Sub-Commission in 2015 and 2016 are the same, which were two cases. Meanwhile, Beijing Headquarter takes a large proportion in cases with an amount in dispute from 15 million to 50 million (four cases). There was only one case at Beijing Headquarter of which the amount in controversy exceeded 50 million.

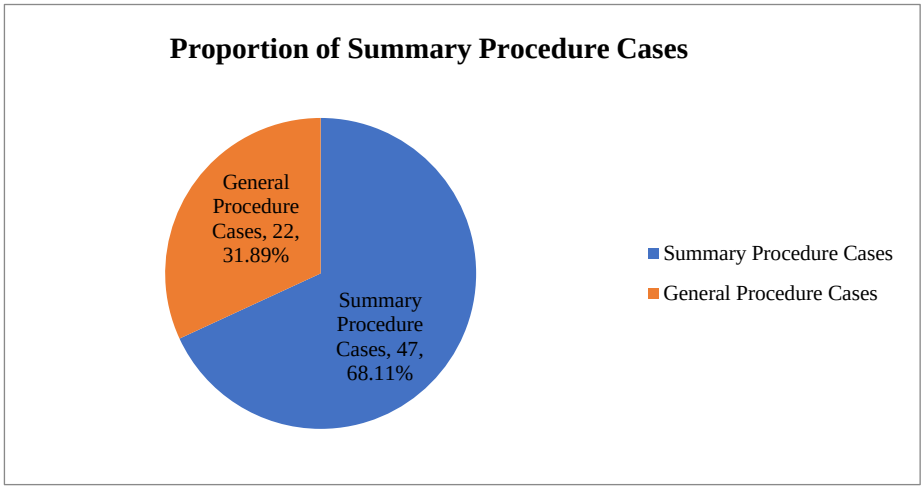


(Chart 12)

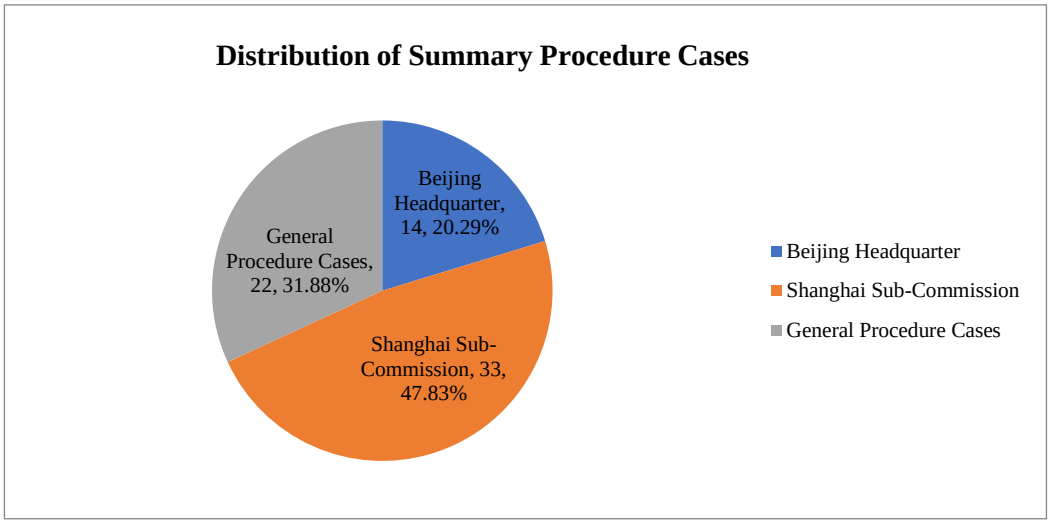
III. Application of Summary Procedure Cases

In 2016, the total number of cases applying summary procedure is 47 and takes over half (68.11%) of the cases acceptedas shown in Chart 13. Among all regions, the proportion taken by summary

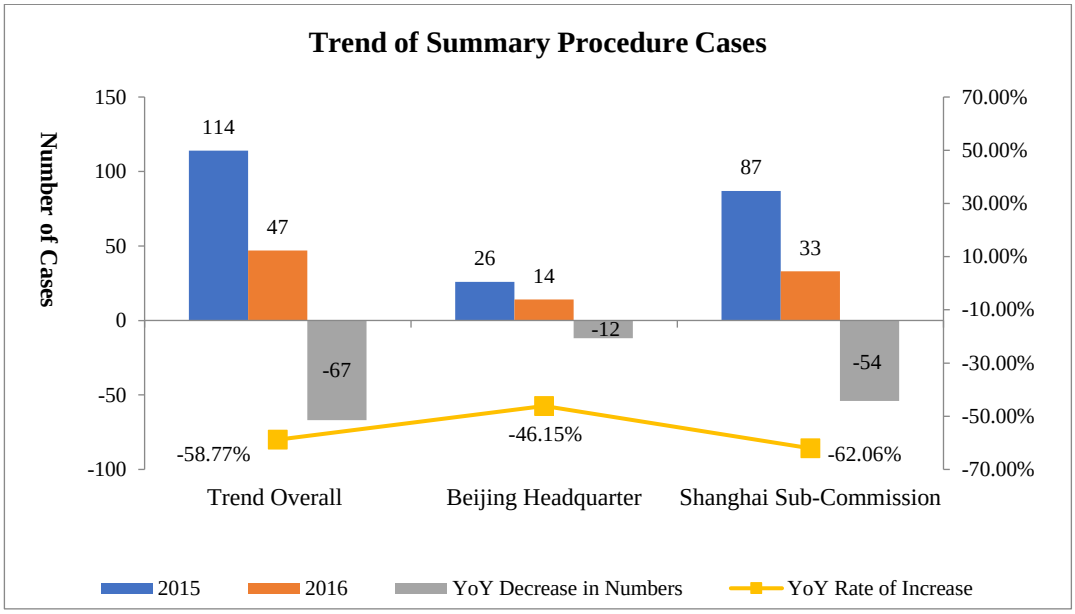
procedure cases at Shanghai Sub-Commission is almost twice as much as that of Beijing Headquarter (Chart 14). As a whole, the number of summary procedure cases is decreasing, which is quite much due to the decrease of the total number of cases accepted this year. In respect of the change of quantity, the decrease in the total number of cases applying summary procedure is mainly a result of the decrease of the amount of summary procedure cases accepted by Shanghai Sub-Commission. (Chart 16).



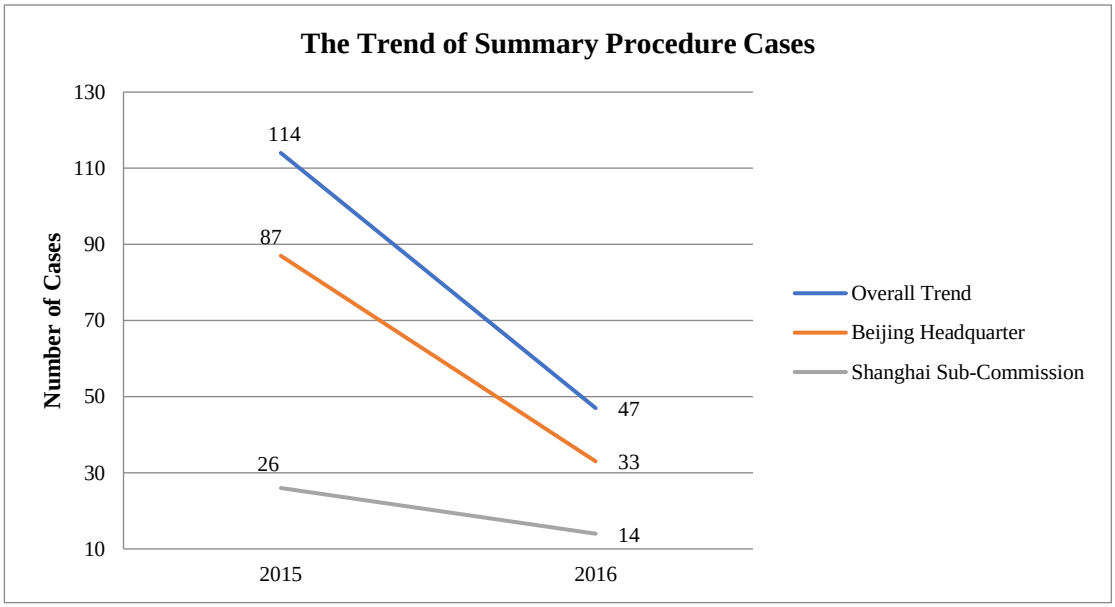
(Chart 13)



(Chart 14)



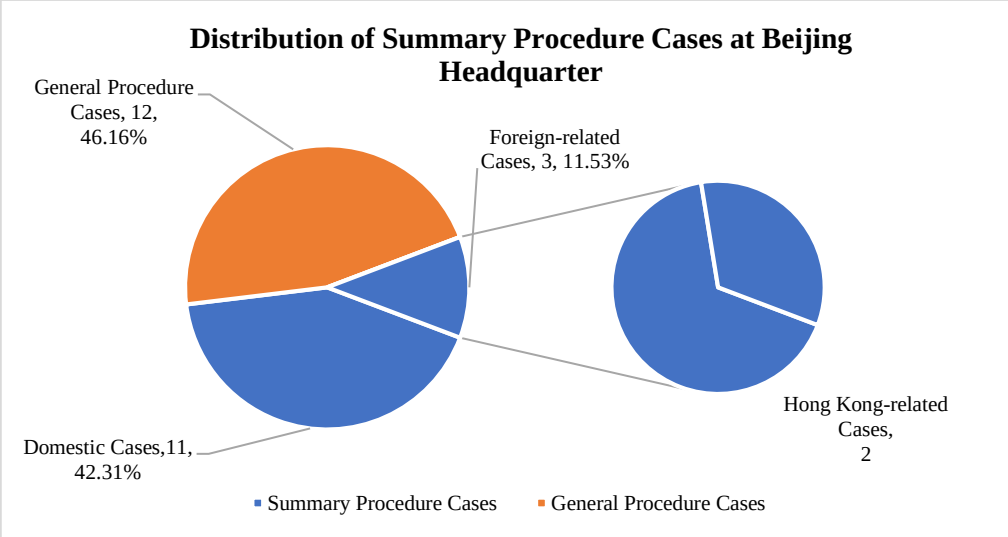
(Chart 15)



(Chart 16)

A. The Application of Summary Procedure Cases at Beijing Headquarter

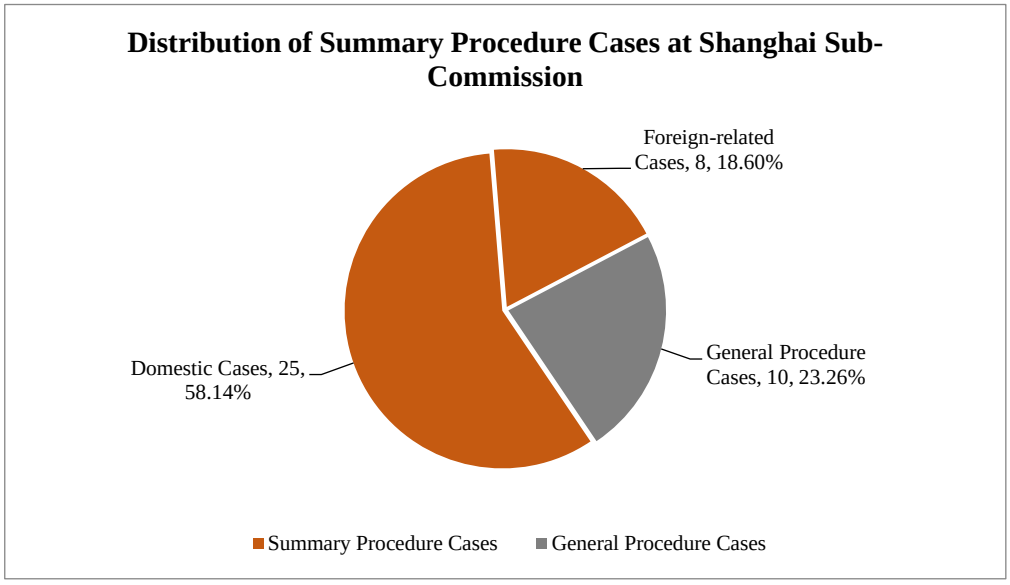
The number of summary procedure cases of Beijing Headquarter is 14 and takes 53.84% of the number of cases accepted (Chart 17). It should be noted that the proportion of domestic cases applying summary procedure is up to 78.57%, i.e., there are only 3 out of the 14 domestic cases not applying summary procedure.



(Chart 17)

B. The Application of Summary Procedure Cases at Shanghai Sub-Commission

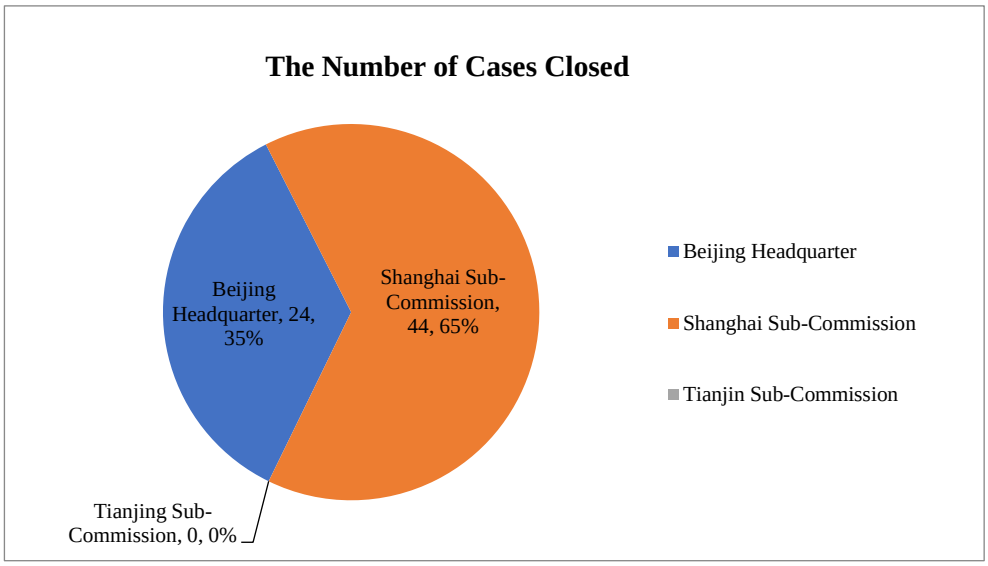
In 2016, the proportion of summary procedures applied in Shanghai Sub-Commission was higher than Beijing Headquarter, and took 76.74% of the total number of cases accepted (43 cases) in the year. See Char 18 for details. Contrary to the figures of Beijing Headquarter, there were more foreign-related cases applying summary procedure at Shanghai Sub-Commission.



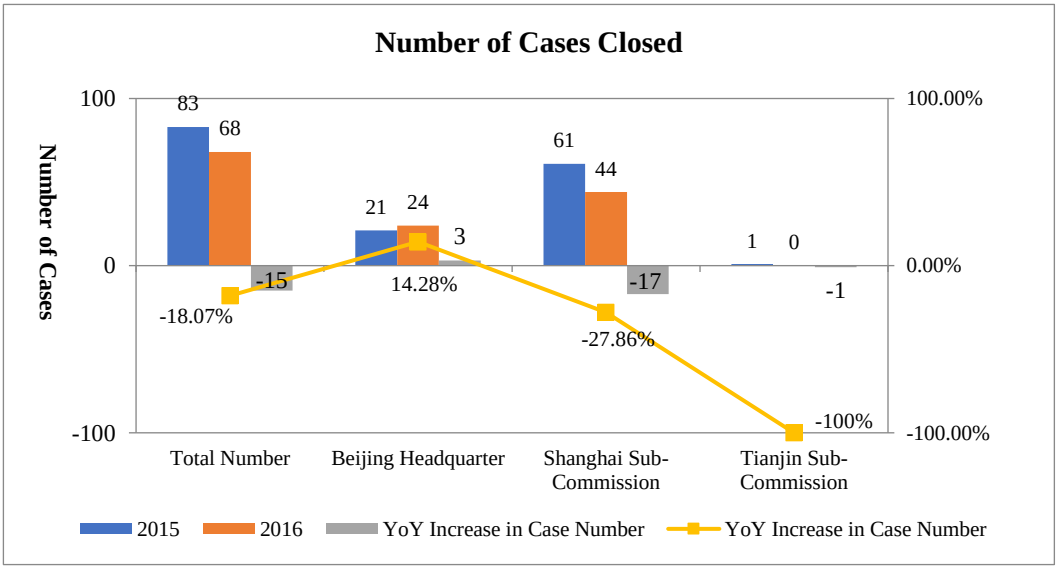
(Chart 18)

IV. The Number of Cases Closed

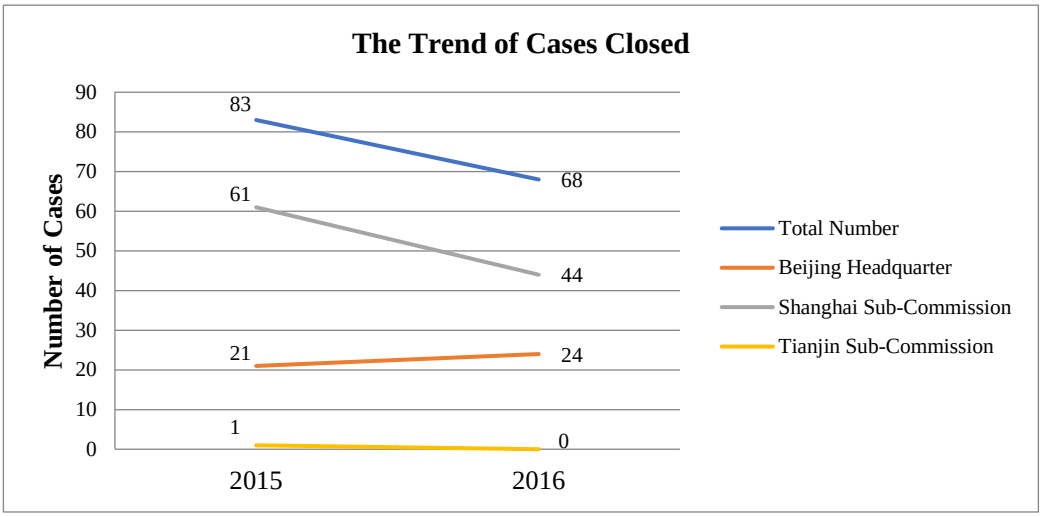
In 2016, the total number of cases closed was 68 (Chart 19) with a trend of decreasing. Apart from the increase in the number of cases closed at Beijing Headquarter, those at Shanghai Sub-Commission and Tianjin Sub-Commission has decreased (Chart 20). The decrease was largely a result of the decrease of cases closed at Shanghai Sub-Commission (Chart 21).



(Chart 19)



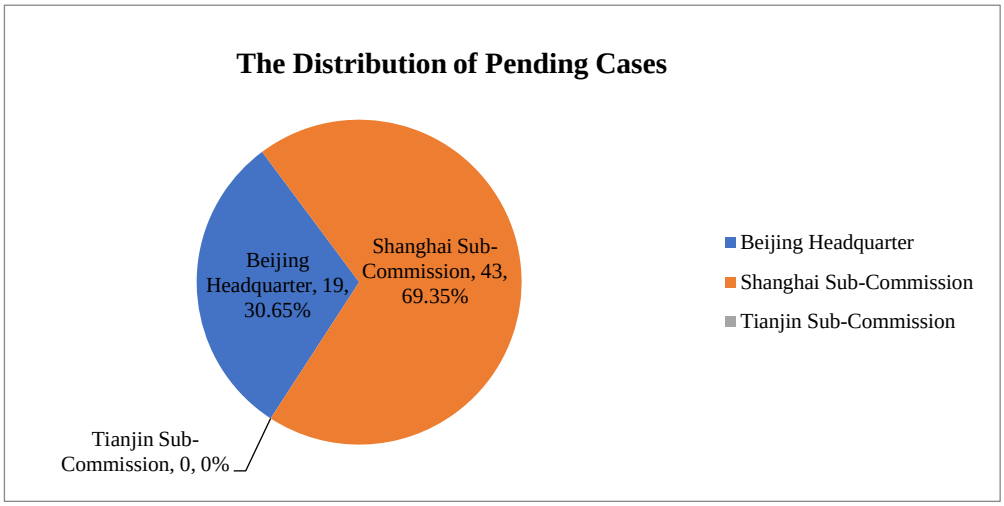
(Chart 20)



(Chart 21)

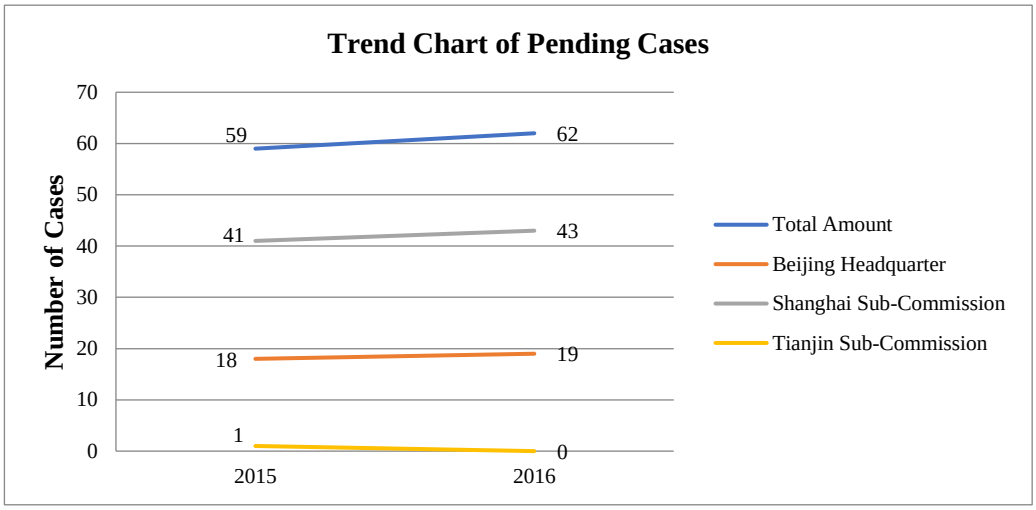
V. Pending Cases

The total number of pending cases in 2016 was 62 as shown in Chart 22.



(Chart 22)

As shown by Chart 23, there was no direct link between the number of pending cases and the number of cases accepted. When the number of cases accepted was decreasing, the number of pending cases was increasing.

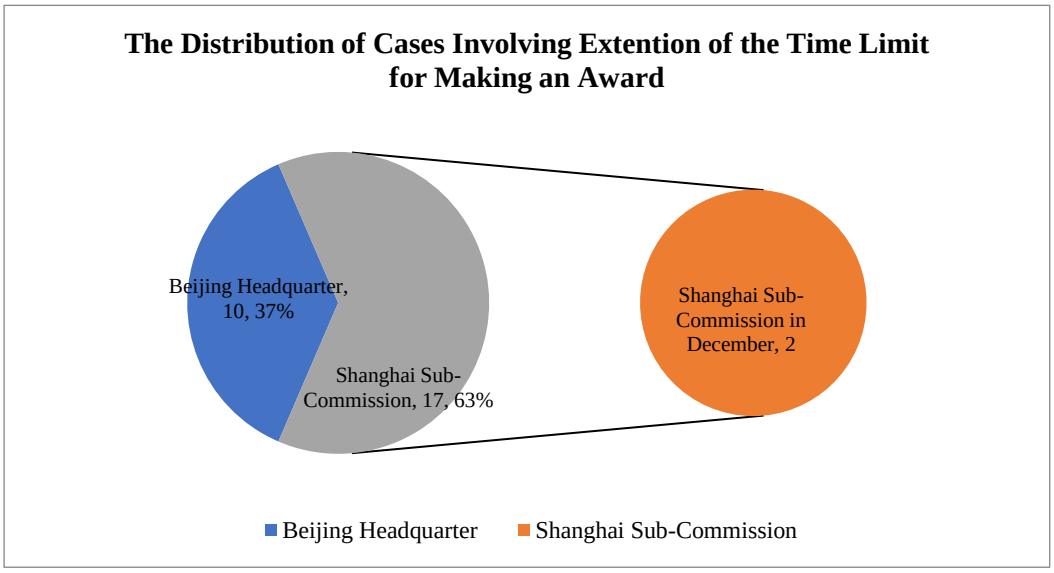


(Chart 23)

As shown in Chart 23, the trend of change in the total number of pending cases was much a result of the change in the number of pending cases at the Shanghai Sub-Commission.

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

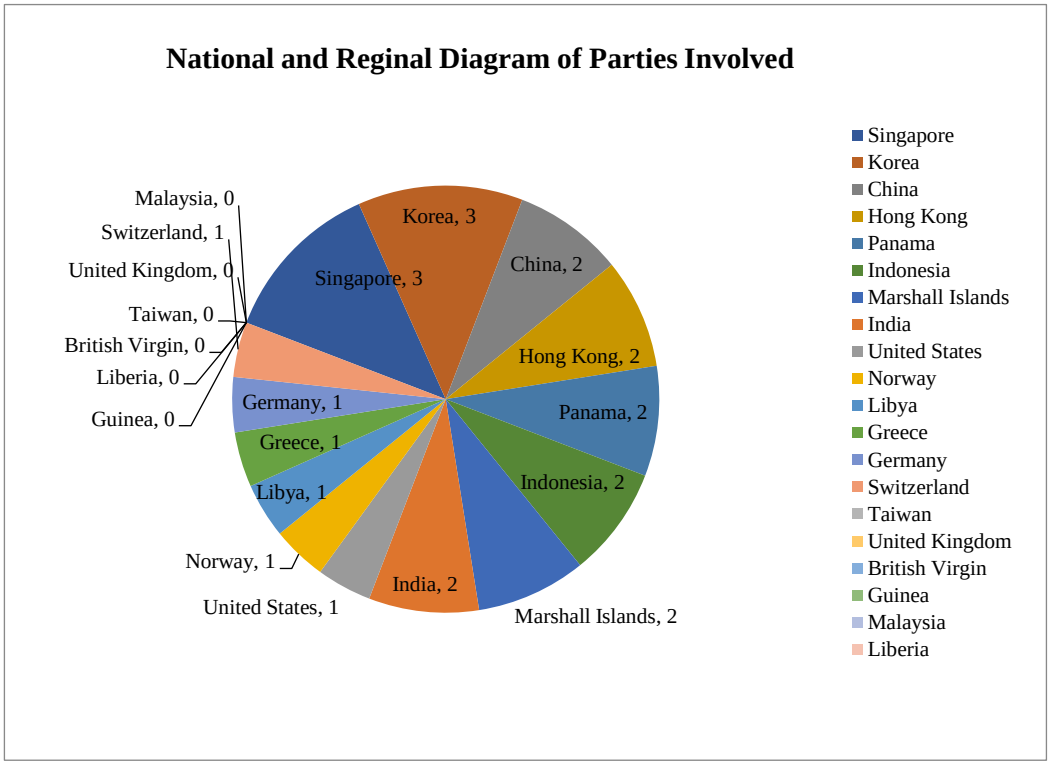
The total number of cases involving extension of time limit for making an award was 27 in 2016 (17 cases at Shanghai Sub-Commission, 10 cases at Beijing Headquarter; no case in December at Beijing Headquarter, and 2 cases at Shanghai Sub-Commission in December). (Chart 24)



(Chart 24)

VII. The Counties and Regions of the Parties Involved

In 2016, there were 13 countries and regions involved in the cases accepted by CMAC. (Chart 25)

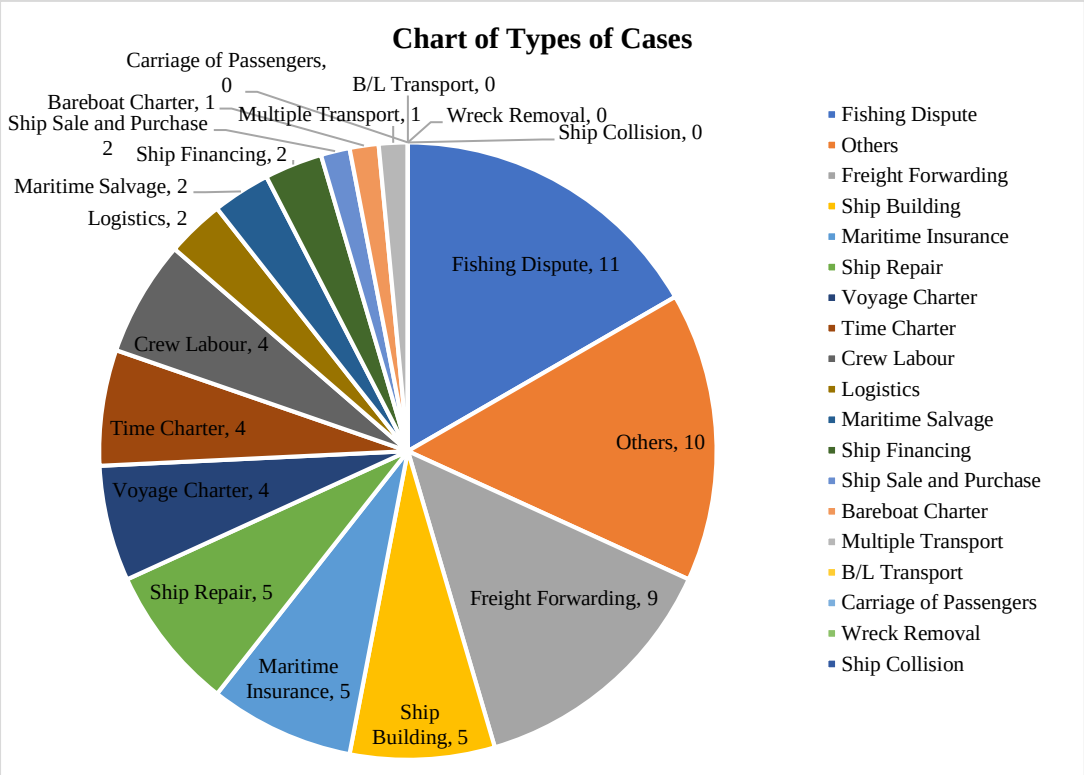


(Chart 25)

The countries and the regions involved were relatively scattered and were not particularly concentrated on a certain number of countries or regions.

VII. Types of Cases

In 2016, the following types of cases were involved in the 68 cases accepted (Chart 26).



(Chart 26)

The types of cases in 2016 were mainly focused on fishing disputes, freight forwarding, ship building, maritime insurance, ship repair, voyage charter, time charter, crew labour etc.

VIII. Conclusion

A. In respect of the overall number of cases, as compared to the year 2015, the number of cases accepted in 2016 had dramatically decreased and was mainly located at Beijing Headquarter and Shanghai Sub-Commission. As to foreign-related cases, contrary to the year 2015, domestic cases have taken the majority of the cases accepted overall in the whole year. Combining the political, economic and geographical factors of the two commissions, it can be seen that the main causes to the decrease in the number of cases at Beijing Headquarter and Shanghai Sub-Commission were different. The decrease at Beijing Headquarter was mainly because of the decrease in the number of domestic cases; yet the decrease at Shanghai Sub-Commission was much more attributable to the decrease of foreign-related cases. In terms of foreign-related cases, the number of cases accepted at Beijing Headquarter and Shanghai Sub-Commission was the same, which was 12.

B. In respect of the amount in controversy, the overall amount in controversy has decreased with only that of Beijing Headquarter increasing in 2016. Upon analysis, there was no functional

link between the number of cases accepted and the amount in controversy. The change in one figure would not directly lead to the change in another. It is worth noting that in cases involving large amount, the figures of Shanghai Sub-Commission were quite balanced in respect of the number of cases with an amount in controversy from 10 million to 50 million and those over 50 million. The figures of Beijing Headquarter were taken mostly by cases involving an amount of controversy between 10 million to 50 million. It is likely that the parties were inclined to select Beijing Headquarter to resolve disputes with an amount in controversy from 10 million to 50 million, which remains to be further analyzed.

C. With respect to the application of summary procedure, the number of cases applying summary procedure in 2016 had dramatically decreased, but still took over half of the total number of cases accepted (68.11%). In particular, the proportion in domestic cases at Beijing Headquarter was up to 78.57%, i.e. only 3 out of the 14 domestic cases did not involve summary procedure. Contrary to Beijing Headquarter, summary procedure cases took both large portion of domestic cases and foreign-related cases at Shanghai Sub-Commission. The foreign-related cases applying summary procedure took only 18.60% of the cases accepted. However, in terms of cases involving foreign-related cases, 8 out of the 12 cases applied summary procedure. In 2016, summary procedure was more frequently applied at Shanghai Sub-Commission.

D. In respect of the number of cases closed, the total number of cases closed in 2016 had decreased, with only the number of cases closed increasing at Beijing Headquarter during the year. In terms of Beijing Headquarter, the decrease in the number of cases accepted did not result in a decrease in the number of cases closed. We should be aware that the caseload of Beijing Headquarter was not large, with only 26 cases in 2016, and 34 cases in 2015. This gave Beijing Headquarter relatively adequate time and energy to handle the cases accepted, which might be one of the reasons to the increase in the number of cases closed.

E. In respect of the number of pending cases, in 2016, the number of cases had slightly increased as compared to last year.

F. With regard to the countries and regions of the parties involved, as compared to the year 2015 during which the majority of cases accepted involved parties from PRC mainland, PRC Hong Kong and Denmark, the countries and regions involved in 2016 were relatively scattered. There were only 4 cases involving parties from China (PRC mainland: 2 from Beijing, and 2 from PRC Hong Kong). Most of the cases involved parties from coastal states along major waterways and the countries and regions which have dynamic import and export trading activities.

G. Regarding the types of cases, in 2016, most of the disputes involved international commercial trade, such as freight forwarding, ship building, maritime insurance, ship repair, voyage charter, time charter, crew labour etc. In addition, fishing disputes had become the type of cases having the largest quantity, which may be resulted from the sea area disputes between China and others in 2016.

H. Looking back to the data of CMAC in 2016, it is not difficult to note that Shanghai Sub-Commission had played a leading role in the total number of cases accepted, the number of foreign-related cases, cases applying summary procedure, the number of cases closed, and the pending cases.

Chapter Four: Data Analysis of the Judicial Assistance and Supervision of China Maritime Arbitration in 2016

According to the court orders published on "*China Judgements Online*" and "*Tiantong Litigation*", in 2016, there were 48 China maritime arbitration cases involving judicial assistance and supervision. Considering that lengthy and tedious legal document would be hard to understand, we provide you with a more direct approach through data presentation. By using multidimensional charts, we present you with the analysis on trial courts, causes of action, geographic distribution, retaining of lawyers, types of disputes and results in cases involving judicial assistance and supervision.

We have conducted a review before analyzing the data at hand:

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

I. Cases Research

In 2016, there were 48 cases involving judicial assistance and supervision of maritime arbitration. There were 48 corresponding judicial documents, among which there were 19 orders for execution, 3 orders of special procedure, 23 first-instance decisions, 2 second-instance decisions, 1 ruling affirming the original order, 1 revocation of the original order, and 1 order of preservation. 12 of the 48 judicial documents were final adjudications. For details please see Table 1.

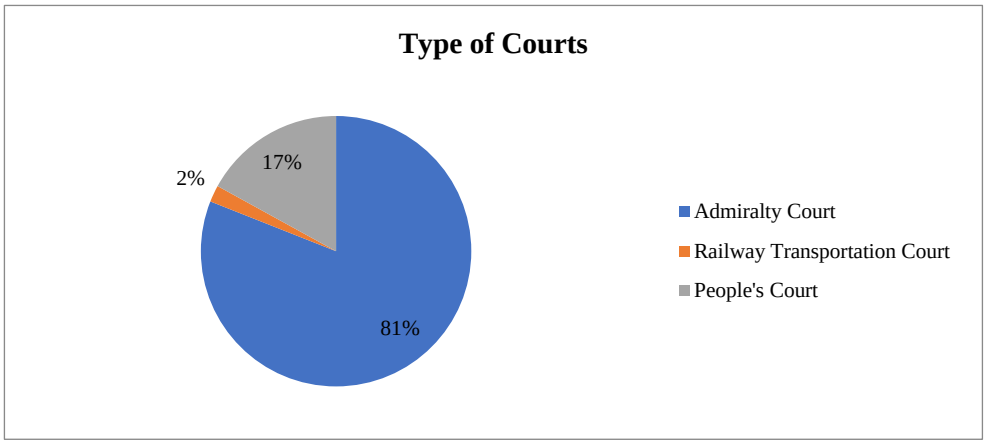
Case Search							
Order for Execution	Order of Special Procedures	Civil Order of First Instance	Civil Order of Second Instance		Preservation Order	Final Order	Total
19	3	23	Order Affirming the Original Order	Revocation of the Original Order	1	12	48
			1	1			

(Table 1)

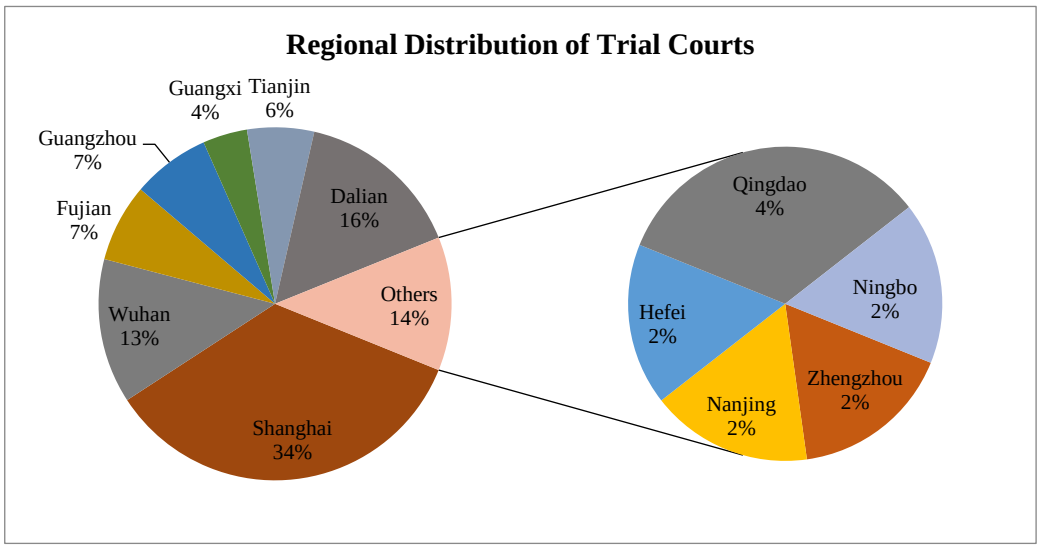
II. General Overview

A. Trial Court

In 2016, there were 48 cases involving judicial assistance and supervision of maritime arbitration. We categorized the data we collected on the basis of the types of trial courts, geographic distribution and the arbitration institution selected by the parties. Most of the cases have been tried and closed by admiralty courts. There are very few which were tried by the Railway Transport Court. (Chart 27)



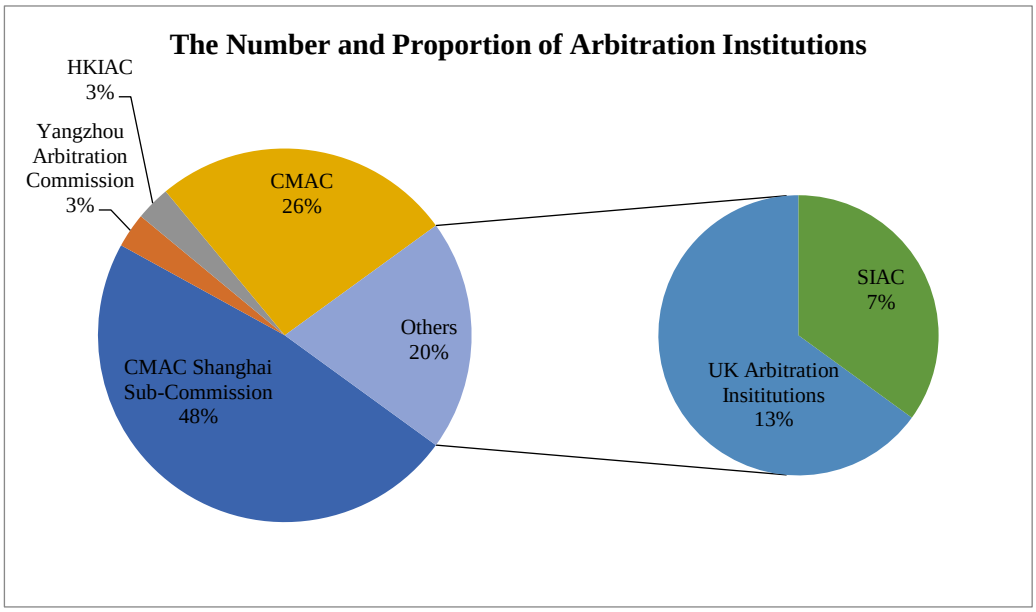
(Chart 27)



(Chart 28)

As demonstrated in Chart 28, more than 1/3 of the cases were tried by the courts in Shanghai, which were a large increase as compared to the year 2015. The number of cases accepted by the

courts in Guangzhou had decreased in 2016 and took 7% of the total number of cases.



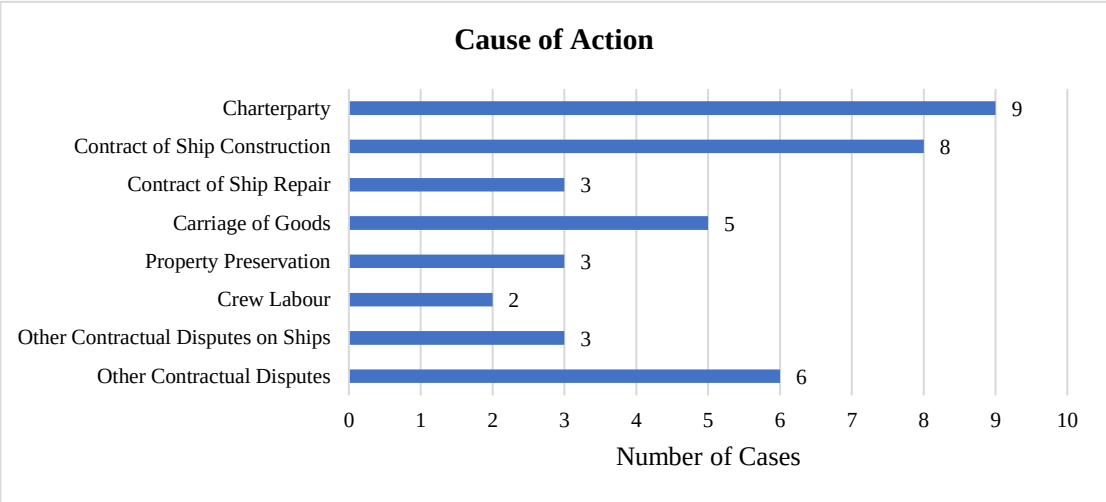
(Chart 29)

In 2016, there were 48 cases involving judicial assistance and supervision of maritime arbitration, only 31 cases disclosed the arbitration institutions. Therefore, Chart 29 was based on these 31 cases. It could be noted that nearly half of the 31 cases were arbitrated at the Shanghai Sub-Commission. The international arbitration institutions involved were Hong Kong International Arbitration Centre and the UK arbitration institutions.

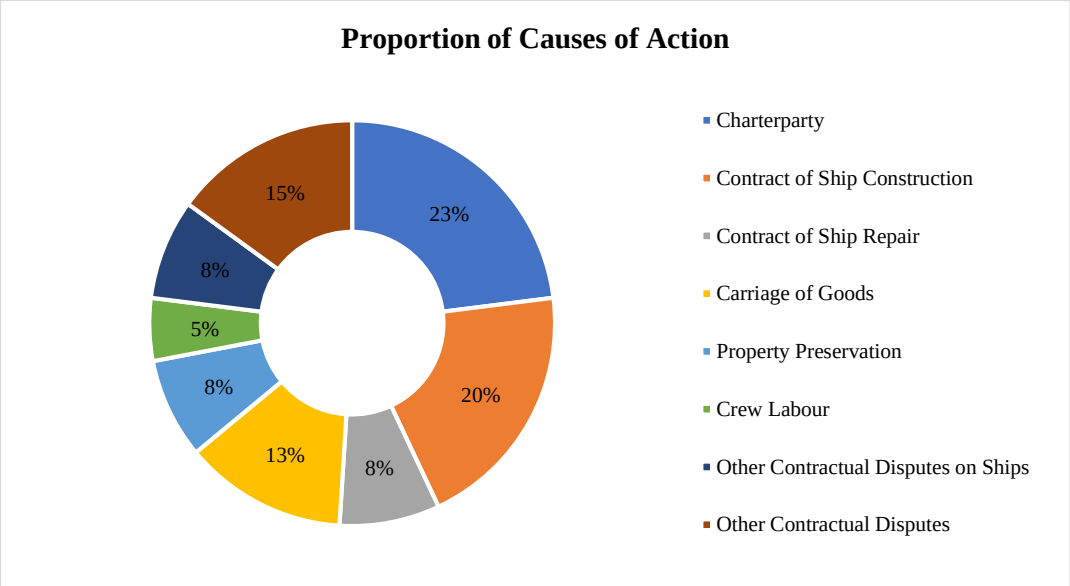
B. Causes of Action

In 2016, there were 48 cases involving judicial assistance and supervision of maritime arbitration, 9 of which did not disclose the cause of action. Therefore, the following analysis was made based on the 39 cases.

The 39 cases in which the cause of action was disclosed involved disputes on various types of ship contracts, contract of carriage of goods, property preservation and other contractual disputes. The ship contract dispute cases could be divided into ship repair, ship construction contract, and charterparty. The number of charterparty dispute was the largest, which was 9 and took 23% of the overall causes of action. (Chart 30 and 31)



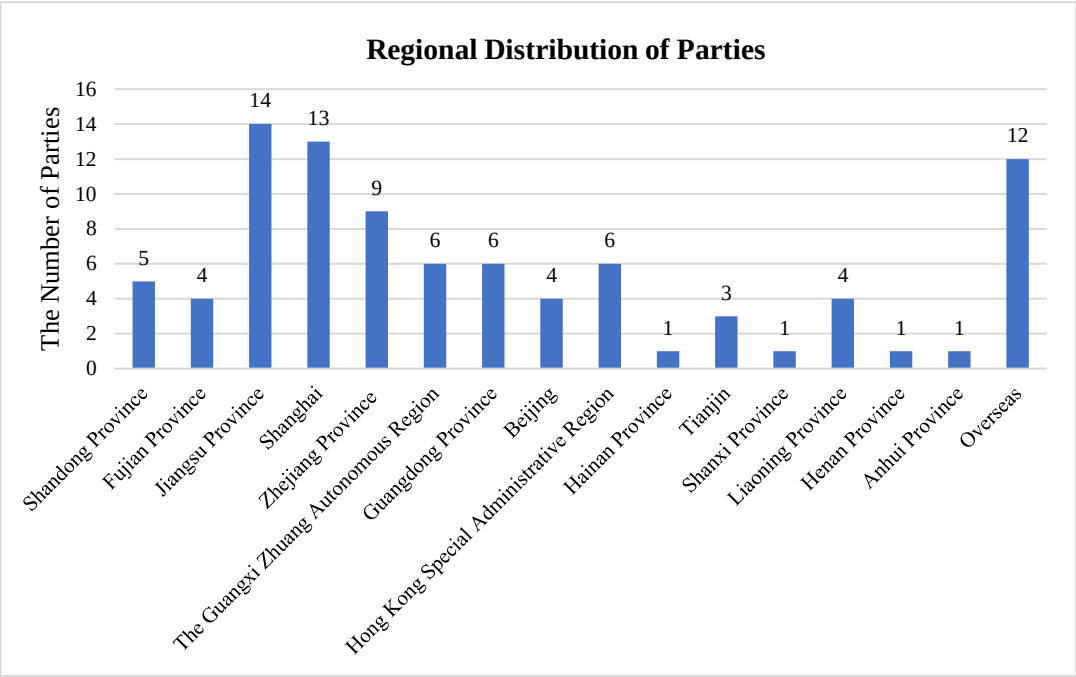
(Chart 30)



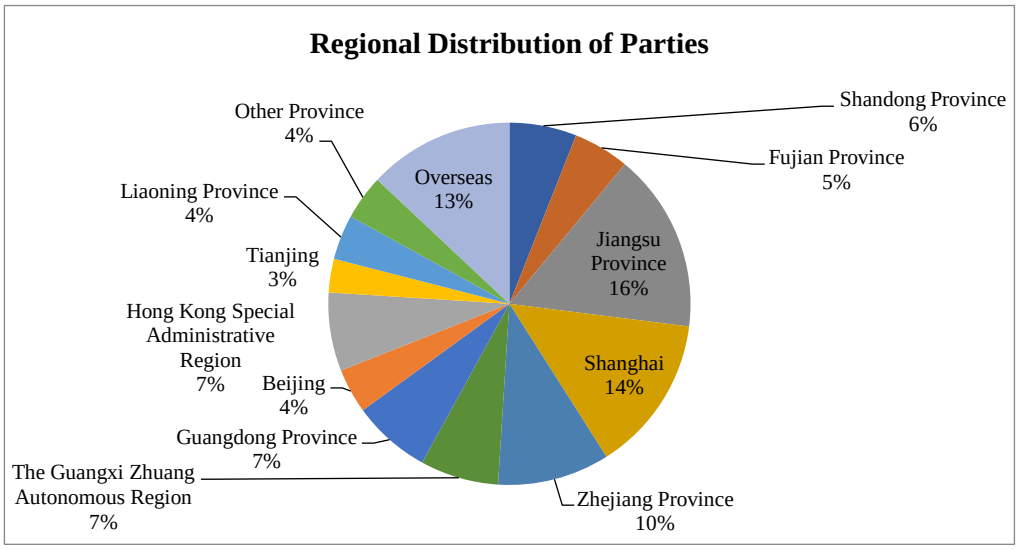
(Chart 31)

C. Regional Distribution of the Parties

In 2016, there were 103 parties involved in cases with judicial assistance and supervision of maritime arbitration, 5 of which did not disclose the place of residence. There were 4 parties of 2 cases where three rulings were made on the same day. After excluding the 8 parties overlapped, there were 90 parties of which the place of residence could be found, including Jiangsu Province, Shanghai, and Zhejiang Province, taking 16%, 14% and 10% respectively. There were 12 parties from foreign countries and took 13% thereof. (Chart 32 and 33).

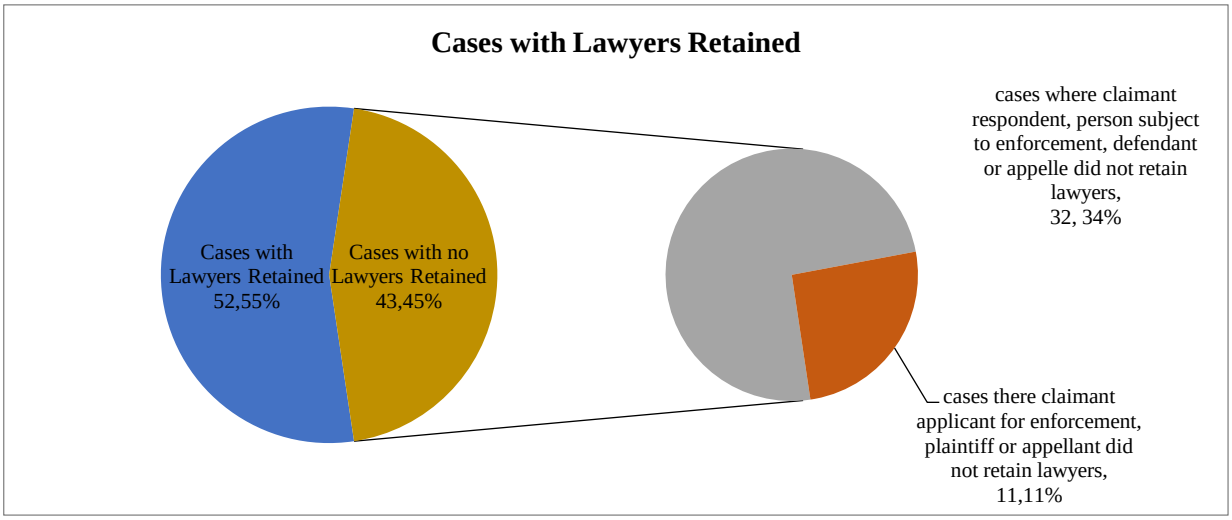


(Chart 32)



(Chart 33)

D. Retaining of Lawyers



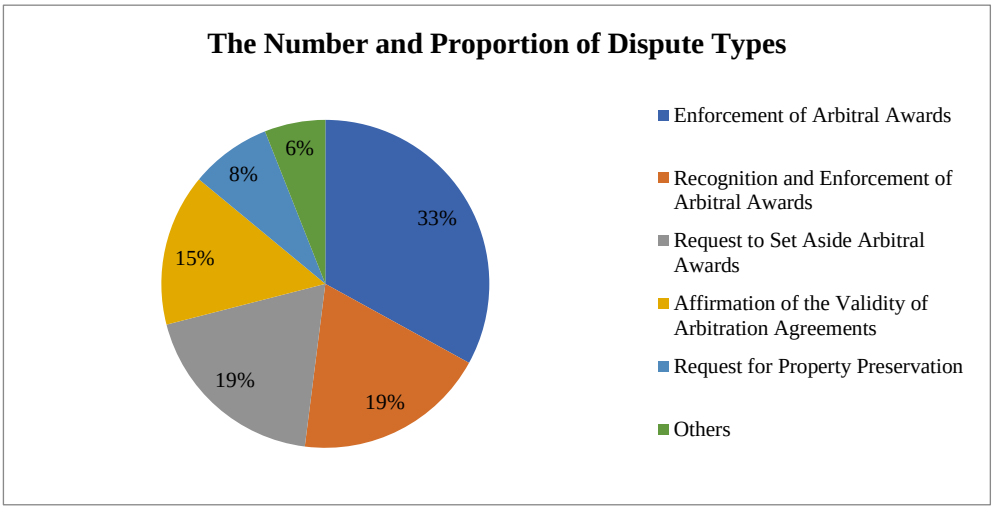
(Chart 34)

In respect of maritime arbitration, most of the parties chose to retain a lawyer. Among the cases where lawyers were not retained, few companies were represented by their in-house counsel. From Chart 34, the parties who did not retain a lawyer were mostly Respondents, parties against which execution is sought, defendants, and appellees. It could be seen that these parties treated their cases negatively.

III. Types of Cases and Results

A. Types of Cases

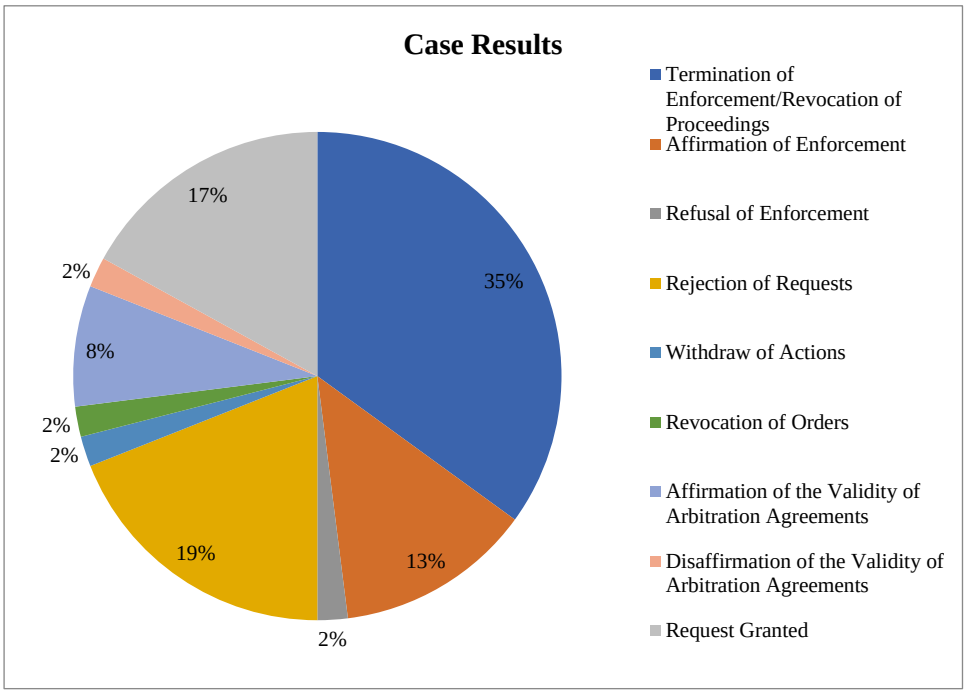
In 2016, among the cases involving judicial assistance and supervision of maritime arbitration, there were 16 cases which applied for enforcement of arbitral awards and took 33% thereof. The number in respect of cases involving the recognition and enforcement of arbitral awards and cases involving the setting aside of arbitral awards was the same. There were 9 cases for each type of case and took 19% respectively. (Chart 35)



(Chart 35)

B. Results

In 2016, nine types of results were involved in cases with judicial assistance and supervision of maritime arbitration, i.e. termination of enforcement/revocation of proceedings, affirmation of enforcement, refusal of enforcement, rejection of requests, withdrawal of actions, revocation of orders, affirmation of the validity of arbitration agreements, disaffirmation of the validity of arbitration agreements, and requests granted, among which cases involving termination of enforcement/revocation of proceedings had the largest number and took 35% of the overall number of cases. Next to it were cases involving rejection of requests which took 19% thereof.

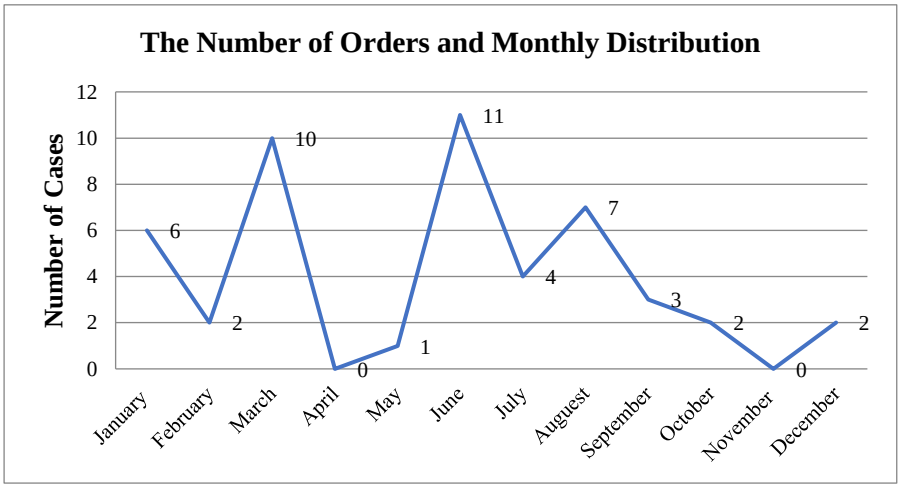


(Chart 36)

From Chart 36, the number of negative results was slightly greater than the number of positive results. There were more cases with the result of the termination of execution/revocation of the proceedings than those with the results of affirmation of enforcement, more cases with the result of rejection of requests than requests granted.

IV. Number of Orders and Monthly Distribution

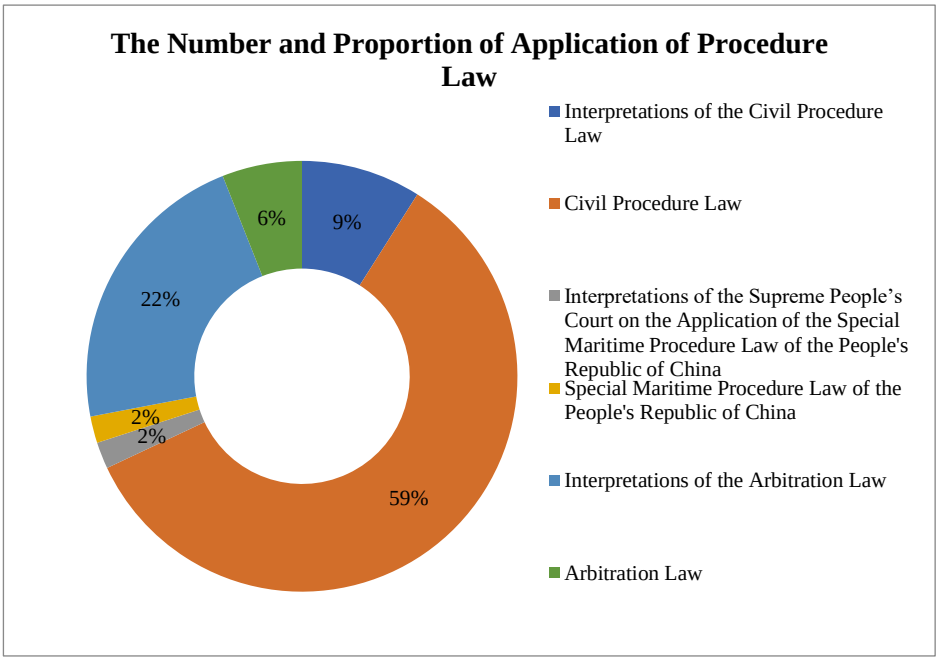
From Chart 37, in March and June had the largest number of cases with 10 and 11 cases each. There was no case accepted in April and November.



(Chart 37)

V. The Quantity and Proportion of the Applicable Procedure Law

In 2016, there were 38 provisions of procedure laws and judicial interpretations applied in cases involving arbitration judicial assistance and supervision. The most frequently applied provisions were Article 154 and Article 283 of the Civil Procedure Law, Article 519 of the Interpretations of the Civil Procedure Law, and Article 58 of the Arbitration Law. (Chart 38)



（Chart 38）

VI. Conclusion

A. In 2016, there were 48 cases involving judicial assistance and supervision of maritime arbitration, correspondingly with 48 judicial documents, of which there were 23 first-instance orders, 2 second-instance orders, among which there was 1 order in which the original judgement was remanded for retrial and 1 order to vacate the original order. In addition, there were 19 orders for enforcement, 3 orders of the special procedure, 1 order for property preservation, and 12 final adjudication.

B. In respect of the types of trial courts, 81% of the 48 cases were tried at admiralty courts, 17% were tried at people's courts, and 1 case was tried at the railway transport court. There were 34% of the cases tried at the courts in Shanghai. The rest of the cases were tried at the courts in Dalian, Wuhan, Fujian, Guangzhou, Guangxi, Tianjin, Zhengzhou, Ningbo, Qingdao, Nanjing, Hefei and Beijing. In addition, nearly half of the maritime arbitration cases in 2016 were arbitrated by CMAC Shanghai Sub-Commission, and the parties who chose international arbitration institutions selected Hong Kong International Arbitration Centre and British arbitration institutions.

C. The disputes involved in the 39 cases disclosed included various types of ship contract, carriage of goods contract, property preservation and other contractual disputes. Ship contract disputes include ship repair, ship construction and charterparty, among which there were 9 cases on charterparty, taking 23%, 8 cases on ship construction, taking 20%, 3 cases on ship repair, taking

8%, 5 cases on carriage of goods, taking 13%, 3 cases on property preservation, taking 8%, 2 cases on crew labour, taking 5%, 3 cases on other types of ship contract disputes, taking 8%, and 6 cases on other types of contractual disputes, taking 15% respectively.

D. In 2016, the parties involved in maritime arbitration judicial assistance and supervision cases were 103, among which there were five parties of which the place of domicile was not disclosed. There were two cases, involving four parties, in respect of which 3 orders were issued respectively on the same day. Therefore, after ruling out the 8 parties repeatedly counted, the number of parties with specified place of domicile was 90. Among the domestic parties, there were 5 domiciled in Shandong Province, 4 in Fujian Province, 14 in Jiangsu Province, 13 in Shanghai, 9 in Zhejiang Province, 6 in the Guangxi Zhuang Autonomous Region, 6 in Guangdong Province, 4 in Beijing, 6 in Hong Kong Special Administrative Region, 1 in Hainan Province, 3 in Tianjin City, 1 in Shaanxi Province, 4 in Liaoning Province, 1 in Henan Province, 1 in Anhui Province. There were 12 parties of which the place of domicile was located in foreign countries.

E. In 2016, the parties involved in maritime arbitration judicial assistance and supervision cases were 103. There were two cases, involving four parties, in respect of which 3 orders were issued respectively on the same day. Therefore, after ruling out the 8 parties repeatedly counted, there were 95 parties involved, among which 52 parties retained lawyers and took 55% of the overall number of the parties. 43 parties did not retain lawyers, taking 45%; and among which a few companies referred the cases to their in-house counsels.

F. There were six types of disputes, of which there were 16 cases requesting for the enforcement of arbitral awards, taking 33%, 9 cases requesting for the recognition and enforcement of arbitral awards, taking 19%, 9 cases applying for the setting aside of arbitral awards, taking 19%, 7 cases requesting to affirm the validity of arbitration agreements, taking 15%, 4 cases applying for property preservation, taking 8%, and 3 cases involving other disputes, taking 6% respectively.

G. There were nine categories of case results, including termination of enforcement/revocation of proceedings, affirmation of enforcement, refusal of enforcement, refusal of requests, withdrawal of action, revocation of orders, affirmation of the validity of arbitration agreements, disaffirmation of the validity of arbitration agreements, and requests granted. The proportions taken were 35%, 35%, 2%, 19%, 2%, 2%, 8%, 2%, and 17% respectively.

H. In 2016, there were 6 cases accepted in January, 2 cases in February, 10 cases in March, 0 case in April, 1 case in May, 11 cases in June, 4 cases in July, 7 cases in August, 3 cases in September, 2 cases in October, 0 case in November, and 2 cases in December.

I. In 2016, there were 38 provisions of procedure laws and judicial interpretations applied in cases involving arbitration judicial assistance and supervision. The most frequently applied provisions were Article 154 and Article 283 of the Civil Procedure Law, Article 519 of the Interpretations of the Civil Procedure Law, and Article 58 of the Arbitration Law.

Chapter Five: Cases Analysis

I. Case Analysis on Judicial Supervision of Arbitration

A. Objection to the Validity of Arbitration Agreement before the Hearing of Arbitration

[Key Issues]

1. Whether failure of objections to the validity of an arbitration agreement prior to the first hearing shall be deemed as the implied acceptance of the jurisdiction of the arbitral tribunal.
2. Whether objections raised after the arbitral award is made is valid.
3. Whether legal person is bound by the arbitration agreement signed by its branches.

[Index]

Trial Court: Wuhan Admiralty Court
Case No.: (2015) Wu Hai Fa Ta Zi No.00015
Date: March 21, 2016
The Parties:
1. The Applicant: Yangzhou Yuanyang International Marina Limited and Yangzhou Yuanyang International Marina Limited Jiangdu Branch;
2. The Respondent: China National Garments Group Corporation

[Facts]

On December 30, 2013, Yangzhou Yuanyang International Marina Limited, Jiangdu (hereinafter "***Yuanyang Jiangdu Company***") and China National Garments Group Corporation (hereinafter "***Garments Corporation***") concluded a "Warehousing Contract", which provided, "*[A]ll disputes shall be resolved by the arbitration commission at the place of the contract performance. This contract shall be valid and remain in full force from January 1, 2014 to December 31, 2014*". During the performance of the contract, Garments Corporation purchased and shipped a number of coals to the port, and entrusted Yuanyang Jiangdu Company with the discharging and warehousing for several times. Yangzhou Yuanyang International Marina Limited (hereinafter "***Yuanyang Company***"), as the parent company of Yuanyang Jiangdu Company, was obliged to deliver the goods as per the written instructions of Garments Corporation. On January 14, 2014, a "Tally Report" was provided by Yuanyang Jiangdu Company to Garments Corporation, according to which the vessel "Yong Feng 58" arrived at the port on December 20, 2013 for discharging of the coals, weighted 16010.68 tons.

After May 2015, Garments Company discovered that Yuanyang Jiangdu Company, without instruction, had delivered 40,000 tons of coals including those discharged from "Yong Feng 58".

After the collapse of negotiation with Yuanyang Jiangdu Company, Garments Corporation initiated an arbitration at Yangzhou Arbitration Commission claiming for the loss of cargos and the corresponding interests. Considering that Yuanyang Jiangdu Company was one of the legal branches of Yuanyang Company, from the perspective of respecting counterclaim right of Yuanyang Company and the assumption of civil liabilities, Yangzhou Arbitration Commission accepted the case on "Warehousing Contract" dispute between Garments Corporation, Yuanyang Jiangdu Company and Yuanyang Company on October 15, 2014, and delivered by mail the arbitration documents to Yuanyang Jiangdu Company and Yuanyang Company in accordance with rules of arbitration. Yuanyang Jiangdu Company and Yuanyang Company did not submit a written response to the Yangzhou Arbitration Commission. The parties appointed three arbitrators to form the tribunal within the agreed period. Yuanyang Company submitted several defence opinions, including the dispute in respect of the goods on "Yong Feng 58" were not within the scope of the arbitration agreement, and meanwhile filed a counterclaim on April 9, 2015. The arbitral tribunal decided to consolidate the claims into one arbitral proceeding. At the hearing, Yuanyang Company submitted its defence, produced and examined evidence, and stated its claims and reasons. Garments Corporation submitted its defence in response to the counterclaim raised by Yuanyang Company. After the third hearing, Yangzhou Arbitration Commission rendered the arbitral award "(2014) YAC No.344" on August 12, 2015, partially sustaining the claims of both parties. In the award, the arbitral tribunal found that dispute concerning goods on "Yong Feng 58" was within the scope of the arbitration agreement.

In 2015, Yuanyang Company and Yuanyang Jiangdu Company filed a lawsuit against Garments Corporation at Wuhan Maritime Court, requesting to set aside the arbitral award made by Yangzhou Arbitration Commission. Wuhan Maritime Court made the order "(2015) Wu Hai Fa Ta Zi No.00015".

[The Decision]

Wuhan Maritime Court denied the request of Yuanyang Company and Yuanyang Jiangdu Company to set aside the arbitral award (2014) YAC No.344 made by Yangzhou Arbitration Commission. The court found that the "Warehousing Contract" concluded by Yuanyang Jiangdu Company and Garments Corporation was the genuine expression of intent by the parties and didn't violate the mandatory provisions of laws and regulations. The contract was duly formed and legally binding. Based on the warehousing disputes arose during the performance of the contract, Yuanyang Company and Yuanyang Jiangdu Company submitted the request to this court to set aside the arbitral award. Therefore, cause of action shall be the dispute concerning the setting aside of arbitral awards made by domestic arbitration commissions.

The court found that Yuanyang Company was legally incorporated in February 2004 and Yuanyang Jiangdu Company was its legal branch formed in November 2007. With regard to the binding force of the arbitration agreement contained in the Warehousing Contract to Yuanyang Company, the court found that Yuanyang Company attended the entire oral hearings after receiving the arbitration

documents, including appointment of the arbitrators, defence, evidence production and examination, etc., and submitted counterclaims. The above conducts indicated that Yuanyang Company's implied acceptance of Garment's claim to resolve the disputes by arbitration, which was in accordance with the principle of voluntariness in civil activities. In addition, Yuanyang Company objected to the validity of the arbitration agreement by challenging the binding force of the arbitration agreement while requesting to set aside the arbitral award. Since Yuanyang Company only raised objection after the arbitral award was made instead of during the hearing, the objection was denied in accordance with Section 1, Article 27 of the Arbitration Law.

[Notes]

This case involves a party who did not execute the arbitration agreement but attended the whole hearings without objection to the validity of the arbitration agreement before the first hearing but instead after the arbitral award was made. This case sets a precedent for issues regarding implied acceptance of arbitration jurisdiction.

Objecting to the validity of the arbitration agreement is one of the fundamental procedural rights of the parties. However, this right shall be exercised promptly in order to be recognized by the law. Regarding the timing to raise such objection, Article 20 of the Arbitration Law provides, "*[I]f the parties object the validity of the arbitration agreement, the objection shall be made before the start of the first hearing of the arbitral tribunal*". However, this provision did not mention the legal consequence in cases where the objection is raised after the first hearing. Article 27 of the Interpretation of the Arbitration Law provides, "*[I]n case an interested party did not object to the validity of an arbitration agreement in the arbitration procedures, and requests revocation of the arbitral award or proposes demur to no enforcement on the ground of invalidity of the arbitration agreement after the arbitral award is made, the request or demur therefrom shall be supported by the people's court.*" Considering the provisions of the Arbitration Law and the Interpretation of the Arbitration Law, if in practice the parties do not object to the validity of an arbitration agreement before the start of the first hearing, the court will deny the objection made thereafter. The purpose for such provisions is to prevent malicious delay of arbitral procedure which would cause waste of judicial resource. Without this regime, constantly the party who bears the unfavourable consequence of arbitral awards may be inclined to request to vacate the arbitral awards, which not only would waste judicial resource but also would impair the authority and the finality of arbitration. It may also undermine the core value of the entire arbitration regime. Thus, it would be necessary to restrict the parties' objections to the validity of arbitration agreements.

The key issue and the core of arbitration jurisdiction is whether there is a valid arbitration agreement concluded. A valid arbitration agreement ensures the jurisdiction of an arbitral tribunal over the dispute, and therefore becomes one of the significant grounds for a court to set aside or enforce it. In respect of the setting aside of an arbitral award, Article 58 of the Arbitration Law provides, "*[T]he parties may apply to the intermediate people's court at the place where the arbitration commission is located for setting aside of an award if they provide evidence proving*

that the award involves one of the following circumstances: 1. there is no arbitration agreement between the parties…" As to the present case, the Claimant, Yuanyang Company, asserted that the arbitration agreement was concluded by its branch with the Respondent, Garments Corporation, which should only bind the parties to the agreement. As there was no arbitration agreement concluded between Yuanyang Company and Garments Corporation, the arbitral award was made without a valid arbitration agreement existing between the parties to arbitration, and therefore shall be set aside. Thus, request of the Applicant, Yuanyang Company, was in accordance with the Section 1, Article 58 of the Arbitration Law. However, the Applicant actively participated in the entire hearing, submitted counterclaims and failed to object to the tribunal's jurisdiction before the start of the first hearing, which qualified as voluntarily implied acceptance of the tribunal's jurisdiction. Therefore, it shall be affirmed that Yuanyang Company had recognized the binding force of the arbitration agreement.

Considering the implied acceptance of the Applicant, the court did not rule on the issue that whether Yuanyang Company was bound by the arbitration agreement concluded by its branch and Garments Corporation.

Section 1, Article 14 of the "*Company Law of the People's Republic of China*" provides, "*[A] company may set up branches. To set up a branch, the company shall file a registration application with the company registration authority to obtain a business license. A branch shall not enjoy the status of a legal person and its civil liabilities shall be borne by the company.*" Article 74 of the "*General Rules of the Civil Law of the People's Republic of China*" provides, "*[A] legal person may establish its branches according to the law. Where the branches shall be registered in accordance with the provisions of laws and administrative regulations, such provisions shall apply. Where a branch engages in civil activities in its own name, the civil liability caused thereby shall be assumed by the legal person. Such civil liability may also be borne by virtue of the property managed by the branch first and then be assumed by the legal person provided that the extent of such civil liability exceeds the value of the branch's property*". These two laws make it clear that a branch of a company does not have legal person status. Article 2 of the Arbitration Law provides, "*[C]ontractual disputes and other disputes arising from property rights and interests between citizens, legal persons and other organizations of equal status in law may be submitted for arbitration.*" Although a branch of a company does not enjoy the status of legal person, it is capable of concluding contracts and arbitration agreement independently as "other organizations". In civil activities, branches of companies have always been recognized with capacity as entities subject to litigation and may become a party to civil actions as "other organizations" according to Article 48 of Civil Procedure Law and Article 52 of the Interpretation of the Civil Procedure Law.

The laws and regulations of arbitration in China are silent on whether a parent company is bound by arbitration agreement concluded by its branches. With regard to the expansion of validity of the arbitration agreement, Article 8 of the Interpretation of the Arbitration Law provides, "*[I]n case an interested party is merged or divided after concluding an arbitration agreement, the arbitration agreement shall be binding upon the successor of its rights and obligations.*" Although branches,

as “other organizations”, are capable as entities subject to litigation or arbitration, their civil liabilities shall be assumed by the parent company. Therefore, parent companies shall be bound by the arbitration agreement concluded by their branches.

B. Failure of Objection to the Court’s Jurisdiction before the First Hearing

[Key Issues]

1. With regard to the effect of demurer of a valid arbitration agreement, whether the court should perform the obligation of review and interpretation ex officio.
2. Whether the court has the jurisdiction over disputes where there is a valid arbitration agreement.
3. The time limit for objection to the jurisdiction of the court.
4. The arbitrability of bankruptcy disputes.

[Index]

Court of First Instance: Beihai Maritime Court
Case No.: (2016) Gui 72 Min Chu No.6
Date of Judgement: June 22, 2016
The Parties:
The Plaintiff: Ning Bo Yingganglixin Logistics Ltd.
The Defendant: Qinzhou Guiqin Shipping Group Ltd.

Court of Second Instance: the High People’s Court of Guangxi Zhuang Autonomous Region
Case No.: (2016) Gui Min Zhong No.299
Date of Judgement: December 7, 2016
The Parties:
1. The Appellant: Ning Bo Yingganglixin Logistics Ltd.
2. The Appellee: Qinzhou Guiqin Shipping Group Ltd.

[Facts]

The Plaintiff, Ningbo Yingganglixin Logistics Ltd. (hereinafter “***Lixin Company***”) entered into a Time Charterparty with the Defendant, Qinzhou Guiqin Shipping Group Ltd. (hereinafter “***Guiqin Company***”). The arbitration clause contained in the Charterparty expressly stipulated that disputes in respect of the contract between the parties shall be submitted to CMAC Shanghai Sub-Commission for arbitration and be subject to the arbitration rules thereof. However, the Plaintiff filed a lawsuit in front of Beihai Maritime Court after disputes arose. According to Beihai Maritime Court, the Defendant asserted during court sessions that there was a valid arbitration agreement between the parties and the court should not accept the case. The case was therefore rejected by Beihai Maritime Court. The Plaintiff appealed to the High People's Court of Guangxi Zhuang

Autonomous Region thereafter.

[Decision]

The court of second instance found that Guiqin Company received the notice of responding to the case in together with the subpoena and other materials on January 15, 2016. Prior to the court session on February 25, 2016, no statement of defence was submitted which included the submission that the Charterparty in dispute contained an arbitration clause. The Defendant simply filed a defence raising the arbitration agreement during the defence stage in court. According to Article 26 of the PRC Arbitration Law, "*[W]here the parties have reached an arbitration agreement, but one of the parties initiates an action in a people's court without stating the existence of the arbitration agreement, the people's court shall reject the action if the other party submits to the court the arbitration agreement before the first hearing of the case unless the arbitration agreement is invalid. If the other party fails to object to the hearing by the people's court before the first hearing, the arbitration agreement shall be considered to have been waived by the party and the people's court shall proceed with the hearing.*" If the appellee did not object to the jurisdiction of the court by claiming the existence of the arbitration agreement, it would be deemed as a waiver of its right to arbitration and left the court with jurisdiction over the dispute. Court of second instance revoked the judgment of the court of first instance and the case was designated to be tried by the Qinzhou Intermediate People's Court, which accepted the bankruptcy proceeding of Guiqin Company.

[Notes]

The case provides reference in deciding on issues including whether the court should review the arbitration clause ex officio and explain to the parties if the arbitration clause is found valid in cases where the contract in dispute contains an arbitration clause, whether the court has jurisdiction over cases where there is a valid arbitration clause, the time limit for the parties to object to the court's jurisdiction and whether bankruptcy disputes are arbitrable.

First, as for the demurrer effect of a valid arbitration agreement, Article 215 of the Interpretation of the Civil Procedure Law provides, *"...where the parties concerned have stipulated an arbitration clause in a written contract or, after a dispute occurs, reached a written arbitration agreement, if one party concerned files a lawsuit with a people's court, the people's court shall notify the plaintiff that the plaintiff shall submit the dispute to an arbitration institution for arbitration; if the party concerned insists on filing a lawsuit, the people's court shall rule not to accept the case, unless the arbitration clause or arbitration agreement is untenable, invalid or becomes invalid, or the content therein is ambiguous and thus cannot be enforced.*" Also, Article 531 provides, *"...for cases which are under the exclusive jurisdiction of a court of the People's Republic of China, the parties involved may not agree on the choice of jurisdiction of a foreign court, except that the parties may agree on the choice of arbitration abroad.*" As such the people's court should review arbitration clauses ex officio.

The existence of a valid arbitration agreement has the effect of excluding not only the general jurisdiction but also the exclusive jurisdiction of courts. Where the parties choose arbitration to resolve disputes, they shall not be subject to the exclusive jurisdiction of the courts. As to the demurrer effect of a valid arbitration agreement, Interpretations of the Civil Procedure Law introduced new rules on the basis of the previous judicial interpretation and provides that the people's court should first inform the plaintiff to submit the dispute for arbitration at the arbitration institution; only when the plaintiff persists in filing a lawsuit may the court order to reject the case. "*[T]he aforesaid article introduced the rule under which the courts may reject the case in circumstances where the plaintiff persists in pursuing an action, which makes the law more comprehensive and would serve the practice of case acceptance.*"[8] At the same time, on the basis of that the arbitration agreement is null, void, or the content therein is uncertain and unable to be performed, the Interpretations of the Civil Procedure Law introduces a condition where the arbitration agreement would not demur the jurisdiction of the court, i.e. the arbitration agreement is untenable, which makes the whole regime more comprehensive and more in line with the relevant provisions for civil legal acts. Consequently, where the people's court considers that the arbitration clause or arbitration agreement is untenable, null, void and unable to be performed due to uncertain contents upon review, it shall fulfill the duty of explanation to the plaintiff. The court shall at first inform the plaintiff to apply for arbitration and only when the plaintiff persists in pursuing the action may the court order to reject the case. During the first hearing, the judge of Beihai Maritime Court had asked the plaintiff whether to waive the arbitration clause. As stated in the court order, Beihai Maritime Court held that during court sessions Guiqin Company claimed that there was a valid arbitration clause between the Plaintiff and the Defendant and therefore the court should not accept the case. Accordingly, the court rejected the plaintiff's filing of action. As such, as the court of first instance, Beihai Maritime Court held that there was no circumstance where arbitration clause or the arbitration agreement was untenable, null, void or unable to be performed due to uncertain contents. Under this circumstance, Beihai Maritime Court shall fulfill its duty of explanation to the plaintiff and inform the plaintiff to apply for arbitration. Only when the plaintiff persists in pursuing the action may the court order to reject the case instead of ordering to dismiss after accepting the case in the first place.

Second, with respect to whether the court has jurisdiction over the disputes where there is a valid arbitration agreement, and the time limit for the parties to challenge the court's jurisdiction, Article 216 of the Interpretations of the Civil Procedure Law provides that, "*[W]here a defendant raises an objection to a civil case accepted on the ground of a written arbitration agreement before the first hearing by a people's court, the people's court shall conduct a review. Upon review, in any of the following circumstances, the people's court shall overrule the action: 1. an arbitration institution or the people's court has confirmed that the arbitration agreement is valid; 2. the party concerned fails to raise an objection to the validity of the arbitration agreement before the first hearing by the arbitral tribunal; and 3. the arbitration agreement conforms to the*

[8] "*Understanding and Application of the Judicial Interpretation of the Civil Procedure Law by the Supreme People's Court*", Page 568, edited by SHEN Deyong, the First Edition, 2015.

provision of Article 16 of the Arbitration Law of the People's Republic of China and falls under none of the circumstances as prescribed in Article 17 thereof."

According to this provision, the time limit for a defendant to object to the court's jurisdiction on the ground of the existence of a valid arbitration agreement shall be the commencement of the first hearing. Meanwhile, in combination with Article 223 of the Interpretations of the Civil Procedure Law, a party concerned defending against, making a statement or counterclaiming against substantial content of the case without raising any objection to jurisdiction can be affirmed as responding to the claim and entering a defence as prescribed in Section 2 of Article 127 of the Civil Procedure Law. If a defendant objects to the court's jurisdiction after the commencement of the first hearing, the court would obtain the jurisdiction and shall continue the trial.

At the same time, pursuant to Article 26 of the Arbitration Law, "*[W]here the parties have reached an arbitration agreement, but one of the parties initiates an action at a people's court without stating the existence of the arbitration agreement, the people's court shall reject the action if the other party submits to the court the arbitration agreement before the first hearing of the case unless the arbitration agreement is invalid., If the other party fails to object to the hearing by the people's court before the first hearing, the arbitration agreement shall be considered to have been waived by the party and the people's court shall proceed with the hearing.*" For the understanding of first hearing, the Supreme People's court further clarifies in Article 14 of the Interpretations of the Arbitration Law that "*[T]he first hearing as referred to in Article 26 of the Arbitration Law means the first trial in court that is organized by the people's court after expiration for defence, excluding all procedural activities before the trial.*"

Therefore, the parties who conclud an arbitration clause in their contract should raise objections to the jurisdiction of the court at the latest before the first hearing, which is during the pre-trial activities, for example, when the court delivers copies of statement of claim or defence, reviews litigation materials, investigates and collects necessary evidence or add parties. In this case, Guiqin Company failed to submit and claim the existence of an arbitration clause contained in the contract before the first hearing and filed an objection to the jurisdiction thereafter. Not until the defence stage of the first hearing did Guiqin Company object to the jurisdiction of the court. The court held that this should be deemed as a waiver of arbitration clause. Thus, the people's court has the jurisdiction over cases covered by other jurisdictions and also has the jurisdiction over cases where there exists a valid arbitration agreement, which reflects the procedural autonomy and subjectivity.

At last, the case concerns the arbitrability of bankruptcy disputes as well. As the Defendant was under bankruptcy reorganization procedure, the plaintiff submitted to Beihai Maritime Court that the bankruptcy manager, Qinhai Marine Group Limited, shall be joined as third party to the case. According to Article 156 of Civil Procedure Law, Beihai Maritime Court decided to join Qinhai Marine Group Limited as third party to participate in the proceedings. During the first instance, the Plaintiff asserted that, although the parties had agreed to resolve their disputes through arbitration, since the Defendant had entered into the bankruptcy proceedings, the case shall be

governed by the courts accepting the application for bankruptcy according to law and shall not be subject to the arbitration clause. However, neither the court of first instance or second instance rule on the issue of the arbitrability of bankruptcy disputes. The arbitrability of disputes is a rather essential issue in the international commercial arbitration, which directly pertains to the validity of an arbitration agreement, arbitration jurisdiction and the validity of an arbitral award. Traditionally, bankruptcy disputes cannot be submitted for arbitration due to public policy. In recent years in international commercial arbitration, the bankruptcy disputes have gradually broken through the barriers of public policy and have been taken into the scope of arbitrable matters, i.e., the disputes pertaining to debts arising between the creditor and the obligor in bankruptcy procedures can be submitted for arbitration on the basis of an arbitration agreement.

In respect of arbitrability, Article 2 of Arbitration Law provides that, "*[C]ontractual disputes and other disputes arising from property rights and interests between citizens, legal persons and other organizations of equal status in law may be submitted for arbitration.*" Meanwhile, Article 3 lists two types of non-arbitrable issues, namely (1) disputes over marriage, adoption, guardianship, child maintenance and inheritance; and (2) administrative disputes falling within the jurisdiction of the relevant administrative organs according to law. Therefore, it is unclear under the Arbitration Law that whether bankruptcy issues are arbitrable. This should be read in conjunction with the "*Enterprise Bankruptcy Law of the People's Republic of China*" (hereinafter referred to as "***Bankruptcy Law***"). Article 20 of the Bankruptcy Law provides, "*[T]he civil litigation or arbitration concerning the debtor that has started but has not yet ended shall be suspended after the People's Court accepts the application for bankruptcy; and the litigation or arbitration shall proceed after the administrator takes over the debtor's property.*" Article 25 provides, "*[T]he administrator shall perform the following functions: …7. Participating in a lawsuit, arbitration or other legal proceedings on behalf of the debtor…*" Article 47 provides, "*[A] conditional credit or a credit with time limit, or a debt with pending litigation or arbitration may be declared by the creditors.*" Article 119 provides, "*[W]ith respect to pending claims in course of litigation or arbitration at the distribution, the administrator shall set aside due proportion of property. With respect to the claims that cannot be distributed two years following the conclusion of bankruptcy proceedings, the due proportion set aside shall be distributed to other creditors.*" Article 122 provides, "*[T]he administrator shall terminate its performance of functions from the day after the date of the completion of the revocation of the registration unless there is litigation or arbitration pending.*" As demonstrated by the above provisions, bankruptcy disputes are arbitrable.

C. Setting Aside Arbitral Awards on the Ground of Matters for Arbitration out of the Scope of the Arbitration Agreement

[Key Issues]

1. Whether the tribunal's ruling on the validity and the exercise of termination of the Shipbuilding Contract, the underlying contract of the Repayment Guarantee of which the disputes are at issue for arbitration, is beyond the tribunal's jurisdiction;

2. Whether there exists the tribunal's unlawful misconduct during the evidence collection procedure;
3. The understanding of that the tribunal may collect evidence on its own if it is necessary.

[Index]

Trial Court: Shanghai Admiralty Court
Case No.: (2016) Hu 72 Min Te No.95, No.96, No.97
Date: June 8, 2016
Parties:
1. The Applicant: China Construction Bank Co., Ltd. Zhoushan Dinghai Branch;
2. The Respondent: Ningbo Hengrong Century Shipping Ltd.

[Facts]

On February 19, 2014, Ningbo Hengrong Century Shipping Ltd. (hereinafter "***Hengrong Company***") executed a Shipbuilding Contract with Zhejiang Zhenghe Shipbuilding Ltd. (hereinafter "***Zhenghe Company***"). On February 27, 2014, China Construction Bank Co., Ltd. Zhoushan Dinghai Branch (hereinafter "***CCBC***") accepted the request of Zhenghe Company for the issuance of a "*Letter of Guarantee on Repayment of Ship Deposit*" (hereinafter the "***Repayment Guarantee***") with respect to the repayment of ship deposit made by Hengrong Company and the corresponding interests accrued 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 shall be final and binding upon both parties.*"

CMAC Shanghai Sub-Commission accepted the dispute arising from the Letter of Guarantee in respect of the vessel numbered MASH20150058. On November 3, 2015, CCBC filed an application for the preservation of evidence; and in accordance with the PRC Arbitration Law, CMAC Shanghai transferred the application to the People's Court of Zhoushan Dinghai District. The arbitral tribunal held hearings on November 13, 2015 and January 8, 2016 over the dispute; and counsels appointed by the parties attended the hearings. During the hearings, both parties made statements in respect of facts, produced and examined evidence, conducted debates, answered questions from the arbitral tribunal and presented their final statements. After the hearings, the parties submitted their written statements within the stated period.

On March 29, 2016, the arbitral tribunal issued the award with respect to the repayment of ship deposit of MASH20150058 vessel that, according to which (1) CCBC shall pay to Hengrong Company the ship deposit in the amount of RMB 50,400,000, and the interests accrued at an annual rate of 7% from the date on which Zhenghe Company receives the deposit till the date on which

Hengrong Company receives the repayment of the amounts at issue; (2) CCBC shall bear Hengrong Company's attorney's fees in an amount of RMB 770,000 due to its involvement in this case. Hengrong Company's claim with respect to travel expenses and other legal fees is denied; and (3) the arbitration fee in the amount of RMB 315,988 shall be borne by CCBC. As Hengrong Company prepaid all the fees of this arbitration, CCBC shall pay to Hengrong Company the amount of RMB 315,988. CCBC shall make the above payment within 30 days from the date of the effectiveness of this arbitral award.

CCBC, the Applicant, requested to set aside the arbitral award, and asserted that the validity of the Shipbuilding Contract was not within the scope of the arbitration agreement contained in the Letter of Guarantee. The arbitral tribunal had no power to rule on 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 partial repayment with respect to the deposit and the interests thereof were issues covered by the Shipbuilding Contract rather than the arbitration clause contained in the Letter of Guarantee. The matters contemplated by the arbitral award are not covered by the arbitration agreement, or outside the jurisdiction of the arbitration commission, and thereby give rise to the ground for setting aside the arbitral award. Besides, the arbitral tribunal failed to collect evidence in accordance with the reply of the court in respect of the preservation of evidence in arbitration, and deliberately neglected the evidence produced by the Applicant. The conducts of the arbitral tribunal constituted violation of due process of law. Furthermore, there were misconducts and mistakes in the interpretation of law, interpretation and 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, the Applicant requested to set aside the arbitral award (2016) CMAC SH No. 004.

As replied by the Respondent: (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 covered 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 corresponding 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 held evidence production and examination procedure in due course and stated its reasoning correspondingly in the arbitral award. 3. The mistakes in the interpretation and application of law, the interpretation of wordings, the ascertainment of contractual obligations and the ascertainment of interest compounding period were not circumstances for setting aside an arbitral award. Therefore, the Respondent requested to reject the application.

[Decision]

As ruled by the court: Cancellation of an arbitral award shall be subject to Article 58 of the Arbitration Law. The basis of the Applicant's request for setting aside the arbitral award was that (a) issues covered by the arbitral award were not within the scope of the arbitration agreement or the jurisdiction of the arbitral tribunal; (b) the preservation of evidence, production and ascertainment of evidence violated the due process of law; and (c) there were incorrect ascertainment of facts and incorrect application of law.

1. Article 10 of the Letter of Guarantee issued by CCBC provided 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 was the guarantee of the Shipbuilding Contract, were in connection with the performance of the Shipbuilding Contract. As such, the arbitration institution had jurisdiction over the disputes. Second, CCBC raised the validity of the Shipbuilding Contract, the exercise of termination right and the repayment of the deposit as its submission. It shall produce evidence to support its 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 issued according to the provisions of the Letter of Guarantee and the law. Issues under the Shipbuilding Contract were not covered by the award. Therefore, the arbitral award did not exceed the scope of the arbitration agreement or the jurisdiction of the arbitration commission. As such the request of CCBC to set aside the arbitral award was rejected.

2. The arbitral tribunal transferred CCBC'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 arbitral tribunal may, as it considers necessary, collect evidence on its own. Therefore, the Applicant's claim that the arbitral tribunal shall investigate and collect evidence according to the court's reply lacked legal basis. There was no circumstance in violation of the due process of arbitration or arbitration rules, which may impair the issuance of arbitral award. Second, the parties produced evidence during the oral hearing, and had the chance to examine evidence as well as 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 was no neglect of evidence as claimed by the Applicant. Therefore, CCBC's claim that the arbitral award should be set aside on the ground that preservation, production and ascertainment of evidence violated the due process of law, was rejected.

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 compounding period covered by the arbitral award are substantive issues in arbitration and are

grounds for setting aside arbitral awards as provided by the law. Therefore, CCBC's claim that the arbitral award should be set aside on the ground of incorrect ascertainment of facts and incorrect application of law was rejected.

Above all, there was no legal basis for setting aside the arbitral award (2016) CMAC SH No. 004 made by CMAC Shanghai over the disputes regarding the repayment of ship deposit of vessel MASH20150058. The Applicant's claim to revoke the award was thereby rejected.

[Notes]

This case sets a precedent in determining issues including the jurisdiction and the power of the arbitral tribunal and evidence collection by arbitral tribunals.

The arbitration agreement empowers the arbitral tribunal to rule over any disputes within the scope of the arbitration agreement. Exceeding such scope of power constitutes one of the legal grounds to set aside an arbitral award and refuse the enforcement thereof. Article 5 Section 1 (c) of the New York Convention provides, "*[T]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced…*" Unlike Article 5 Section 1 (a) of the New York Convention, ruling over disputes beyond the scope of the arbitration agreement does not equal to ruling beyond the jurisdiction of the arbitral tribunal, but an overstep of jurisdiction, i.e. ruling over disputes that the parties did not submit for arbitration. The "*UNCITRAL Model Law on International Commercial Arbitration*" provides for the same grounds for setting aside arbitral awards and refusing the enforcement thereof[9]. Article 58 of the Arbitration Law provides "*…2. the matters of the award are beyond the extent of the arbitration agreement or not under the jurisdiction of the arbitration commission…*" as a ground for the vacation of an award. Thus, awards issued exceeding the scope of the arbitration agreement constitutes one of the grounds to set aside an award and refuse its enforcement. Whether the tribunal has the jurisdiction over the disputes submitted and whether the disputes could be submitted for arbitration are decided by the expression of the arbitration agreement. Should the parties not wish to resolve their disputes through litigation, they are advised to use comprehensive terms in drafting the agreement. Every arbitration commission has its own model arbitration clause, such as China Maritime Arbitration Commission (CMAC)Model Arbitration Clause (1), "*[A]ny dispute arising from or in connection with this Contract shall be submitted to China Maritime Arbitration Commission (CMAC) for arbitration which shall be conducted in accordance with the CMAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties*", and Clause (2), "*[A]ny dispute arising from or in connection with this Contract shall be submitted to China Maritime Arbitration Commission (CMAC)_____Sub-Commission (Arbitration Center) for arbitration which shall be conducted in accordance with the CMAC's* contract" is considered

[9] See "UNCITRAL Model Law on International Commercial Arbitration", Article 34(2)(iii), and Article 36(i)(a)(iii).

as the most general term and thus is widely recommended, such as United Nations Commission on International Trade Law, International Chamber of Commerce and London Court of International Arbitration.

In this case, Article 10 of the Repayment Guarantee adopted Model Arbitration Clause (2) of CMAC. In the decision the court ruled that, "*[I]n accordance with the agreement between the parties, any disputes arising from or in connection with the Repayment Guarantee may be submitted for arbitration. Thus, the arbitration commission undoubtedly has jurisdiction over disputes arising from the Repayment Guarantee, the guarantee agreement of the Shipbuilding Contract*". Article 5 of the "*Security Law of the People's Republic of China*" provides: "*[A] guarantee agreement shall be accessory to the underlying contract, and shall be invalid if the underlying contract is invalid. Where a guarantee agreement provides for a separate agreement, such agreement shall be observed.*" This article indicates that a guarantee agreement is subordinate and supplementary to the underlying contract, and shall be invalid if the underlying contract is found invalid. The issue at hand is whether the Respondent, Zhenghe Company, was obliged to repay the ship deposit and its corresponding interests in accordance with the Repayment Guarantee. Since the Guarantee Agreement is valid only when the Shipbuilding Contract is valid, the arbitral tribunal has the power to decide the validity of the Repayment Guarantee and the Shipbuilding Contract. Zhenghe Company's obligation to repay the ship deposit was conditioned on whether Hengrong Company exercised its contractual right of termination in respect of the Shipbuilding Contract. Therefore, the arbitral tribunal has the jurisdiction to decide on whether the contractual termination right was duly exercised.

The arbitral tribunal had transferred CCBC'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 arbitral tribunal may, as it considers necessary, collect evidences on its own. Therefore, the Applicant's claim that the arbitral tribunal shall investigate and collect evidence according to the court's reply lacks legal basis. There is no circumstance in violation of due process of arbitration or arbitration rules which may impair the issuance of the arbitral award. CCBC asserted that the arbitral tribunal failed to investigate and collect evidence according to the court's reply in arbitration evidence preservation procedure and thus was in violation of due process of arbitration. As to evidence investigation and collection, Article 43 of the Arbitration Law provides, "*[T]he parties shall produce evidence in support of their claims. An arbitral tribunal may collect on its own evidence when it considers necessary.*" This article indicates that the parties shall produce evidence in support of their claims, defenses and counterclaims, which is also the primary principle of arbitration. This article provides great discretion to the arbitral tribunal in collecting evidence on its own, as neither the Arbitration Law or its corresponding judicial interpretation made clear the circumstances under which the tribunal may collect evidence. However, it would be necessary to limit such discretion with stringent rules since it would impair the role definition of the tribunal and the parties in arbitration proceedings and exceed the reasonable authority of the tribunal empowered by the parties in dispute. The arbitral tribunal is the adjudicator, whose obligation is to examine and review the evidence submitted by the parties instead of collecting evidence on behalf of the parties. The

parties failing to collect evidence shall assume any unfavorable consequences. Reasonable role definition of the tribunal and the parties could ensure the impartiality and the efficiency of arbitration. The arbitral tribunal, as it considers necessary, may collect evidence should the following circumstances occur: (1) facts that may impair the interests of the State, the public interests of society or the lawful rights and interests of any other person; (2) procedural matters such as objection to the validity of an arbitration agreement and challenge of arbitrators. Theoretically, investigation of procedural matters would neither involve substantive legal relationships between the parties nor affect the equality between the parties and the impartiality of the arbitrators; and (3) the parties fails to collect evidence due to objective reasons, such as evidential materials are kept by the relevant state organs and cannot be independently collected by the parties, or materials and transaction information of third parties or institutions are kept by the bank. In practice, evidence would be more easily collected in the names of arbitration commissions.

D. Dispute Involving Damages Resulting from Wrongful Detention of Vessel

[Key Issues]

1. Whether there is connection between the Defendant's wrongful preservation and the damages claimed by the Plaintiff.

2. Whether the evidence produced by the Defendant in respect of loss arising from vessel operation was sufficient.

[Case Index]

Trial Court: Xiamen Maritime Court
Case No.: (2016) Min 72 Min Chu No. 565
Date: November 10, 2016
Parties:
1. The Plaintiff: Fujian Yuanyuan Shipping Ltd.
2. The Defendant: Nanjing Zhonggang Shipping Ltd.

[Facts]

Vessel "Zhonggang Yongshun" (former name "Ocean Petroleum 881") is a chemical tanker/oil tanker, whose registered owner is Fujian Yuanyuan Shipping Ltd. (hereinafter "***Yuanyuan Company***"). However, without the transport permit for chemical tanker/oil tanker, Yuanyuan Company is not qualified to operate the vessel. In December 2014, Yuanyuan Company executed a sales contract with Zhonggang Shipping Ltd. (hereinafter "***Zhonggang Company***") in respect of the sale of the vessel and made delivery within the month. Zhonggang Company engaged Zhoushan Dinghai Reef Ship-repairing Ltd. (hereinafter "***Reef Company***") for the repair of the vessel. On April 10, 2015, Yuanyuan Company applied for arbitration at CMAC Shanghai Sub-

Commission, requesting to terminate the contract, to return the vessel, to confiscate the deposit and payment of damages. Zhonggang Company counterclaimed the termination of contract, the return of the deposit in double amount, payment of ship repairing fees, wages of crew members, fuel charges etc. On March 31, 2016, CMAC Shanghai Sub-Commission issued the award, of which the ruling includes the termination of the sales contract, the return of the vessel by Zhonggang Company, and the rejection of Zhonggang Company's counterclaims. Thus, Yuanyuan Company requested in front of Ningbo Maritime Court for enforcement of the award.

During arbitration, Zhonggang Company applied for property preservation. On July 7, Xiamen Maritime Court issued the order (2015) Xia Hai Fa Bao No. 42, freezing the right to dispose, transfer the title of, mortgage and bareboat charter the vessel "Zhonggang Yongshun", and informed Fuzhou Maritime Safety Bureau for the assistance of enforcement thereof. Yuanyuan Company signed in the order on July 17, 2015. After the arbitral award was made, on April 19th, 2016, Xiamen Maritime Court lifted the preservation as per the request of Yuanyuan Company, and informed Fuzhou Maritime Safety Bureau on April 20th.

On June 3, 2015, Yuanyuan Company had previously sent Zhonggang Company a notice of termination requesting to terminate the contract on the ground of breach of contract, and that Zhonggang Company shall return the vessel within three days as of the date receiving the notice. The notice reached Zhonggang Company on June 8th. Later, Yuanyuan Company applied on July 2nd, 2015 to Ningbo Maritime Court for an order of compulsory measure requiring that Zhonggang Company shall return the vessel "Zhonggang Yongshun" immediately. Due to the failure of making payment of the corresponding fee, Ningbo Maritime Court ordered to revoke the order of compulsory measure on July 14, 2015.

On June 2nd, 2015, Reef Company informed Zhonggang Company that the repair of the vessel had completed, and that due to the failure of the payment of the repair fee, docking fee etc., the vessel would be retained on lien before the clearance of the corresponding payment. As for now, Vessel "Zhonggang Yongshun" is still under the lien of Reef Company. According to Yuanyuan Company, it has sent staff to the vessel for the security of equipments in July 2015.

On June 24, 2016, Xiamen Maritime Court accepted the case on disputes of damages in property preservation between the Plaintiff, Yuanyuan Company and the Defendant, Zhonggang Company. The Plaintiff claims that the Defendant shall be responsible for an amount of RMB 19,776,650 and the corresponding interests, as well as the litigation fee and other legal fees. Before the start of court hearing, the principal amount of its claim was changed to RMB 15,474,030.

[Decision]

The court rejected the claims of the Plaintiff and decided that the Plaintiff shall bear the litigation fee in an amount of RMB 114,644.

According to the decision, the dispute at hand is the liabilities for damages of property preservation in legal proceedings. Wrongful application of preservation is a tort liability. Its prerequisites consist of wrongful act, fault, causation between the wrongful act and the consequences, and consequences. Zhonggang Company applied for property preservation to ensure the accomplishment of its claims. However, its claims were rejected in full. Therefore, Zhonggang Company should be found at fault in applying for property preservation. However, Yuanyuan Company asserted that Zhonggang Company shall be responsible for the damages arising from the freezing of the right to bareboat charter. It shall produce evidence to prove the amount of damages suffered by it from such freezing. Claims that cannot be supported by evidence or are inconsistent with the facts are not grounded.

In the present case, due to the lack of qualification, freezing the right of bareboat chartering would impede the operation of the Vessel "Zhonggang Yongshun". However, prior to the order of preservation, the vessel had already been retained on lien by Reef Company. The damages due to the stop of operation had already occurred. The situation continued until the removal of preservation and did not create or cause more damages to Yuanyuan Company. Therefore, there would be no causal link between the property preservation and the consequence. Yuanyuan Company asserted that it had applied for maritime compulsory order according to which it could provide guarantee to retrieve the vessel. Due to the preservation of the vessel, it had to withdraw the application. As such, a causal link should be found. However, the application for compulsory order was withdrew prior to the order of preservation. Therefore, there is no ground for Yuanyuan Company's assertion. Besides, the compulsory order was sought against Zhonggang Company. Should the application be granted, Reef Company could still object on the ground of its right of lien and thereby preclude the execution of the compulsory order. The removal of lien by providing guarantee should be conducted on the basis of negotiation with the counterparty, failing which shall be conducted pursuant to a new legal proceeding other than the compulsory order sought. Therefore, considering that other measures were far from being taken, and the uncertainty in the future process, it would not be sufficient enough to link the damages caused by the stop of operation with the measure of property preservation. On the other hand, as asserted by Yuanyuan Company, it could provide guarantee for both the compulsory order and the removal of lien, and the guarantee required by the court was greatly higher than that for removing the lien. Based on the disputes between the parties, the arbitral award stated that there was no objection in respect of the termination of contract and the return of the vessel. The subject of dispute includes the deposit as well as a certain amount of damages claimed by the parties respectively. As such, upon the notice of the withdrawal of the application for compulsory order and the notice of property preservation, Yuanyuan Company could use the guarantee in applying for compulsory order to remove the property preservation. After the counter-claims of Zhonggang Company are secured, Yuanyuan Company could provide guarantee for Reef Company through the corresponding procedure and retrieve the vessel accordingly. As such, it cannot be grounded that the cessation of operation of the vessel was caused by the freezing of the right of bareboat chartering. Accordingly, the fee arising from the security of the vessel was prior to the preservation measure. The preservation was merely designated for the rights upon the vessel, other than the actual possession and control of the vessel. Therefore, there would be no causal link between the security fee and

the measure of preservation.

In respect of the evidence of the amount of damages, Yuanyuan Company asserted that due to the cessation of operation, the Vessel "Zhonggang Yongshun" could not carry the cargos of Fude Company. Due to the lack of transport capacity, it had to hire another vessel to perform its affreightment contract with Fude Company, and thereby suffered from damages. However, according to the "Affreightment Contract of Hazardous Chemicals, the affreightment of vessel occurred prior to the measure of preservation. Yuanyuan Company did not provide further explanation in respect of this situation. Thus, it remains unclear of the breakdown of the damages it claimed. Besides, the vessel could only be operated after it has been bareboat chartered. Losses suffered during the term for arranging the bareboat charter are not attributable to the wrongful preservation, and thereby shall be deducted accordingly. Yuanyuan Company did not provide explanation or submit evidence for the term required for arranging bareboat charter. Therefore, the damages in respect of the stop of operation of the vessel cannot be ascertained.

[Notes]

This case provided guidance for the judicial practice in ascertaining the damages in wrongful detention of vessels.

Wrongful detention of vessels normally would cause harmful consequences; and the aggrieved party could, on this ground, claim for damages. However, in the present case, though there was wrongful application for preservation, the court did not affirm the Defendant's liability of tort. The reasons are as follows:

Wrongful application of preservation is a tort liability, of which the prerequisites consist of wrongful act, fault, causation between the wrongful act and the consequences, and consequences. The issues at hand are the causal link between the wrongful act and the consequences, and the existence of harmful consequences. In respect of the first issue, the court reasoned from five aspects of the causal link, i.e. that the preservation did not create or cause more damages, that there was no sufficient ground for the forfeiting of compulsory measures due to the measure of preservation, that the losses arising from the stop of operation of the vessel cannot be attributed to the measure of preservation due to that the corresponding measure are far from being taken and the uncertainty of future process, that the Plaintiff could have restored the operation of the vessel through other methods, and that there is no causal link between the security of the vessel and the measure of preservation. Thus, it is clear that there is no causal link between the wrongful application for preservation and the harmful consequences.

In respect of the second issue, the Plaintiff merely submitted the condition of another vessel "Ancheng" as evidence, which cannot prove the actual breakdown of damages. The vessel could only be operated after the arrangement of bareboat charter. Therefore, losses suffered during the term of the arrangement of bareboat charter, which are irrelevant with the wrongful preservation,

should be deducted. However, Yuanyuan company did not provide explanation or evidence in respect of the term for the arrangement of bareboat charter. The court is correct to find that the amount of damages cannot be ascertained.

From the decision, not all of wrongful preservation would result in the liability of damages. For such cases, the prerequisites of tort liability should be analyzed in determining the existence of liability and the evidence in respect of the amount of damages should be produced.

II. Case Analysis of CMAC

A. Dispute of Cargo Salvage Contract

[Key Issues]

1. Standard on related contracts and the conduct of performance thereof;
2. Effect of the effective judgement on the case.

[Facts]

On March 3, 2011, the outsider, a company incorporated in Yantai City, insured 18 rolls of cold rolled steel with "Domestic Waterway and Land Transportation Insurance". On March 5, the 18 rolls of cold rolled steel were loaded on Z Ship, which rolled over while loading other cargos and resulted in, in addition to the death of a worker, the 18 rolls of cold rolled steel sinking into the sea. On March 9, the Claimant, on behalf of the insured, the company incorporated in Yantai City, entered into a Cargo Salvage Contract with the Respondent, providing that the Respondent shall salvage the 18 rolls of cold rolled steel. As consideration, the Claimant shall make payment of RMB 470,000 to the Respondent. The Claimant made full payment on May 11, 2011.

Upon the payment of insurance compensation and obtained the right of subrogation, the Claimant instructed its subsidiary to file a lawsuit as the plaintiff against the shipowner of Z Ship, i.e. the party responsible for the accident, and Port of Dalian claiming for the depreciation of cargo and salvage fees etc. The Claimant acknowledged during the course of trial that the Respondent had entered into a "Salvage Contract" with Port of Dalian in respect of the salvage of the worker killed during the accident. The court decided that the conduct of salvaging the cold rolled steel of the Respondent is the performance of the "Salvage Contract" and has received the corresponding salvage fee from Port of Dalian. The plaintiff made payment of RMB 470,000 as salvage fee, which lacks the corresponding factual basis. The Claimant appealed to the Supreme Court of Liaoning Provision. The judgement of the first instance was affirmed.

Based on the judgement, the Claimant claimed that the Respondent did not actually perform the "Cargo Salvage Contract". The Respondent's conduct of salvage was the performance of the

"Salvage Contract" concluded with Port of Dalian. As the "salvage" entrusted by Port of Dalian included the salvage of cargos, Respondent's salvage of the 18 rolls of cold rolled steel was performed against the payment of Port of Dalian. Therefore, the Respondent shall not be entitled to receive payment under the "Cargo Salvage Contract", and therefore, shall return the payment in the amount of RMB 470,000.

[The Award]

In accordance with the "*CMAC Arbitration Rule*", the tribunal reached an award on March 4, 2016, and ruled that the Respondent shall return the salvage fee in an amount of RMB 209,000 and the interest (per the corresponding loan interest published by the People's Bank of China) accrued beginning from May 11, 2011 till the date on which the salvage fee is returned.

[Opinions of the Tribunal]

First, the tribunal analyzed the subject matter of arbitration and the arbitrability thereof. From the conclusion of the "Cargo Salvage Contract" to the case in respect of the dispute involving the operation at port tried by Dalian Maritime Court, the parties were not in dispute in respect of the fact that the Respondent had performed the "Cargo Salvage Contract". During the trial of the first instance, the Claimant submitted clear response opinions that the Respondent had performed the "Cargo Salvage Contract" and appealed on the ground thereof. As such, the basis for the Claimant's request for arbitration is not its dispute with the Respondent, but instead, that the facts found by the court are inconsistent with the understanding of the parties to the "Cargo Salvage Contract". Due tothe fact that the findings of the court will affect the determination of whether the "Cargo Salvage Contract" was actually performed, and in turn will affect the contractual relationship between the parties, the Claimant is entitled to request for arbitration in accordance with the arbitration agreement contained in the "Cargo Salvage Contract".

Second, the tribunal analyzed on the first point of dispute that whether the "Cargo Salvage Contract" had been performed. Based on the written documents and the finding in arbitration, the tribunal held that the "Cargo Salvage Contract" had been concluded after the occurrence of the accident and had manifested the true expression of intent of the parties. Before the execution of the contract, the Respondent, as the salvage operator, concluded the "Salvage Contract" with Port of Dalian. In the "Salvage Contract", the primary obligation of the Respondent was corpse salvage; whereas the clearance of cargo was the ancillary obligation. The tribunal held that there was no law prohibiting the use of ancillary obligation in a contract as the primary obligation of another contract concluded with a third party in return of payment. Therefore, the "Cargo Salvage Contract" was duly formed and was valid.

After the execution of the "Cargo Salvage Contract", the Respondent, on March 9 and 10, 2011, salvaged 10 rolls of cold rolled steel from Z Ship and stored the cargos in port of Dalian. The cargos were sold by the Claimant and transported out of the port. In respect of the rest 8 rolls of

cold rolled steel, the Respondent admitted that they were salvaged by another company. On May 11, 2011, upon the delivery of cargos to the buyer, the Claimant paid to the Respondent a salvage fee of RMB 470,000. Therefore, the tribunal found that the Respondent partially performed the "Cargo Salvage Contract". Pursuant to the pricing clause contained in the contract, the salvage fee in respect of the salvage of the 10 rolls of cold rolled steel shall be RMB 261,000.

Third, the tribunal analyzed the related contracts and the conduct of performance thereof. Though the scope of dispute submitted for arbitration was limited to the "Cargo Salvage Contract" between the Claimant and the Respondent. However, based on the evidence produced by the Claimant, there were two other contracts in relation to the salvage after the roll-over accident. One is the "Salve Contract" concluded between the Respondent and Port of Dalian; and the other one is the "Ship Salvage Contract". The tribunal held that the three contracts were independent contracts, and were entered into for purposes of cargo salvage, personnel salvage and ship salvage respectively. Though all the three contracts involved the salvage of the cargo at issue, from the purpose of contract, only the "Cargo Salvage Contract" was designated for the salvage of the cargo at issue. In respect of the other two contracts, the salvage of cargos was only a measure taken to fulfill their respective contract purposes and was ancillary obligations. The main considerations in the "Cargo Salvage Contract" were cargo salvage and salvage fee. The standard for determining the performance of the "Cargo Salvage Contract" was that whether the 18 rolls of cold rolled steel were successfully salvaged.

At last, the effect of the judgement over this case. The tribunal noticed that the reasons and basis of the Claimant's request for arbitration were the facts found by the judgement. However, the Claimant did not agree with the finding of the court, which could be proved by the Claimant's defenses and its conduct of appealing. Furthermore, the trial at court was in respect of disputes of port operation; and the court reached a presumption that "the Respondent performed the 'Salvage Contract'". This presumption is contrary to the finding of the tribunal, which is obliged to render an award on the basis of the facts found in this case.

The tribunal held that the Respondent partially performed the "Cargo Salvage Contract", for which the salvage fee shall be RMB 261,000. As such, the rest 209,000 and the interests thereof shall be returned.

[Comment]

This case provides a meaningful reference in dealing with related contracts. Meanwhile, the effect of the facts found by the effective judgement of the court on the fact finding in arbitration needs to be noticed.

Related contracts are the contracts entered into by the relevant parties in the course of the development of an event. These contracts are independent from each other in form but are related in their contents. The "Cargo Salvage Contract" and the "Salvage Contracts" are two related

contracts. The “Salvage Contract” was concluded by the Respondent and Port of Dalian, of which the primary obligation was corpse salvage, and the ancillary obligation was cargo clearance. The “Cargo Salvage Contract” was concluded by the Claimant and the Respondent, where the primary obligation of the Respondent was cargo salvage. The two contracts have different contracting parties, but overlap in respect of their contents, and therefore are related contracts.

The dispute in this case was that the Claimant asserted that the Respondent did not actually perform the “Cargo Salvage Contract”, but instead conducted the salvage of cargos in performing the “Salvage Contract” with Port of Dalian. The key in understanding this question is the delivery of cargos. Though, the Respondent conducted the same salvage, it could only deliver the cargos to one entity. Basing on the fact that the Claimant ultimately sold the cargos, it could be found that the Respondent delivered the cargo pursuant to the contract. Therefore, it would be difficult to find that the Respondent did not actually perform the “Cargo Salvage Contract”.

In respect of the rights and obligations contained in the two contracts, the Respondent is obliged to deliver the steel to the Claimant under the “Cargo Salvage Contract”, and to the contrary, would not be obliged to make delivery to Port of Dalian should the salvage of cargos is considered as ancillary obligations under the “Salvage Contract”. There would be no conflict between the contracts under this circumstance. Otherwise, the Respondent’s delivery of cargos to the Claimant would constitute a breach of contract against Port of Dalian. Of course, whether the obligation is ancillary obligation is subject to the production of evidence, to which the court and the tribunal were divergent. This leads to another issue in this case, which is that the effect of effective judgements on arbitration.

Under the current Civil Procedure Law, facts already been ruled on would not be required to be proved for the second time. Facts already been ruled on refer to the facts found in the effective judgements by the court. To manifest the unity of judicature, and the finality of litigation, facts found in effective judgements normally would not subject to argument. If in a subsequent litigation, the same fact in dispute arises again, unless the law provides otherwise, the court shall not rule against the finding of facts in the former litigation. Article 75 of the Opinions of the Procedure Law provides, “*[T]he parties concerned need not to assume the burden of proof for the following facts: …(4) Facts affirmed in the judgment of the people's court that has taken effect…*”, which was reiterated by the Supreme People’s Court in the “*Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings*”. However, whether the facts found in the course of litigation should also be recognized in arbitration is a pending issue needs to be solved. Article 7 of the Arbitration Law provides, “*[D]isputes shall be fairly and reasonably settled by arbitration on the basis of facts and in accordance with the relevant provisions of law.*” Pursuant to this provision, arbitration shall be conducted on the basis of facts and the law. The scope of application and the effect thereof, and whether arbitration shall follow the rules applied in litigation are not covered by the Arbitration Law. Therefore, tribunal may take the facts found in litigation as reference instead of automatically recognizing these facts. In this case, the tribunal held that the litigation brought in court was in respect of the dispute of port operation, and the conclusion drawn

by the court that the Respondent performed the "Salvage Contract" was merely a presumption. This presumption differed from the facts found in the arbitration, on which the tribunal shall rely on in issuing an award. This further proves that the arbitral tribunal does not automatically recognize the facts found in litigation, but instead, shall base on the facts found in arbitration and make a ruling.

B. Case on Charterparty Dispute

[Issues]

1. Who shall be responsible for the wages of the crew members;
2. Whether there were arrears of wages of the crew members.

[Facts]

On October 29, 2014, the Claimant and the Respondent entered into a charterparty (hereinafter the "***Charterparty***") providing for the Respondent's demise chartering of A Ship, under which the charter period started from November 1, 2014 to October 31, 2015. The charter hire was RMB 54,155, and shall be paid before the 5th day of each month. After the execution of the Charterparty, the Claimant delivered A Ship to the Respondent at Port of Jinzhou as agreed. On October 31, 2015, when the Claimant requested for the return of the ship, 11 crew members including the captain and chief engineer refused to leave the ship and claiming for the wages in arrears. The Respondent issued a receipt of loan to the crew members on November 13, 2015. On November 15, 2015, considering that the crew members refused to leave the ship, the Respondent provided to the Claimant a warranty, promising to bear all the costs and expenses. On October 19, 2015, the Claimant made payment of the wages in arrears in an amount of RMB 402,332. However, the Respondent refused to compensate the Claimant against the payment of wages. Therefore, the Claimant submitted a request for arbitration at CMAC. During the course of arbitration, the Claimant received a subpoena from Dalian Maritime Court, in respect of the payment of RMB 451,712.80 against the fuels provided to A Ship by a company incorporated on Hu Lu Island during the period of charter. Dalian Maritime Court ruled that the Claimant shall make payment to the company incorporated on Hu Lu Island a payment in the amount of RMB 411,626.80.

The claims of the Claimant were:

a. The Respondent shall compensate the Claimant against the payment of wages in the amount of RMB 402,322;
b. The Respondent shall compensate the Claimant against the payment of fuels in the amount of RMB 451,712.80;
c. The Respondent shall bear the fees of this arbitration.

The Respondent's defenses were as follows:

1. The Payment of Wages

First, the Respondent is not a party to the Charterparty. As demonstrated in the Charterparty and the request for arbitration, the Respondent concluded the Charterparty in the name of a company incorporate in Shanghai. Therefore, the Shanghai company, instead of the Respondent, is the charterer. An individual cannot become a party to the Charterparty. According to the Article 14 of the Charterparty, the Charterparty shall be executed by the application of both parties' corporate seals, which cannot be accomplished by an individual. Besides, page 4 of the judgement issued by Dalian Maritime Court wrote the "operator"; whilst page 9 of the judgement wrote that "the evidence at hand is not enough to prove the existence" of bareboat chartering arrangement. Though the validity of the arbitration agreement has been affirmed by Shanghai Maritime Court, the validity of arbitration agreement is not equivalent to the validity of other agreements due to the severability rule.

Second, the Claimant did not make payment for the wages. On November 13, 2015, the Respondent, on behalf of the Shanghai company, issued a receipt of loan to the crew members promising to repay the wages in arrears within two months. The crew members were in active cooperation when leaving the ship. The refusal to leave the ship constitutes significant incidents on ship, the occurrence of which cannot be proved by the logbook provided by the Claimant. At the time of the payment of wages, which was November 19, 2015, the A Ship had already arrived at Port of Bayuquan. Furthermore, the payment of more than 400,000 RMB in cash is impossible in corporate acts and is not reasonable. The Claimant failed to provide any record of withdrawal of cash. There is no evident proving that the Claimant actually made payment of the wages to the crew members. Neither was there any evidence showing the emergency of the situation which requires the payment on account.

2. The Charge of Fuels

There is no evidence proving that the Respondent has the obligation to bear the charge of fuels. The fact that the Jinzhou company provided A Ship with fuels is not relevant in this case and is merely the business activities between the Jinzhou company and the Shanghai company. The judgement itself cannot prove that the Respondent has actually borne the charge of fuels. Furthermore, the judgement at hand is a first-instance judgement, which has not been appealed by the Claimant. The Claimant forfeited its rights and shall take the corresponding consequences. The number of fuel charges found in the judgement numbered "(2016) Liao 72 Min Chu No.159" made by Dalian Maritime Court is apparently inconsistent with the number in this case.

[The Award]

1. The Respondent shall compensate the Claimant in respect of the wages of crew members;
2. The Respondent shall compensate the Claimant in respect of the fuel charges;

3. Other claims submitted shall be rejected;
4. The Respondent shall bear the fees of this arbitration.

[Opinions of the Tribunal]

The tribunal finds that the Charterparty has provided clearly for the "Shipowner" and it was executed by applying the corporate seal of the Respondent, instead of that of the Shanghai company. During the performance of the Charterparty, the Respondent in the name of itself issued the receipt of loan and the warranty. The facts manifest that the Respondent, at the execution of the Charterparty and during the performance thereof, was aware of and acknowledged its status as the charterer under the Charterparty. Based on the facts at hand, it cannot be proved that the Shanghai company signed the Charterparty. Neither could it be found that the Respondent executed the Charterparty on behalf of the Shanghai company.

In respect of the dispute over the wages of crew members, there are four questions at issue, i.e. that who shall bear the wages of crew members, that whether there were arrears of wages, that whether the Claimant made payment of the wages on the Respondent's account, and that whether such payment on account could be compensated.

1. There was no dispute over the first two questions. The Article 2 of the Charterparty provides that the charter period starts from November 1, 2014 and ends on October 31, 2015. Article 3 provides that the port to return the ship was Port of Jinzhou. Section 2, Article 8 provides that the Respondent shall be responsible for all the expenses, costs and wages of crew members during the charter period. Section 2, Article 8 provides that the Respondent shall hire qualified crew members and provide them with training and management correspondingly. Therefore, the tribunal found that the wages of crew members shall be borne by the Respondent and that there were arrears of wages.

2. In respect of the issue that whether the Claimant bore the wages on Respondent's account, the tribunal notices that the Respondent issued 13 receipts of loan, of which the authenticity was not objected to by the Respondent. The crew members produced 13 receipts of payment, which contained full signatures. The names of crew members and the amounts owed could match the name and amount contained in the receipts of loan. The Respondent also issued a warranty of which the authenticity was not objected to by the Respondent. All the evidence taken together could preliminarily prove that the Claimant made payment of the wages on Respondent's account.

3. In respect of the compensation against all payments made on account, the tribunal notices that the Charterparty provides for the timely return of the vessel. Section 2 Article 9 of the Charterparty provides, "*[A]part from the hires, all other fees incurred during the management of the vessel by Party A shall be borne by Party B*". According to the tribunal, the Respondent failed to arrange for the evacuation of the ship, which would interfere the shipowner's use of

the ship and would cause losses. According to the evidence at hand, the date of payment was 20 days after the date to return the ship. The Claimant was entitled to take actions to mitigate its losses by making payment of the wages on Respondent's account to the crew members in order for them to leave the ship. As asserted by the Respondent, claim for wages cannot be transferred as it is enjoyed by the particular individual. However, it would not be the case, as ruled by the tribunal, if the actions taken by the Claimant were merely a mitigation of loss. Therefore, the assertion of the Respondent is not accepted.

In respect of the charge of fuels, the tribunal found that the charges were incurred during the period of chartering, and that the fact that the Respondent did not pay for the use of fuels caused losses to the Claimant. As such, the Respondent shall take the corresponding responsibility.

[Comments]

The issues are that whether the Respondent is a party to the Charterparty, that whether the Claimant made payment for the wages on Respondent's account, and that which party shall be responsible for the wages and fuel charges. This case has meaningful effect for tribunals in the application of evidence and the determining the burden of proof in demise charter disputes.

Article 144 of the "*Maritime Law of the People's Republic of China*" provides, "A bareboat charterparty is a charterparty under which the shipowner provides the charterer with an unmanned ship which the charterer shall possess, employ and operate within an agreed period and for which the charterer shall pay the shipowner the hire." Considering the very nature of bare boat charter, it is normally provided in the charterparty that all fees and expenses, including fuels charges, wages of crew members, port fees, supplies and other necessary fees, shall be borne by the charterer. Should the charterer violate the corresponding agreement which causes losses to the lessor, the charterer shall take the responsibility of the breach of charterparty. In respect to this particular issue, Section 1, Article 149 of the "*Maritime Law of the People's Republic of China*" provides, "*[D]uring the bareboat charter period, if the charterer's possession, employment or operation of the ship has affected the interests of the shipowner or caused any losses thereto, the charterer shall be liable for eliminating the harmful effect or compensating for the losses.*"

In the present case, Section 2, Article 8 of the Charterparty provides that the Respondent shall be responsible for all the expenses and wages of crew members, and shall be responsible for all the licenses for the operation of the vessel during the charter period. According to this provision, there should be no doubt that the fuel charges, in together with the wages of crew members shall be borne by the Respondent. The Respondent thereafter challenged the claim that the Claimant made payment for the wages on Respondent's account, and asserted that the Claimant did not actually make such payments.

In civil procedure, upon determining the object to be proved, the next question would be the burden of proof. The responsibility of proof, i.e. the burden of proof, is usually referred to as "the

responsibility to produce evidence", which bears the meaning that for the avoidance of unfavourable ruling, a party is obliged to produce evidence in respect of its claims. When the facts supporting the claims are not clear, the party having the burden of proof would have to take the consequence that the related facts cannot be found by the court. Section1, Article 64 of the Civil Procedure Law provides, "*[A] party shall be responsible for providing evidence in support of his or her allegations.*" Article 2 of the "*Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings*" introduced a detailed provision that "*[A]ny party to a civil case shall be responsible for producing evidence in support of the facts on which its own claim(s) or the facts on which its defense to the claim(s) of the other party are based. Where no evidence is produced or the evidence produced is insufficient to support the claims made, the party that bears the burden of proof shall bear any unfavorable consequences.*"

By reference to the rules in civil procedure, Section 1, Article 43 of the Arbitration Law provides, "*[T]he parties shall produce evidence in support of their claims*", which is identical to the provision in the Civil Procedure Law. In the case at hand, the Respondent alleged that the Claimant did not actually pay for the wages of crew members, but failed to produce any evidence to overturn the evidence produced by the Claimant. The Respondent suspected that whether the receipt was provided by the crew members, but failed to produce any evidence proving that the receipts are forged. The Respondent challenged the claim that the Claimant paid the wages to crew members in cash, and requested for the provision of the slip of withdrawal. We could conclude from the conducts of the Respondent that all the allegations and challenges of the Respondent were based on suspicions without the support of evidence. Therefore, the Respondent would have to take the unfavourable consequence that the tribunal admitted the evidence produced by the Claimant.

C. Case on Shipbuilding Contract Dispute

[Facts]

In August 2011, the Claimant and the Respondent entered into a "Shipbuilding Contract". In September 2012, upon amicable negotiations, the Claimant and the Respondent concluded a "Memo" in respect of the construction of the bulk carrier. In July 2013, the Claimant sent to the Respondent a "Notice of Termination", notifying the Respondent of its exercise of the right of termination under the "Shipbuilding Contract", claiming for the return of the payment for shipbuilding and requesting the Respondent to take the liability for breach of contract. According to the Claimant, the Respondent failed to perform the contract as agreed, which constituted material breach, and thereafter caused enormous economic losses to the Claimant.

The tribunal rendered an award on September 11, 2014, supporting the termination of the "Shipbuilding Contract", the return of the payment for shipbuilding in the amount of RMB 59,892,000, and the payment of the interests accrued thereof beginning from the November 11, 2011.

On July 16, 2015, pursuant to the arbitration agreement contained in the "Shipbuilding Contract", the Claimant submitted a request for arbitration to CMAC Shanghai Sub-Commission, claiming for the return of the payment for shipbuilding in the amount of RMB 22,000 and the interests accrued thereof, and the interest loss, which shall be calculated from July 13, 2013 at an interest rate of 1% per month, in respect of the RMB 59,892,000.

[Issues]

Whether the request for this arbitration violates the principle of "non bis in idem".

[The Award]

The request for arbitration was refused.

[Opinions of the Tribunal]

First, in the award dated 2014, the tribunal already found that the Claimant had made payment for shipbuilding to the Respondent. Second, in the arbitration dated 2013, the tribunal had asked whether the Claimant wanted to change its request for arbitration, but did not receive any clear response from the Claimant. The tribunal did not receive any document in respect of the change of request for arbitration or any additional payment of arbitration fees for the increase of the Claimant's claims. Therefore, the Claimant's claim did not change. The parties are entitled to dispose of, including recognizing, forfeiting and modifying, its claims. As such, there would be a basis to believe that the Claimant forfeited its right of claims. Pursuant to the Claimant's claim, the tribunal held that "the Respondent shall return the payment for shipbuilding and the interests accrued thereof beginning from November 10, 2011." This fact was also affirmed by the Claimant. Therefore, the Claimant in this arbitration cannot exercise its right of claims under the principle of "non bis in idem".

[Comments]

This case concerns the issue of repeated request for arbitration. In practice, due to the lack of the knowledge of law, the lack of evidence and the errors in calculating damages, there sometimes would be the inadequacy of claims in arbitration. Therefore, some of the entities involved would try to submit the dispute for arbitration a second time. This case is essential in understanding the principle of "non bis in idem" and the finality of arbitration.

Article 9 of the Arbitration Law provides, "*[T]he system of final and binding arbitral award shall apply to arbitration. After an arbitral award is rendered, where the parties apply for arbitration or initiate an action to the people's court in respect of the same dispute, an arbitration commission or a people's court accept the action. If the arbitration award is canceled or is not enforced as rendered by a people's court in accordance with the law, the parties may, in accordance with a*

new arbitration agreement between them in respect of the dispute, apply for arbitration or initiate legal proceedings with the people's court." This provision established the finality regime of commercial arbitration in China, which is also considered as the source of the "non bis in idem" principle in our country. The "non bis in idem" principle contributed to the one-time resolution of disputes, and the contents and procedure of which have become the "bible" in interpreting the validity of arbitration agreements in modern commercial arbitration. Therefore, to increase its efficiency, maintaining the quasi-judicial and mandatory function, commercial arbitration shall avoid repeat trial of the same dispute, which is also the core idea of the "non bis in idem" principle.

According to Article 9 of the Arbitration Law, repeated arbitration refers to the arbitration requested in respect of the same dispute after an arbitral award is rendered. However, it is not clear what does "the same dispute" mean. In commercial arbitration theories, the principle of "non bis in idem" requires three same objects, which are the entities involved, the subject matter of arbitration and the reason for arbitration. The same entities involved refers to that the two arbitrations involve the same parties or same party relations. Determining whether the reasons for arbitration are the same is based on that whether the parties in the subsequent arbitration could raise different legal facts instead of producing new evidence or the submitting new arguments. As for the subject matter of arbitration, it is hotly disputed without reaching a consensus. The most widely recognized opinion is that the subject matter of arbitration shall be determined from the aspect of a combination of substance and procedure, i.e. the subject matter of arbitration is the request submitted to the tribunal for the determination of a certain legal status or a substantive legal effect. From the perspective of substance, the subject matter of arbitration is the request to obtain a specific legal status or effect. From the perspective of procedure, the subject matter of arbitration is the claims submitted to the tribunal.

In the present case, the parties involved and the legal relationship between them are the same. The Claimant failed to submitted different legal facts in the latter arbitration. Therefore, the parties involved and the reason for arbitration are the same in the two arbitration procedures. In respect of the subject matter of arbitration, either following the substance theory or the procedure theory, the two arbitrations involve the same subject matter. Therefore, the second request of arbitration constitutes repeat arbitration, and violates the principle of "non bis in idem". Upon the rendering of an arbitral award, the award would become binding immediately. As such, the parties shall not submit the same dispute for arbitration or litigation. Should repeat arbitration is allowed, it would impair the efficiency, authority and finality of arbitration. Another lesson we can learn from this case is that to fully achieve their benefits, the parties need to treat their claims in arbitration with more discretion.

D. Case on Ship Repair Contract

[Facts]

On June 3, the Claimant and the Respondent communicated in respect of the repair of A Ship

through e-mails. On September 24, 2015, A Ship entered into the repairing yard. Because that the ship stayed in the yard for too long, the Claimant had urged the Respondent to make clear the parts subject to repair. However, the Claimant received no reply. On December 30, 2015, the Claimant issued the first bill of fees which was accepted by the Respondent with the application of the ship's seal. The bill shows that from September 26 to December 31, 2015, the ship berthed in the yard for 97 days with a fee of USD 900 per day. During its berth, there was 14 times of transfer of berth, which involved towage fee, pilotage fee, lifting appliance fee and electricity fee which shall be calculated as agreed. The total fee was USD 254,000. At the same time, the Claimant issued an invoice to the Respondent, which was accepted by the Respondent by applying the ship's seal. The invoice stated that the USD 254,000 shall be paid in full before January 15, 2016.

On January 9, 2016, the Claimant informed the Respondent that Ship A had berthed for a long period without specifying the need of repairing and had caused the Claimant huge amount of losses. The Claimant requested the Respondent to make clear the resolution to the situation before January 15, otherwise the it would take legal actions, including adjusting the price. However, the Respondent only replied that it had notified the mortgage bank and other related parties and will inform the Claimant once there is any update. On January 20, 2016, the Claimant informed the Respondent that "it will increase the price for berth to USD 4500 per day and will reserve the right to claim for damages against the ship owner."

On April 20, due to that the Respondent failed to make payment for the fees agreed, the Claimant issued a notice of lien and retained possession of Ship A.

On May 18, 2016, the Claimant issued the second bill of fees in respect of Ship A, under which the berth fee was increased to USD 2,588 per day from January 15, 2016. However, the Respondent only applied the ship's seal on a list which includes the quantity, days, times, hours and KWH without specifying the unit price, the amount of each fee, or the total amount of all the fees.

The Claimant submitted its request for arbitration claiming for the repairing fees and the interests accrued thereof, and that the Respondent shall bear the fees for arbitration and retaining of attorney.

[Issues]

1. Whether the Claimant could unilaterally increase the price for berth;
2. Whether the Claimant could ask for the agreed payment before the time limit for payment has expired.

[Comments]

Due to the fluctuation of the shipping market, lots of shipping companies were facing with difficulties in business, which resulted in the increase of disputes. This case is a good example of the situation. The case involves two issues: (a) contract modification and interpretation, and (b)

whether the conducts of the Respondent constituted anticipatory breach of contract.

In terms of the first issue, contracts are agreements reached on the basis of the parties' mutual consents, which, without mandatory rules or agreed conditions, shall not be unilaterally modified. The Claimant produced evidence to demonstrate the reasonableness of its claim for berth fee. Even the Claimant succeeds in proving the reasonableness, it cannot unilaterally change the terms of the berth fees. If the Claimant believes that it had suffered from losses, it should claim for damages. Meanwhile, the Claimant asserted that though without explicit agreement, the berth fees of USD 900 per day was the price under the condition that Ship A is actually going through repairing; and if there is no repair of Ship A, the Claimant was entitled to adjust the terms for berth fee. This is an issue of contract interpretation. The rule of contract interpretation purports to explore the true intent of the parties, which can be divided into inner intent and effective intent. According to the rules of both the civil law system and common law system, the contract interpretation rule is designated for the effective intent of the parties. Only in circumstances where there is no intent conferred by the parties, or where one party ought to know the intent of the other, the inner intent will come into play. In the present case, the Claimant's claims are based on the condition that the Respondent has correct interpretation of the Claimant's intent; otherwise the Claimant's inner intent shall not be considered.

In terms of the second issue, anticipatory breach of contract is originated from common law, and was taken by reference by the Contract Law. Article 108 of the Contract Law provides, "*[W]here either party to a contract indicates expressly or by conduct that it will not perform the contractual obligations, the other party may hold the party liable for breach of contract before the expiration of the time limit of the performance.*" The anticipatory breach of contract regime in China includes not only explicit but implied anticipatory breach. In the present case, the conducts of the Respondent, including long-term berth without repairing, postponement of the Claimant's requests and arrears of wages of the crew members which led to judicial detention of the ship, constitute the situation that "by conduct that it will not perform the contractual obligations", and therefore, constitute anticipatory breach of contract. The Claimant shall be entitled to request the Respondent to make payment of the corresponding fees before the time limit expires.

E. Case on Contract of Affreightment

[Facts]

Claims of the Claimant:

On December 18, 2014, the Claimant and the Respondent concluded a "BENZENE Contract of Affreightment" (hereinafter the "***COA***"), which provides for the transportation of bulk liquefied chemicals during January 1 to December 31 of 2015. The loading port was Port A; and the discharging port was Port B.

On July 27, 2015, upon the instruction of the Claimant, the Respondent dispatched Ship H to Port A for loading of cargos. The loading period agreed was August 5 to August 7 of 2015. Ship H arrived at Port on 23:30 of August 3, 2015 and was ready for loading. At the meantime, the Claimant has been keeping in touch with the port agent and the broker for the preparation of loading of cargos and was informed that the cargos would be ready between August 5 and August 6 of 2015. However, the Claimant received a notice on August 5 that the Respondent was cancelling the voyage. The Claimant alleges that it has completely and properly performed its contractual obligations, and that the Respondent has committed material breach of contract. Therefore, the Claimant requests that:

1. the Respondent shall compensate the Claimant against fuel charges, wages of crew members, fees for cleaning the cabin, insurance premium, and loss of supplies;
2. the Respondent shall compensate the Claimant against the loss for detention;
3. the Respondent shall compensate the Claimant against the attorney's fees.

Defenses of the Respondent:

First of all, during the period of loading, without the instruction of cancelling the voyage, the Claimant unilaterally instructed the ship to leave the port in advance and cancelled the voyage, which constituted breach of contract, and therefore shall take the unfavourable consequences. There was no breach of contract on the side of the Respondent. Second, the requests of the Claimant lack factual and legal basis.

[Issues]

1. Whether the COA was legitimate and valid;
2. Whether there was a breach of contract of the Respondent;
3. How to determine the amount of actual loss.

[Comments]

In respect of the first issue, on December 18, 2014, the Claimant and the Respondent entered into the COA, which provides for the transportation of bulk liquefied chemicals (including but limited to BENZENE) in the quantity of 3000t to 6000t per month. The Claimant, as the carrier, shall provide at least one voyage with a cabin fit for at least 3000t of cargos each month. The loading port was Port A; and the discharging port was Port B. The freight shall be determined based on the port for discharging. The COA manifests the parties' true intents; and the contents of which is not in violation of any mandatory law or regulations of China. Therefore, the COA was legitimate, valid and binding.

Regarding the second issue, the dispute is whether there was breach of contract of the Respondent. The Claimant asserted that after Ship H arrived at Port of Qinzhou, the Claimant had been in

contact with the port agent and the broker for the preparation of cargos. On August 5, 2015, the Claimant received the notice transferred by the broker that the voyage was to be cancelled due to the delayed preparation of cargos by the Respondent. Therefore, the Claimant alleged that the Respondent has committed breach of contract and shall compensate the Claimant for damages and losses. The Respondent, however, asserted that the loading period specified in the COA was August 5 to 7 of 2015. Though Ship H arrived at the loading port as agreed, it left the port before August 5. The Respondent had never dispatched or authorized to dispatch the notice to cancel the voyage. As such, the Claimant, in the absence of the notice of cancelling the voyage delivered by the Respondent, instructed the ship to leave the port of loading and unilaterally cancelled the voyage, which constituted a breach of contract, and therefore shall take the unfavourable consequences. Where there are disputes in respect to the performance of contract, the burden of proof shall lie with the party bearing the obligation to perform. The broker is a closely related party and plays a pertinent role in this case. According to the notarial deed, the broker sent emails for several times. And upon searching on the "National Enterprise Credit Information Publicity System", the broker, instead of being an unrelated third party as alleged by the Respondent, is closely related to the parties, by which the evidence produced shall be given credibility. Furthermore, concluding charterparties through brokers is in conformity with the shipping practice. The "Consulting Agreement", "Declaration" issued by the broker, and the "Notarial Deed" produced by the Claimant satisfies standard of authenticity, relevance and legitimacy, and forms a complete evidence chain. The Respondent did not produce any evidence which would prove otherwise. Therefore, the Claimant had fulfilled its burden of proof. As for the Respondent, the only evidence produced was a notice issued by a third party specifying that the cargos were ready for loading. The Respondent did not submit any evidence proving that it had notified the Claimant that the cargos were ready for loading. As such, the Respondent failed to prepare the cargos according to the contract and therefore, committed breach of contract.

In respect of the third issue:

1. Pursuant to Article 107 of the Contract Law, "*[W]here a party to a contract fails to perform the contractual obligations or its performance does not comply with the terms of the contract, the party shall bear liabilities for breach of contract such as continuing its performance of the obligations, taking remedial measures or compensation for losses.*" Therefore, the Respondent shall be liable for the cost damages incurred during the business operation of the Claimant. According to the "Receipt and Invoice for Fuels Supply", the "Bank Slip and Wage Slip of Crew Members", the "Insurance Policy", the "Certificate of Ship Transaction" and the "Report of Evaluation", the Respondent shall compensate the Claimant against the fuel charges, wages of crew members, insurance premium and the depreciation of the ship. As for the material supplies, repairing fees, management fees and other damages, due to the lack of direct evidence, the claims are not accepted by the tribunal.

2. According to Article 113 of the Contract law, "*[W]here either party to a contract fails to perform the contractual obligations or its performance of the obligations does not meet the*

terms of the contract, thereby causing losses to the other party, the amount of compensation for losses shall be equal to the losses caused by breach of contract, including benefits receivable after the performance of the contract, provided that it shall not exceed the probable losses caused by breach of contract which was foreseen or ought to have been foreseen by the breaching party at the time of conclusion of the contract." The tribunal holds that the voyage was cancelled due to the breach of contract by the Respondent and caused loss of profits to the Claimant. Therefore, the Respondent shall compensate the Claimant accordingly. As for the provision contained in Article 119 of the Contract law that "*[A]fter one party violates a contract, the other party shall take proper measures to prevent further losses; if the other party fails to take proper measures, thereby aggravating the losses, it shall not claim any compensation for the further losses*", the Claimant cannot prove that it has duly mitigated its loss of profits by looking for other market opportunities. Basing on the principle of fairness, the loss of profits that the Respondent shall compensate will be half of the expected profits.

F. Case on Contract of Carriage

[Facts]

On February 28, 2015, the Claimant and the Respondent concluded a contract of carriage in respect of S Ship. After the performance of its obligations under the contract, the Claimant alleged that the Respondent had been in delay of the payment under the contract. The Claimant submitted the request for arbitration pursuant to the arbitration clause contained in the contract and claimed for the freight, penalties and the arbitration fees.

In respect to the claims raised by the Claimant, the Respondent, in its defense, asserted that it had not been aware of the conclusion, performance and settlement of the contract. The Respondent challenged the authenticity and the performance of the contract. In the contract of carriage provided by the Claimant, there is no signature of the legal representatives of the Respondent, or the signature of the agent. The settlement letter was not signed by the Respondent either. According to the Respondent, it had not been aware of the existence of the settlement letter. The Respondent requested for authentication of corporate seals during the oral hearing. In the contract provided by the Claimant, it was agreed that the Respondent shall be either the consignor or the consignee, and it was provided in the contract a deposit. The "Freight Bill" did not record whether the Respondent was the consignor or consignee. The Respondent asserted that the penalty claimed by the Claimant was too high, which, should the delay of freight do exist, shall be calculated based on 1.3 times of the loan interest rate. The content and the date of the Letter for Overdue Payment were written in advance. The individual who signed on the Letter for Overdue Payment has committed economic fraud, which may be an individual conduct rather than a corporate conduct.

[Issues]

1. The performance of the Contract of Carriage;
2. The calculation of the freight and interest.

[Comments]

In respect of the first issue, the contract was concluded through emails, and was later executed by the parties on May 11, 2015. The Contract of Carriage executed for supplement was executed by the application of the signature of the Claimant's representative and the contract seal, and the application of the contract seal of the Respondent. The Contract of Carriage had proper parties for execution, was negotiated on a self-willing, equal and mutually consented basis, represented the true intentions of the parties, and the content of which was not in violation of any mandatory law or regulation of China. Therefore, the Contract of Carriage was valid and binding. The parties shall perform their respective obligations accordingly. Regarding the performance of the contract, the Claimant submitted the "Freight Bill", the "List of Delivery", the "Settlement Letter of S Ship" and the "Letter for Overdue Payment" together with the bank slip thereof as evidence. Though, neither the consignor nor consignee in the "Freight Bill" was specified to be the Respondent, which was inconsistent with the contract provisions, the name, quantity, loading port and discharging load contained in the "Freight Bill" and the "List of Delivery" were in conformity. Besides, the Respondent had confirmed the "Settlement Letter of S Ship" and the "Letter for Overdue Payment", which are in conformity with the contract, by attaching its seal. The Respondent questioned the authenticity of the seal but withdrew the application for authentication later in the oral hearing. Therefore, the confirmation by the Respondent in respect of the "Settlement Letter of S Ship" and the "Letter for Overdue Payment" was effective; and the documents aforesaid shall be binding on the Respondent. Therefore, the Claimant had performed the contract, to which the Respondent shall make payment for the freight as consideration.

With respect to the second issue:

1. First, the Claimant requested for the freight overdue. According to the Contract of Carriage, the "Settlement Letter of S Ship" and the "Letter for Payment Overdue", Section 4, Article 2 of the contract provides, "*...Party A shall make payment in full of the basic freight and berth fee at the loading port either through wire transfer or electronic transfer before the ship arrives at the discharging port (the payment shall be made earlier should the payment date is an official holiday); whereas the berth fee at the discharging port, detention fee and other transportation fee shall be made in full within 5 working days after the discharge of cargos…*" According to the "List of Delivery", the cargos were discharged on March 4, 2015. Pursuant to the contract, the Respondent shall make payment of all the fees under the contract before March 12, 2015. Therefore, the Respondent shall make payment for the freight overdue before March 12, 2015.

2. Second, the Claimant requested for penalties in respect of the delay of payment. Section 4, Article 2 of the contract provides, "*...Party A shall make payment in full of the basic freight and berth fee at the loading port either through wire transfer or electronic transfer before the ship arrives at the discharging port (the payment shall be made earlier should the payment*

date is an official holiday); whereas the berth fee at the discharging port, detention fee and other transportation fee shall be made in full within 5 working days after the discharge of cargo. Otherwise, Party B shall be entitled to a penalty at a rate of 0.5% per day …" According to the "List of Delivery", the cargos were discharged on March 4, 2015. Pursuant to the contract, the Respondent shall make payment of all the fees under the contract before March 12, 2015. Otherwise, the Respondent shall be liable for a penalty in respect of the payment overdue. Therefore, the penalty shall be calculated beginning from March 13, 2015 till the date on which the payment is made. As asserted by the Claimant, the standard for calculating the penalty was high, and shall be on the basis of four times of the loan interest rate of the People's Bank of China. This assertion lacks legal basis; and therefore, the penalty shall be calculated based on a rate of 6% per annum.

Chapter Six: 2016 CMAC Big Events

On January 18, 2016, CMAC Shanghai Sub-Commission was invited to the "*Shipping Capacity Transaction Seminar on 2016 'One Belt and One Road'*" held in Shanghai.

On February 25, 2016, the "*Press Release on the 'CNSA Standard Terms for Shiprecycling'*" jointly held by CMAC and China National Shiprecycling Association was held in Beijing.

On March 3, 2016, the "*Seminar on Shipping Insurance and Maritime Legal Service under the 'One Belt and One Road' Strategy*" was held by CMAC Shanghai Sub-Commission and Shanghai Institute of Marine Insurance in Shanghai.

On March 7, 2016, Yu Jianlong, the Vice President and the Secretary General of CIETAC and CMAC, was invited to the "*Seminar of Vancouver Maritime Arbitrator Association*".

On March 9, 2016, CMAC Shanghai Sub-Commission held the "*Seminar on Shipping Finance and Maritime Arbitration – Opportunities and Challenges*" in Shanghai.

On April 15, 2016, the "*Seminar on the Practice and Legal Issues of the Finance Leasing of Foreign Related Vessels*" jointly held by CMAC, Shanghai Law Society and Liaoning Law Society was held in Shanghai. Chen Bo, the Vice Chairman of CMAC, attended the seminar and presented speech.

On April 25, 2016, the Opening Ceremony of CMAC Zhoushan Liaison Office was held. Yu Jianlong, the Vice President and the Secretary General of CIETAC and CMAC, attended the ceremony and presented speech.

On April 26, 2016, the "*Press Release of the International Freight Forwarding Model Agreement and the Seminar on the Legal Practice of Freight Forwarding*" was held in Beijing. Yu Jianlong, the Vice President and the Secretary General of CIETAC and CMAC, and others attended the ceremony and presented speech.

On April 26, 2016, Xie Changqing, the Secretary General of CIETA and CMAC Tianjin Arbitration Centre was invited to the "*China Maritime Finance (DFTP) Summit*".

On April 27, 2016, the "*Press Release of the International Freight Forwarding Model Agreement and the Seminar on the Legal Practice of Freight Forwarding*" was jointly held by CMAC Shanghai Sub-Commission and Shanghai International Freight Forwarders Association in Pudong District, Shanghai.

May 3 – May 6, 2016, Chen Bo, the Vice Chairman of CMAC led a team attending the 42th

General Assembly of CMI in New York.

On May 12, CMAC Shanghai Sub-Commission, Shanghai Maritime University, Shanghai Maritime Court and Shanghai Law Society held the "*Seminar on Establishing the China Maritime Judicial Centre under the Background of 'One Belt and One Road'*" in Shanghai.

On May 19, 2016, Jiang Hong, the Secretary General of CMAC Shanghai Sub-Commission, was invited to the "*Seminar on the International Freight Forwarding Model Agreement*" held at Shanghai Bar Association.

On June 8, 2016, Chen Bo, the Vice Chairman of CMAC was invited to the "*Opening Ceremony of 2016 (the Ninth) Week of China Environment and Health, and the 2016 Ocean Environment and Health: Ocean Forum*" and presented a speech.

On July 7, 2016, the "*Execution and Opening Ceremony of the 'Legal Education Practice Foundation' Jointly Built by CMAC and DMU School of Law*" was held in Beijing.

On July 14, CMAC Shanghai Sub-Commission attended the "*Press Release of the 'Development Report on Sino – Baltic Sea International Shipping Centre (2016)' and the 'Blue Book on the Building of Shanghai International Shipping Centre 2016'*" held in Shanghai.

On August 6, Xu Fei, the Principal of CMAC Shanghai Sub-Commission, was invited to the "*Third Seminar of the ADR Research Square Series Forum and the 2016 Shanghai International Arbitration Forum*" and presented a speech.

On September 23, 2016, the "*Seminar on International Maritime Arbitration (Shanghai)*" jointly held by CMAC and Vancouver Maritime Arbitrators Association was held in Shanghai; and Chen Bo, the Vice Chairman of CMAC presented a speech.

On September 27, 2016, the "*Seminar on International Maritime Arbitration (Beijing)*" jointly held by CMAC and Vancouver Maritime Arbitrators Association was held in Beijing. The Opening Ceremony was held by Chen Bo, the Vice Chairman of CMAC; and Yu Jianlong, the Vice President of CMAC presented a speech.

On October 31, 2016, the "*Seminar on the Environmental Responsibility, Risks and Solutions of Supply Chains (Transportation and Storage)*" was held by CMAC in Beijing.

On November 15, Chen Bo, the Vice Chairman of CMAC, was invited to the "*Maritime Adjudication Special Academy of China Adjudication Academy 2016 Annual Meeting and the 'Seminar on the Building of International Maritime Judicial Centre and Theory Studying on Admiralty and Maritime Adjudication*'" and presented a speech.

On November 16, 2016, Chen Bo, the Vice Chairman of CMAC, was invited to the "*2016 Sino-UK Maritime Justice and Maritime Arbitration Forum*".

On November 30, the "*Seminar on China SCR*" jointly held by CMAC, China Diving & Salvage Contractors Association, China Maritime Law Association, China Shipowners Mutual Assurance Association, China Shipowners Association and the Insurance Association of China was held in Beijing. Wang Chengjie, the Vice President and Secretary General of CIETAC and CMAC, attended the seminar and presented a speech; Chen Bo, the Vice Chairman of CMAC and the Secretary General of China Maritime Law Association presented a speech.

On December 16, Chen Bo, the Vice Chairman of CMAC, attended the "*Second Representatives Meeting of Liaoning Law Society Maritime Academy*" and the "*2016 China Maritime Arbitration Dalian Forum*" and presented a speech.

On December 28, 2016, CMAC held the "*Press Release of the 'Annual Report of China Maritime Arbitration 2015'*" and the Salon for CMAC arbitrators.

Chapter Seven: Summary on 2016 China Maritime Arbitration

In 2013, China initiated an idea of building the "21st Century Maritime Silk Road". In the last three years, we have achieved great success in the building of the "21st Century Maritime Silk Road". The cooperation in international economy and trade between China and foreign counties has gone deeper; and the ancient waterway has been given new meaning in the modern era. The shipping industry plays a decisive role in the building of the Maritime Silk Road. The transport capacity of China shipping fleet has exceeded 100 million DWT; the number of ocean vessels is No.3 in the world, among which the transport capacity of China COSCO Shipping Group lists as No.2 in the world; and the cargos throughput and container throughput have reached the first place in the world. Meanwhile, there has been tremendous increase in the shipbuilding industry. The numbers of orders for shipbuilding in 2015 and 2016 are both in the first place in the world. China has become a country with great influence in shipbuilding industry. All of the above demonstrates that China has become a decisive player in the world shipping industry.

As the initiator of Maritime Silk Road and an influential country in shipping industry, China will have to increase its soft power correspondingly. Every national strategy to be implemented will have to be supported by both hard and soft powers of a country. The underlying idea is the same with the "One Belt and One Road" Strategy, which is the most important strategy in the economic development and foreign relations of China. In March 2016, "strengthening the maritime adjudication, building the international maritime center" was written into the working report of the Supreme People's Court. Currently, the legal community of China is committed in the building of "Two Centers", of which one is the international maritime judicial center and the other is the international maritime arbitration center. In the academic world, the "Two Centers" is regarded as a great match in serving the Maritime Silk Road. Under the initiative of "One Belt and One Road", and the background and the strategy of building the international maritime arbitration center, China maritime arbitration is faced with unprecedented opportunity.

Though in the area of maritime arbitration, the interconnection between China and the international world has been completed and the upgrade of arbitration rules, standards and talent pool has been preliminary completed, China maritime arbitration faces great challenge. On the one hand, due to historical reasons, China is a great country in shipping industry, but is not the center for international maritime dispute resolution. At present, London and Singapore are well recognized centers for international shipping and international maritime dispute resolution. On the other hand, lacking the knowledge and confidence in China maritime arbitration regimes, the parties would be inclined to choose to resolve disputes at maritime courts. In 2016, there were 16,000 maritime cases decided by maritime courts. The number of cases decided by maritime courts in China has far exceeded the total number of those in other countries.

As for the parties, in resolving their dispute, whether to choose maritime court or arbitration institution and whether to choose domestic arbitration or outbound arbitration reflect the parties'

autonomy. For arbitration institutions, they should face similar challenges. The arbitration institutions in China should promote the brand building of domestic maritime arbitration, participate in the building of industry rules, expand the discourse of China arbitration. In the meantime, arbitration institutions should promote the modification and completion of law making, strengthen the judicial assistance and supervision in maritime arbitration, advance theoretical studies, talents training and the building of pro-arbitration culture. They need to improve the rules and practice, combine the international and domestic experience, participate in important maritime seminars, keep in contact with the hot issues in the industry, and promote Chinese maritime arbitration. They should strive to take advantage of institutional management, increase the quantity and quality of service, increase the public credibility of arbitration. In the time that Chinese maritime arbitration plays a big role in international maritime disputes, and bearing the idea of keeping in touch with the market, effective function and premium service, arbitration institutions can greatly contribute in the building of an international maritime arbitration center.