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Chronology of Practice: Chinese Practice in Private International Law in 2017*

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Abstract

This survey contains materials reflecting the practice of Chinese private international law in 2017. **First**, the statistics of the foreign-related civil or commercial cases accepted and decided by Chinese courts is extracted from the reports of the Supreme People's Court (SPC), released in 2018, most notably the Report on the Work of the SPC in 2017. **Second**, two judicial interpretations of the SPC that took effect in 2017 are translated, *i.e.*, the Provisions of the SPC on Issues Concerning Report and Approval of Cases Requiring Judicial Review of Arbitration and the Provisions of the SPC on Several Issues Concerning Trial of Cases Requiring Judicial Review of Arbitration. These two instruments contain provisions reflecting a pro-arbitration tendency in Chinese courts. Another document, the Nanning Statement of the Second China-ASEAN Justice Forum, is also introduced. It contains a commitment to judicial assistance cooperation, especially improvement of mutual recognition and enforcement of judgments. **Third**, since China signed The Hague Convention on Choice of Court Agreements in 2017, but has not yet ratified it, one case selected in this paper cites the Convention as a reference in its assessment of the exclusivity of the applicable choice of court clause. **Fourth**, three representative cases with regard to independent guarantee, letter of credit and financial loan contract are examined. These cases from the SPC shed light on the independence principle of the guarantee and the credit, as well as the strict compliance principle. **Fifth**, three typical cases decided by various Chinese courts during 2017 are introduced. These cases involve issues relating to the law applicable to construction contracts and land contracts, as well as property relationships between spouses. As for the

* Note by the Editors: Chinese courts and other official bodies use Chinese as the official language. The English translation is done by the author, unless otherwise noted. Readers are advised to consult the original materials in their research.

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application of international conventions, two separate cases involving the application of the CISG and the Montreal Convention are reviewed. **Finally**, the paper examines three cases with different or inconsistent practices regarding reciprocity and other issues, given recent increases in the recognition and enforcement of monetary judgments by Chinese courts. In this regard, a unified practice is required in Chinese courts.

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I. Introduction

1. This paper only covers some aspects of the practice of private international law in China and focuses on jurisdiction, choice of law, recognition and enforcement of foreign judgments.

2. This paper is intended to serve as a reference for both legal scholars and practitioners with an interest in recent legal developments in Chinese private international law. Chinese courts and associated agencies use Chinese as the only official language, and there is no official translation of their work product in other languages. The English versions of all quotations cited in this paper are translated by the author unless otherwise noted. Readers are advised to consult the official documents for their own research.

The main sources for the cases referenced or cited in this paper are as follows:

(1) *Zhongguo caipan wenshu wang* [China Judgments Online], the official database for judgments and rulings by Chinese courts. The website is http://wenshu.court.gov.cn.

(2) *Shewai shangshi haishi shenpan zhidao* [Guide on Foreign-Related Commercial and Maritime Trials]. The Guide is edited by the Fourth Civil Tribunal of the Supreme People's Court. Thirty-three volumes have been published as of August 2018.

3. The structure and format of this paper follow earlier versions, which include but are not limited to *Chronology of Practice: Chinese Practice in Private International Law in 2016* (Vol. 16(4), pp. 787-844) in which the author did not offer any comments. Furthermore, the cases selected are those that triggered different opinions or disagreements among Chinese courts, or that significantly influenced international civil procedure in Chinese courts.

4. Case names and reporter abbreviations are not translated to English. Instead, they are referenced in *pinyin* for the convenience of readers wishing to consult the original materials, for example, *Shandong Dongyue International Economic Trade Cooperation Co., Ltd v. Hanlon International Building Products Inc.*, (2012) *ji shang wai chu zi* No. 15.

5. Because of the difficulty of translations from Chinese to English, the author of this paper has sought to clearly communicate the meaning of the Chinese texts rather

than to provide literal translations. Yet, to provide a sense of authenticity, Chinese ways of expression have been retained. Readers may find explanatory information in footnotes or square brackets where the original texts include Chinese terms that may not be known.

6. The following abbreviations are used: PRC (People's Republic of China); NPC (National People's Congress); SPC (Supreme People's Court); SAR (Special Administrative Region); Chinese Private International Law 2010 (Law of the PRC on Application of Law to Foreign-Related Civil Relations); the SPC Private International Law Interpretation 2012 (Interpretation (I) of the SPC on Certain Issues Concerning the Law of the PRC on Application of Law to Foreign-Related Civil Relations); Interpretations of the Civil Procedure Law (Interpretations of the SPC on the Application of the Civil Procedure Law of the PRC in 2015); CIETAC (China International Economic and Trade Arbitration Commission).

II. Overview

7. On 9 March 2018, ZHOU Qiang, Chief Justice and President of the SPC, delivered the Report on the Work of the SPC in 2017 at the First Session of the Thirteenth NPC. Regarding foreign-related trials, Chief Justice ZHOU summarised the year's cases as follows:[1]

> [. . .] Chinese courts at all levels concluded 75,000 foreign-related civil and commercial cases, and equally protected the legitimate rights and interests of Chinese and foreign parties. More and more foreign parties agree upon choice of Chinese courts to resolve their disputes. [The SPC] has improved the system for judicial review of arbitration and promoted the use of arbitration in resolving foreign-related disputes. [. . . Chinese maritime courts] concluded 72,000 maritime cases of first instance, and substantially safeguarded China's maritime security and judicial sovereignty. Chinese courts strengthened communication and cooperation of international justice, and dealt with 11,000 cases involving international judicial assistance[. . .].[2]

III. Laws and the SPC's interpretation

8. In 2017, important laws and judicial interpretation documents that were promulgated to deal with foreign-related civil and commercial trials include the General

1 ZHOU Qiang, Report on the Work of the SPC in 2017 (28 July 2018), http://news.china.com/zw/news/13000776/20180326/32230884_all.html.

2 Ibid.

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Rules on the Civil Law of the PRC,[3] the SPC Provisions on Issues Concerning the Reporting and Approval of Cases Requiring Judicial Review of Arbitration,[4] the SPC Provisions on Several Issues Concerning the Trial of Cases Requiring Judicial Review of Arbitration,[5] and the SPC Interpretations on Several Issues Concerning the Application of the Marriage Law of the PRC (II).[6]

III.A. SPC Provisions on Issues Concerning the Reporting and Approval of Cases Requiring Judicial Review of Arbitration

9. On 26 December 2017, the SPC Provisions on Issues Concerning the Reporting and Approval of Cases Requiring Judicial Review of Arbitration were promulgated.[7] The contents of the Provisions are as follows:

> With a view to correctly hearing cases requiring judicial review of arbitration, unifying the adjudication standards, safeguarding the legitimate rights and interests of the parties, and fostering the development of arbitration, the Provisions are formulated in accordance with the Civil Procedure Law of the PRC, the Arbitration Law of the PRC and other relevant laws, as well as in light of adjudication practices.
>
> **Article 1** The cases requiring judicial review of arbitration under the Provisions include the following:
>
> (1) an application for confirmation of the validity of an arbitration agreement;
>
> (2) an application for setting aside an arbitral award rendered by an arbitral institution of Mainland China;

3 The General Rules on the Civil Law of the PRC were adopted on 15 March 2017 at the Fifth Session of the 12th NPC of the PRC, and came into effect on 1 October 2017.

4 *Fa shi* [2017] No. 21. The Provisions were adopted at the 1727th meeting of the Judicial Committee of the SPC on 20 November 2017, and are effective as of 1 January 2018.

5 *Fa shi* [2017] No. 22. The Provisions were adopted at the 1728th meeting of the Judicial Committee of the SPC on 4 December 2017, and are effective as of 1 January 2018.

6 *Fa shi* [2017] No. 6. The Interpretations were adopted on 4 December 2003 at the 1299th meeting of the Judicial Committee of the SPC, and revised on 20 February 2017 at the 1710th meeting of the Judicial Committee of the SPC. The Interpretation came into force on 1 March 2017.

7 The SPC Provisions on Issues Concerning the Reporting and Approval of Cases Requiring Judicial Review of Arbitration, *Renmin Fayuan Bao* [People's Court Daily], 30 December 2017.

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(3) an application for enforcement of an arbitral award rendered by an arbitral institution of Mainland China;

(4) an application for recognition and enforcement of an arbitral award rendered in Hong Kong SAR, Macao SAR and Taiwan region;

(5) an application for the recognition and enforcement of a foreign arbitral award; and

(6) other cases requiring judicial review of arbitration.

Article 2 Where, in handling the judicial review of a foreign-related arbitration case involving a foreign country, or involving Hong Kong SAR, Macao SAR or Taiwan region, an Intermediate People's Court or a special People's Court, upon review, intends to make a decision that the arbitration agreement is invalid, the arbitral award rendered in Mainland China by a Chinese arbitral institution should not be enforced or should be set aside, the arbitral award made in Hong Kong SAR, Macao SAR or Taiwan region should not be recognised or enforced, or the foreign arbitral award should be refused recognition or enforcement, the Court shall submit the decision to its High People's Court for approval. If the High People's Court, upon review, agrees with the lower Court's decision, it shall submit the decision to the SPC for approval. Only after the case is reviewed and approved by the SPC, can a ruling, in accordance with the SPC's opinion, be rendered.

Where, in handling the judicial review of an arbitration case that involves neither a foreign country, nor Hong Kong SAR, Macao SAR or Taiwan region, an Intermediate People's Court or a special People's Court, upon review, intends to make a decision that the arbitration agreement is invalid, or that the arbitral award rendered in Mainland China by a Chinese arbitral institution should not be enforced or should be set aside, the Court shall submit the decision to its High People's Court for approval. Only after the case is reviewed and approved by the High People's Court, can a ruling in accordance with the opinion of the High People's Court, be rendered.

Article 3 Where, in handling the judicial review of an arbitration case under Paragraph 2 of Article 2 that involves neither a foreign country, nor Hong Kong SAR, Macao SAR or Taiwan region, the High People's Court, upon review, intends to agree with the decision of the Intermediate People's Court or the special People's Court that the arbitration agreement is invalid, or that the arbitral award rendered in Mainland China by a Chinese arbitral institution should not be enforced or should be set aside, the High People's Court shall, under any of the following circumstances, submit its decision to the SPC for approval, and a ruling shall be rendered in accordance with the SPC's opinion after review and approval by the SPC:

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(1) the parties to the application for judicial review of the arbitration are domiciled in different provincial-level administrative regions;

(2) the arbitral award rendered by a Chinese arbitral institution in Mainland China is refused recognition or is set aside on social public interest grounds.

Article 4 Where a case is submitted by a lower People's Court to its superior People's Court for review, the written report and case files shall be attached to its submission. The written report shall clearly state the review opinions and specific reasons of the lower People's Court.

Article 5 Where a superior People's Court, after receiving the request for approval from its lower People's Court, finds that the relevant facts of the case remain unclear, the superior People's Court may, upon its own initiative, call upon the parties for clarification, or remand the case to the lower People's Court for further fact-finding before re-submission of the request for approval.

Article 6 The superior People's Court shall, by way of a letter, reply to its lower People's Court with a review opinion.

Article 7 Where a party to a civil action files an appeal against a ruling concerning the validity of an arbitration agreement in which the People's Court of first instance refuses to accept the case, dismisses the case or upholds the objection to its jurisdiction, and the People's Court of second instance, upon review, intends to determine that the arbitration agreement either has not been formed, or is invalid, inoperative or unenforceable due to ambiguous terms, the People's Court of second instance shall submit the decision to its superior People's Court for approval in accordance with Article 2 of the Provisions. Only after the case is reviewed and approved by the superior People's Court, can a ruling, in accordance with the opinion of the superior People's Court, be rendered.

Article 8 The Provisions take effect as of 1 January 2018. In the event of any discrepancy between the judicial interpretations issued previously by the SPC and the Provisions, the Provisions prevail.[8]

III.B. SPC Provisions on Several Issues Concerning the Trial of Cases Requiring Judicial Review of Arbitration

10. On 26 December 2017, the SPC Provisions on Several Issues Concerning the Trial of Cases Requiring Judicial Review of Arbitration were promulgated.[9] The contents of the Provisions are as follows:

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8 Ibid.

9 The Provisions of the SPC on Several Issues Concerning the Trial of Cases Requiring Judicial Review of Arbitration, *Renmin Fayuan Bao* [People's Court Daily], 30 December 2017.

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With a view to correctly hear cases requiring judicial review of arbitration and protecting the legitimate rights and interests of the parties, the Provisions are formulated in accordance with the Civil Procedure Law of the PRC, the Arbitration Law of the PRC and other relevant laws, as well as in light of adjudication practices.

Article 1 the cases requiring judicial review of arbitration under the Provisions include the following:

(1) an application for confirmation of the validity of an arbitration agreement;

(2) an application for enforcement of an arbitral award rendered by an arbitral institution of Mainland China;

(3) an application for setting aside an arbitral award rendered by an arbitral institution of Mainland China;

(4) an application for recognition and enforcement of an arbitral award rendered in Hong Kong SAR, Macao SAR and Taiwan region;

(5) an application for the recognition and enforcement of a foreign arbitral award; and

(6) other cases requiring judicial review of arbitration.

Article 2 A case involving the application for confirmation of the validity of an arbitration agreement is under the jurisdiction of the Intermediate People's Court or the special People's Court at the place where the arbitral institution specified in the arbitration agreement is located, where the arbitration agreement is signed, or where the applicant or the respondent is domiciled.

A maritime case involving the validity of the arbitration agreement is under the jurisdiction of the maritime court at the location of the arbitral institution specified in the arbitration agreement, the place where the arbitration agreement is signed, or the domicile of the applicant or the respondent. In the event that no maritime court exists at any of the above locations, the nearest maritime court shall have jurisdiction.

Article 3 Where recognition of a foreign arbitral award is related to a case that is pending before the People's Court, but neither the respondent's domicile nor the place where the respondent's property is located is within Mainland China, the application for recognition of the foreign arbitral award is within the jurisdiction of the People's Court hearing the related case. If the above People's Court is a basic People's Court, the application for recognition of the foreign arbitral award is within the jurisdiction of the People's Court above this basic

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People's Court. If the People's Court hearing the related case is a High People's Court or the SPC, the Court may conduct the review by itself or designate an Intermediate People's Court to conduct the review.

Where a foreign arbitral award is related to a case that is pending before an arbitral institution in Mainland China, but neither the respondent's domicile nor the place where the respondent's property is located is within Mainland China, the application for recognition of the foreign arbitral award is under the jurisdiction of the Intermediate People's Court at the place where the arbitral institution hearing the related case is located.

Article 4 Where the applicant files an application with two or more competent People's Courts, the People's Court that was first seized has jurisdiction.

Article 5 Where an applicant applies to the People's Court for confirmation of the validity of an arbitration agreement, the applicant shall submit a letter of application, and the original or a certified copy of the arbitration agreement.

The letter of application shall specify the following:

(1) whenever the applicant or the respondent is a natural person, his name, gender, date of birth, nationality and domicile; whenever the applicant or the respondent is a legal person or other organization, its name and domicile, as well as the name and position of its legal representative or representatives;

(2) the contents of the arbitration agreement;

(3) the specific claims and grounds.

If the letter of application, the arbitration agreement or other documents are written in foreign languages, the party shall also submit a Chinese translation.

Article 6 Where the applicant files an application to the People's Court for the enforcement or the setting aside of an arbitral award made by a Chinese arbitral institution in Mainland China, or for the recognition and enforcement of a foreign arbitral award, the applicant shall submit a letter of application, and the original or a certified copy of the arbitral award.

The letter application shall specify the following:

(1) whenever the applicant or the respondent is a natural person, his name, gender, date of birth, nationality and domicile; whenever the applicant or respondent is a legal person or other organization, its name and domicile, as well as the name and position of its legal representative or representatives;

(2) the main contents and effective date of the arbitral award;

(3) the specific claims and grounds.

If the letter of application, the arbitration agreement or other documents are in foreign languages, the party shall also submit a Chinese translation.

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Article 7 Where the documents submitted by the applicant fail to comply with Article 5 or 6 of the Provisions, and if, after clear explanations by the People's Court, those documents submitted still fail to comply with the above provisions, the People's Court shall refuse acceptance of the case.

Where the applicant files an application with a People's Court without jurisdiction over the case, the People's Court shall notify the applicant to apply to the competent People's Court. The People's Court shall refuse acceptance of the case if the applicant fails to change the Court.

The applicant may, if dissatisfied with the ruling or refusal to accept the case, lodge an appeal.

Article 8 The People's Court shall, after registering the case and discovering that the application fails to satisfy the conditions for acceptance, dismiss the case.

Regarding the dismissal prescribed in the preceding paragraph, if the applicant, upon satisfying the conditions for acceptance, reapplies, the People's Court shall accept the case.

The applicant may, if dissatisfied with the refusal to accept the case, lodge an appeal.

Article 9 The People's Court shall, within seven days, conduct an examination and make a decision as to whether or not to accept the application.

After accepting a case requiring judicial review of an arbitration, the People's Court shall, within five days, send the applicant and the respondent a notification of the acceptance of the application and their rights and obligations.

Article 10 Where the respondent raises an objection to the jurisdiction of a People's Court after the People's Court has accepted a case requiring judicial review of arbitration, the objection shall be raised within 15 days of receipt of the People's Court's notice. The People's Court shall examine the respondent's objection and make a ruling. The party may, if dissatisfied with the ruling, lodge an appeal.

Where the respondent is not domiciled within the territory of the PRC, the respondent should raise an objection to the jurisdiction of the People's Court within 30 days after receiving the People's Court's notice.

Article 11 In examining a case requiring judicial review of arbitration, the People's Court shall form a collegial panel and make enquiries with the parties.

Article 12 A foreign-related arbitration agreement or a foreign-related arbitral award refers to an arbitration agreement or an arbitral award that falls within any of the circumstances prescribed at Article 1 of the SPC Private International Law Interpretation 2012.

Article 13 Where the parties agree upon the law applicable to the validity of a foreign-related arbitration agreement, the parties' consensus should be explicit.

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The law agreed as applicable to the contract cannot serve as the law applicable to the validity of the arbitration clause in the contract.

Article 14 Where the parties do not agree on the law applicable to the validity of a foreign-related arbitration agreement in accordance with Article 18 of the Chinese Private International Law 2010, the People's Court shall, in case of conflict between the law of the place where the arbitral institution is situated and the law of the place of arbitration, apply the law that recognises the validity of the arbitration agreement.

Article 15 Where an arbitration agreement fails to specify the arbitral institution or the place of arbitration, but the arbitral institution or the place of arbitration can be determined in accordance with the applicable arbitration rules stipulated in the arbitration agreement, such arbitral institution or place of arbitration shall be recognised as the arbitral institution or the place of arbitration prescribed in Article 18 of the Chinese Private International Law 2010.

Article 16 Where the People's Court reviews the party's application for recognition and enforcement of a foreign arbitral award according to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the respondent argues that the arbitration agreement is invalid, the People's Court shall determine the law applicable to the validity of the arbitration agreement in accordance with Paragraph 1 (a) of Article 5 of the New York Convention.

Article 17 The People's Court shall, when reviewing the application for enforcement of a non-foreign-related arbitral award rendered by a Chinese arbitral institution in Mainland China, apply Article 237 of the Civil Procedure Law of the PRC.

The People's Court shall, when reviewing the application for enforcement of a foreign-related arbitral award rendered by a Chinese arbitral institution in Mainland China, apply Article 274 of the Civil Procedure Law of the PRC.

Article 18 For the purpose of Paragraph 1(6) of Article 58 of the Arbitration Law of the PRC and Paragraph 2(6) of Article 237 of the Civil Procedure Law of the PRC, the acts of an arbitrator soliciting or accepting bribes, committing malpractices for personal benefits or perverting the law when arbitrating shall refer to acts confirmed by a valid criminal legal document or a disciplinary sanction.

Article 19 Where the applicant requests the withdrawal of an application after the People's Court has accepted the case requiring judicial review of arbitration and before a ruling has been rendered, the People's Court shall permit the applicant's request.

Article 20 The ruling rendered by the People's Court in a case requiring judicial review of arbitral awards shall, upon service thereof, have legal effect unless the ruling constitutes a refusal to accept the case, a dismissal of the

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application or an objection to jurisdiction. The People's Court shall not accept an application for reconsideration, an appeal or a request for retrial, unless otherwise provided by the law and judicial interpretations.

Article 21 Regarding an application for confirmation of the validity of an arbitration agreement involving Hong Kong SAR, Macao SAR or Taiwan region, and an application for enforcement or revocation of an arbitral award involving Hong Kong SAR, Macao SAR or Taiwan region, the case should be reviewed by the People's Court by reference to the provisions applicable to cases requiring judicial review of foreign-related arbitration.

Article 22 The Provisions take effect as of 1 January 2018. In the event of any discrepancy between judicial interpretations issued previously by the SPC and the Provisions, the Provisions prevail.[10]

III.C. Nanning Statement of the Second China-ASEAN Justice Forum

11. On 8 June 2017, the second China-ASEAN Justice Forum was held in Nanning, Guangxi Zhuang Autonomous Region of the PRC. The Forum reaffirmed the necessity to establish and maintain substantial reciprocity and cooperation among judiciaries of China and ASEAN countries, as well as those of South Asian countries. The Forum released the Nanning Statement of the Second China-ASEAN Justice Forum ("Nanning Statement"). The main contents of the Nanning Statement are as follows:[11]

I. The Forum commends the exchanges and cooperation between China and ASEAN countries since the adoption of the Nanning Statement in the First China-ASEAN Justice Forum in various forms, such as bilateral high-level visits, information exchanges and judges' training. The participants of the Forum will push forward with more exchanges and cooperation among judiciaries of China and ASEAN countries, as well as South-Asian countries.

II. As the participants of the Forum noted, with the development of the Belt and Road Initiative, the ever-expanding trade and personnel exchanges among China and ASEAN countries, as well as South-Asian countries, the need for judicial cooperation has been continuously increasing.

III. Supreme courts of participating countries will pay closer attention and respond to the trend of informatisation and endeavour to adopt information technology means according to their capacity and conditions in order to improve judicial

10 Ibid.

11 The Nanning Statement in Chinese is available at the SPC website: (www.court.gov.cn/zixun-xiangqing-47372.html). The English version is supplied by the Forum, but has been changed in several places in language.

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capability and practice, efficiently resolve disputes, and better ensure judicial fairness. The Forum supports judiciaries in expanding the applicability of information technology services to make the work of courts more transparent and efficient, as well as to make implementation of justice more widely accessible to society.

IV. The principle of judicial transparency is an important means to promote judicial fairness and to improve judicial practice. Supreme courts of participating countries will pay more attention to continuously increasing judicial transparency and credibility, based on common international standards and practices, as well as their respective national situations. Meanwhile, the protection of personal information and privacy, national security and public interests shall also be taken into consideration.

V. As transnational trade and investment are thriving around the region, the increasing urgency to further explore coordinating and integrating the commercial law of each country has been recognised. To the extent permitted by domestic laws, Supreme courts of participating countries will consider engaging in comparative study and communication on their respective commercial laws and in working out conflicts in pursuit of coordination and complementarity of their commercial laws to the greatest extent.

VI. Improving cross-border dispute resolution mechanisms is conducive to fostering a well-ordered legal environment for transnational trade and investment in the region. To the extent permitted by domestic laws, Supreme courts of participating countries will actively consider the adoption of mediation and other alternative dispute resolution mechanisms.

VII. Regional cross-border transactions and investments require a judicial safeguard based on appropriate mutual recognition and enforcement of judgments among countries in the region. Subject to their domestic laws, Supreme courts of participating countries will interpret domestic laws in good faith, try to avoid unnecessary parallel proceedings, and consider facilitating the appropriate mutual recognition and enforcement of civil or commercial judgments among different jurisdictions. If two countries have not been bound by any international treaty on mutual recognition and enforcement of foreign civil or commercial judgments, both countries may, subject to their domestic laws, presume the existence of their reciprocal relationship when it comes to the judicial procedure of recognising or enforcing such judgments made by courts of the other country, provided that the courts of the other country had not refused to recognise or enforce such judgments on grounds of lack of reciprocity.

VIII. Supreme courts of participating countries from ASEAN support the SPC in founding both the Judges Exchange and Training Base for China-ASEAN Countries and the Legal and Judicial Information Center for China-ASEAN

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> Countries in Guangxi, China, as well as the International Judicial Assistance Research Base for China-ASEAN Countries in Yunnan, China, so as to jointly promote more connected, pragmatic and efficient judicial exchange and cooperation among courts of China and ASEAN countries.[12]

IV. Jurisdiction

12. As for choice of court, so far, China has only signed The Hague Convention on Choice of Court Agreements, but has not yet ratified the Convention. However, in *Chao Gao v. Cathay United Bank Co, Ltd.*,[13] the Convention was referenced by the Shanghai High People's Court to interpret the parties' choice of court clause.[14] In this case, Cathay United Bank engaged in financial derivatives trading and structured transactions with the main obligor, Audi Technology Ltd. Chao Gao provided a guarantee on all Audi Technology Ltd.'s debts in the amount of USD 5 million to Cathay United Bank and undertook to bear joint liability. Under Article 13 of the guarantee, "the guarantor agrees that the guarantee is governed by the laws of the Republic of China. In case a lawsuit involving the guarantee is filed, the parties agree to resort to Taiwan __ court as the court of first instance, unless an exclusive jurisdiction is otherwise provided." Later, the two parties had a dispute regarding the above clause. Chao Gao argued that the parties had agreed to resort to Taiwanese courts to resolve the case; however, Cathay United Bank argued that the blank underscore within the disputed clause suggested that the parties failed to agree as to what to put in the blank space created by the underscore. Therefore, the clause was incomplete and ambiguous. In resolving the issue regarding the parties' choice of court, the Shanghai High People's Court held that:

> As regards the issue of whether the parties to a dispute have made an exclusive choice of court agreement, Chinese laws have no explicit provisions. Article 3 of The Hague Convention on Choice of Court Agreements, concluded in 2005, provides that:
>
> Article 3 Exclusive choice of court agreements
>
> For the purposes of this Convention –

12 Ibid.

13 Civil Ruling of the Shanghai High People's Court, (2016) *hu min xia zhong* No. 99 (4 August 2017), (http://wenshu.court.gov.cn/content/content?DocID =9f27857c-3da6-468b-9723-a7db010e1a3a).

14 For a similar case, please see Mayde Light Ltd. v. Long Life International (Hong Kong) Company Ltd., Civil Ruling of the Shanghai High People's Court (2017), *hu min xia zhong* No. 96, (4 August 2017) (wenshu.court.gov.cn/content/content?DocID=c7aaace4-3701-4597-8bab-a7db010e176d).

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(a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;

(b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

(c) an exclusive choice of court agreement must be concluded or documented –
  (i) in writing; or
  (ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

(d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

As per the Convention, whether the chosen court has exclusive jurisdiction or not depends on the terms of the parties' agreement. The guarantee involved in the case explicitly states that "[i]n case a lawsuit involving the guarantee is filed, the parties agree to Taiwan __ court as the court of first instance." Given that the parties to the present case did not agree otherwise, the choice of court clause should be interpreted as an exclusive jurisdiction agreement that excludes the jurisdiction of the courts in Mainland China. Even though the choice of court clause does not specify which court in the Taiwan region shall have jurisdiction over the parties' dispute, the clause still provides certainty because the parties are able to file a lawsuit to a specific court in the Taiwan Region according to the laws of the Region. Cathay United Bank's allegation that the choice of court clause is invalid due to its ambiguity and lack of certainty is, therefore, unfounded in fact and law.[15]

13. On this issue, the SPC held as follows:

The terms of a contract clause in dispute should be interpreted according to the contract's plain meaning, taking account of the contract's intended context.

15 Above n.13.

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The first half of the clause in dispute is "the guarantor agrees that the guarantee is governed by the laws of the Republic of China." Since the two parties agreed on the laws of the Republic of China as applicable to the guarantee, it is reasonable to presume that the chosen court should be a court in the Taiwan region. A blank underscore was left between "Taiwan" and "Court". Generally speaking, the blank should refer to a local court in the Taiwan region, meaning that the parties had preliminarily agreed that the case was subject to the jurisdiction of a court in the Taiwan region, but had not reached a consensus regarding a specific court in the region. In addition, the guarantee involved in the case was supplied by Cathay United Bank and the choice of court clause is a standard term. The *contra proferentem* principle should be applied if a dispute about a standard term arises. Therefore, the original court's ruling that the clause had certainty is not improper even if Article 13 of the guarantee does not specify which court in the Taiwan region has jurisdiction over the parties' dispute. A party could still file a lawsuit to a specific court in the Taiwan region according to the laws of the region, and the Article excludes the jurisdiction of the courts in Mainland China. Because the courts of Mainland China have no jurisdiction over the present case, there is no legal basis for Cathay United Bank to assert that the case should be subject to the jurisdiction of the original court (the Shanghai Intermediate People's Court) on grounds that the original court is more convenient.[16]

V. Choice of Law

V.A. Independent Guarantee

14. On 18 November 2016, the SPC Provisions on Several Issues concerning the Trials of Independent Guarantee Cases[17] was promulgated. In 2017, several cases involving independent guarantees were published. Among them, *Anhui Foreign Economic Construction (Group) Co., Ltd. v. Inmobiliaria Palacio Oriental S.A.*,[18] is an important and complicated one. On 16 January 2010, the developer, Inmobiliaria Palacio Oriental S.A. (a Costa Rica company, hereinafter "Oriental") entered into a

16 Civil Ruling of the SPC, (2017) *zui gao fa min shen* No. 4205 (28 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=3c3520ec-3e37-4e03-9819-a8aa014a463c).

17 *Fa shi* [2016] No. 24. The Provisions were adopted at the 1688th meeting of the Judicial Committee of the SPC on 11 July 2016 and are effective as of 1 December 2016.

18 Civil Judgment of the SPC (2017), *zui gao fa min zai* No. 134 (4 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=923d5a37-1226-4a8f-a4a5-a86c00bf7739).

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contract entitled the Construction Contract of Lakeside Huafu Project in Costa Rica, with Anhui Foreign Economic Construction (Group) Co, Ltd. ("FECC Group", the contractor) and Anhui FECC Central America S.A. ("FECC Central America", the constructor) in San Jose City, Costa Rica. On 26 May 2010, FECC Group applied to Anhui Branch of China Construction Bank ("CCB Anhui Branch") for a guarantee for contract performance in which the reissuing bank was Bancode Costa Rica, the beneficiary was Oriental, and the guaranteed project was Lakeside Huafu Project in Costa Rica. Two days later, Bancode Costa Rica issued Guarantee No. G051225 for contract performance. The guarantor was CCB Anhui Branch; the principal was FECC Group; and the amount of the guarantee was $2,008,000. The guarantee ended effectively on 12 February 2012. CCB Anhui Branch issued the counter-guarantee No. 34147020000289 in which Anhui Branch promised to pay the price under the guarantee within 20 days of receiving the notice by Bancode Costa Rica.

15. On 7 February 2012, FECC Central America commenced arbitration proceedings against Oriental at the Dispute Resolution Center of the Federal Association of Engineers and Architects of Costa Rica ("the Resolution Center of Costa Rica"), seeking the discharge of contract and compensatory damages on grounds that Oriental failed to pay the construction fees of the completed part in arrears and the corresponding interest. The default on construction payment constituted a fundamental breach of contract. Three days later, Bancode Costa Rica sent a message by telegram, which stated that Oriental claimed for compensation and requested payment of $2,008,000 under Guarantee No. G051225. Accordingly, Bancode Costa Rica requested CCB Anhui Branch for payment of the above amount before 16 February 2012. However, on 12 February, the second tribunal of the Administrative Court of Costa Rica issued an order for provisional protection and ordered Bancode Costa Rica to suspend payment under Guarantee No. G051225. On 23 February 2012, FECC Group filed a lawsuit with the court of first instance (the Hefei Intermediate People's Court, Anhui Province, China) for guarantee fraud and applied for a suspension of payment under the counter-guarantee. The application was supported by the Hefei Intermediate People's Court. The copy of the ruling of the Hefei Intermediate People's Court was also delivered to Bancode Costa Rica on 5 March. The following day, the second tribunal of the Administrative Court of Costa Rica rendered a judgment, dismissing the application of FECC Central America for the order of provisional protection. On 21 March, Bancode Costa Rica paid the proceeds under Guarantee No. G051225 to Oriental. On 9 July 2013, the Resolution Center of Costa Rica found that Oriental had, during the performance of contract, fundamentally breached the contract, and ordered that Oriental pay the construction price and corresponding interest. FECC Group asserted that Oriental's violation of the principle of good faith was an abuse of the principle of independence of the guarantee and thus constituted fraud. The assertion of FECC Group gained support from both the Hefei Intermediate People's Court and the High People's Court of Anhui Province.

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Oriental was dissatisfied with the two courts' judgments and applied to the SPC for reconsideration. On the issues of choice of law and jurisdiction, the SPC held that[19]:

> This case is a foreign-related commercial dispute because the two parties to this case, Oriental and Bancode Costa Rica, are located outside China's territory. Article 8 of the Chinese Private International Law 2010 provides that "the qualification of a foreign-related civil relationship is governed by the law of the forum". FECC Group, being the domestic parent company of FECC Central America, applied for the issuance of the guarantee. FECC Group applied to CCB Anhui Branch to issue the demand counter-guarantee in which Bancode Costa Rica re-issued the guarantee for contract performance to the beneficiary, Oriental. In light of the text of the guarantee, the payment obligations of Bancode Costa Rica and CCB Anhui Branch are independent of the underlying transaction and the legal relationship arising from the application of the guarantee. Therefore, the above guarantee can be identified as an independent demand guarantee, and the above counter-guarantee can be identified as an independent demand counter-guarantee. As FECC Group filed a lawsuit with the court of first instance on the ground of guarantee fraud, the nature of the case is a guarantee fraud dispute. The independent counter-guarantee that is requested for suspension of payment was issued by CCB Anhui Branch. The place where the CCB Anhui Branch is located should be the place where the damage occurs. The court of first instance, as the court at the place where the tort is committed, has jurisdiction over the present case. Since the guarantee involved in the case specifies the application of the Uniform Rules for Demand Guarantees, the Rules should constitute a part of the guarantee. According to Article 44 of the Chinese Private International Law 2010, "tort liabilities are governed by the *lex loci delicti*". Thus, in the absence of any relevant provisions concerning a guarantee fraud in the Uniform Rules for Demand Guarantees, the law of the PRC should be applied as the criteria for deciding the guarantee fraud. China has not yet acceded to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit,[20] and the parties failed to agree on the application of this Convention, or failed to include relevant provisions of the Convention as the international transaction rules into the guarantee. Without the parties' choice of law, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit cannot apply to the present case.[21]

19 Ibid.

20 Author's note: The courts of first instance and second instance applied the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit to the case on the grounds that the Uniform Rules for Demand Guarantees and Chinese laws have no relevant provisions.

21 Above n.18.

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16. As for the guarantee fraud, the SPC held as follows:[22]

The main issue in this case is whether FECC Group can invoke the “fraud exception” principle to suspend payment under the guarantee and the related counter-guarantee in this case. In light of the facts of the case, and after summarising the parties’ claims and defenses which have been confirmed by the parties in court, this court focuses on the following issues and separately analyses them as follows:

The first issue is whether Oriental as the beneficiary has provided sufficient *prima facie* evidence regarding the underlying contract as the factual basis for its claims for payment.

This issue requires a factual review of the underlying contract. The parties to this case allege the opposing parties have, in performing the underlying contract, breached the contract and claimed rights on the basis of the underlying transaction. Thus, it is necessary to determine that the beneficiary has *prima facie* evidence regarding the underlying contract to factually support its claims for payment. Where a People’s Court hears a case regarding independent guarantees and independent counter-guarantees, the court should adhere to the principle of limited and necessary review of the underlying transaction. The scope of the review should be limited to two issues: first, whether the beneficiary was fully aware that the opposing party breached the underlying contract; and, second, whether other facts leading to payment under the independent guarantee exist. A broader scope of review will shake the institutional value of “payments on demand” for independent guarantees.

According to Article 68 of the SPC Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the PRC (for Trial Implementation), fraud usually refers to fictitious facts and concealment of the truth. According to the facts ascertained by this court on retrial, Guarantee No. G05122 for contract performance, issued by Bancode Costa Rica, explicitly stipulates that the following documents should be submitted in order to realise on the Guarantee: the document specifying the reasons for making payment under the Guarantee; the date on which FECC Central America was notified of payment under the Guarantee; the original of the letter of Guarantee and its amendments. Where FECC Group asserts that Oriental’s acts constituted fraud under the independent guarantee, it should submit the evidence to prove that Oriental, in order to realise on the independent guarantee, committed one of the following acts: first, the documents presented to claim payment are forged or contain false information; second, there is no other

22 Ibid.

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reliable basis for the claims for compensation. In this case, the matters warranted by the guarantee were "the quality or endurance of materials used in the construction, losses caused by compensation and recovery, and/or compensation due to the constructor's non-performance of obligations." Therefore, once the beneficiary supplies *prima facie* evidence that can demonstrate problems with respect to the quality of the construction, the requirements of "the document indicating the reasons for the performance of guarantee" will be satisfied in order to realise on the guarantee. In performing the underlying contract, Oriental's project supervisors, Jose Brenes and Mauricio Mora, issued a Construction Project Inspection Report on 23 January 2012. The Report confirmed deficient construction, inferior quality, and the need for modifications or repairs. This Report constitutes *prima facie* evidence of the construction quality issues.

During retrial proceedings, Oriental submitted first instance judgment No. 150-2016, rendered by the Fourth Civil Chamber of San Jose, Costa Rica, with the aim to demonstrate that FECC Central America seriously breached the construction contract. However, because the judgment rendered by the foreign court has not yet been recognised by Chinese courts through judicial proceedings, it does not have *res judicata* effect in the proceedings pending in China. Moreover, it has not yet come into force and cannot be used in the pending Chinese proceedings as auxiliary evidence to demonstrate the performance of the underlying transaction.

In sum, the Construction Project Inspection Report constituted *prima facie* evidence. However, the evidence submitted by FECC Group is not enough to prove that the Report contained false information or was forged, or that Oriental was fully aware that the opposing party did not breach the underlying contract, or that no other facts warranted payment under the independent guarantee though payment was still requested. Based on the breach of the underlying contract by FECC Group and in accordance with the contract, Oriental's request for realising on its rights under the independent guarantee does not constitute guarantee fraud. The judgment by the original court, which held that Oriental's claim for compensation under Guarantee No. G051225, constituted guarantee fraud, is incorrect, and is thus reversed by this court.

The second issue is whether Oriental's request to realise on rights under the guarantee could constitute fraud where the arbitral award ruled that Oriental's performance of the underlying contract amounted to a breach of contract.

During the hearing of this case, FECC Group argued that Oriental's acts constituted guarantee fraud within the meaning of Article 12(c), (d) & (e) of the Provisions of the SPC on Several Issues concerning the Trials of Independent Guarantee Cases ("the Provisions on Independent

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Guarantee").[23] In accordance with the Provisions on Independent Guarantee, and in light of the facts of this case, this court construes the above issue as follows:

The guarantee is independent of the underlying transaction between the principal and the beneficiary. The bank issuing the independent guarantee only reviews whether or not the documents submitted by the beneficiary comply with the terms of the guarantee, and has the right to decide whether or not to pay on its own. The guarantor bank's payment obligations are not influenced by the principal's right to defend under the underlying transaction. Once Oriental, as the beneficiary, supplied *prima facie* evidence to prove the problems of the construction project, even if no dispute resolution procedures, such as lawsuits or arbitration, had been initiated by Oriental and no breach of contract by the opposing party had been confirmed, such a situation would not influence Oriental's rights under the guarantee. Even if a lawsuit or arbitration over the underlying contract had been initiated, if the final decision has not yet been made, the beneficiary's rights under the guarantee will not be influenced. Furthermore, even if an effective judgment or an arbitral award determines that the beneficiary has breached the underlying contract, the breach does not necessarily constitute the necessary and sufficient condition for the guarantee fraud.

In this case, the issues raised are the construction quality and other acts amounting to breach of contract. The facts surrounding the beneficiary's breach of the contract, *e.g.*, failure to pay the construction price, have no logical causal relationship with the construction quality issues. The situation where Oriental, as a beneficiary, failed to perform the underlying contract does not necessarily constitute a fraudulent claim for payment under the independent guarantee. Article 12(c) of the Provisions on Independent Guarantee provides that the conditions for guarantee fraud are to be limited to "where a court's judgment or an arbitral award decides that the debtor under the underlying transaction has no obligation to pay". Hence, unless otherwise stipulated by the guarantee, the review of the underlying contract should have been limited to those matters stipulated by the guarantee for the performance of the contract. If the issue of whether or not the beneficiary has breached the underlying contract is to be included within the scope of review of the guarantee fraud, the review should be very cautious. Although its award of 9 July 2013 found Oriental to have breached the contract in the process of performance, the Resolution Center of Costa Rica only decided those issues raised by FECC Group, which initiated proceedings on 7 February 2012. Oriental raised no counterclaim.

23 *Fa shi* [2016] No. 24. The Provisions were adopted at the 1688th meeting of the Judicial Committee of the SPC on 11 July 2016 and are effective as of 1 December 2016.

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Furthermore, the award did not discharge FECC Group of liability for payment and compensation for Oriental's breach of contract. Therefore, the contents of the arbitral award should not form the basis for holding that Oriental's acts constitute guarantee fraud under Article 12(c) of the Provisions on Independent Guarantee.

[. . .]

The third issue is about the independent counter-guarantee in relation to the independent guarantee.

[. . .]

Based on the characteristics of the independent guarantee, the guarantor, besides the debtor, assumes the liability for direct payment. There is no subordinate relationship between the independent guarantee and the principal debt. Even if the debtor exercises the right to defend in a dispute resolution procedure, the independent guarantor does not necessarily benefit from this defence. Moreover, even if the beneficiary fraudulently claims payment under the independent guarantee, it cannot be reasoned that the guarantor bank has fraudulently claimed payment under the independent counter-guarantee. Only under circumstances where the guarantor bank is fully aware that the beneficiary fraudulently claims payment, but still makes payment in violation of the principle of good faith, and then requests payment under the independent counter-guarantee to the counter-guarantor bank, can a fraudulent claim for payment under the independent counter-guarantee be identified. Since FECC Group filed this action over the guarantee fraud, it should bear the burden of proof in proving that Bancode Costa Rica was fully aware of the independent guarantee fraud committed by Oriental, but still made payment in violation of the principle of good faith; and Bancode Costa Rica further requested payment under the demand counter-guarantee in its capacity as beneficiary, which constituted fraudulent claims for payment under the counter-guarantee. At present, FECC Group can neither prove that Bancode Costa Rica fraudulently made payments under the independent guarantee to Oriental, nor provide the proof that Bancode Costa Rica fraudulently claimed payment under the independent counter-guarantee. FECC Group lacks the factual basis to assert a suspension of payment under the independent counter-guarantee.

To conclude, FECC Group is neither able to prove that Oriental committed the independent guarantee fraud, nor that Bancode Costa Rica was fully aware of the independent guarantee fraud committed by Oriental and still made payments in violation of the principle of good faith. Thus, FECC Group lacks the factual basis to claim suspension of payment under the independent guarantee and the independent counter-guarantee involved in this case.[24]

24 Above n.18.

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V.B. Letter of Credit

17. In the preceding case, *Anhui Foreign Economic Construction (Group) Co., Ltd v. Inmobiliaria Palacio Oriental S.A.*, the beneficiary was a company of Costa Rica. However, in the following case, *East China Seas Holdings Corp. Ltd v. Caixa Bank, S.A.*,[25] the beneficiary was a Chinese company. The facts of the case are as follows:

> On 16 July 2013, on the application of Deca 1285, S.L. ("Deca"), Caixa Bank, S.A. ("Caixa Bank") transmitted a MT 700 swift message for issue of a documentary credit to the Gongti Road Sub-branch of Beijing branch of Agricultural Bank of China, and issued an irrevocable and transferable documentary credit for the beneficiary, East China Seas Holdings Corp. Ltd. ("East China Seas").
>
> The documentary credit states that the issuing bank is Caixa Bank and the applicant is Deca; the applicable rule is the latest version of the Uniform Customs and Practice for Documentary Credits; the subject amount is $59,500. During the period stipulated in the documentary credit, East China Seas presented the documents required by the credit. At first, Caixa Bank advised the bank that the documents did not comply with the requirements of the documentary credit. Later, Caixa Bank advised that the nonconformity had been accepted and the date of payment was 20 November 2013. However, on 15 November, Caixa Bank informed the advising bank that it received a Spanish court order to suspend all the payments in relation to the documentary credit. Caixa Bank also delivered the order rendered by the court of Cádiz on 14 November 2013 to the beneficiary.
>
> According to the court order, Deca applied for provisional measures and requested Caixa Bank to suspend the payment under the documentary credit. Upon review, the court of Cádiz held that the credit beneficiary, *i.e.*, East China Seas, "maliciously breached the contract, and with the inclination to committing fraud, delivered goods that did not comply with the specifications agreed in the contract, which led to a result that the goods could not be circulated or sold on the market." Hence, the court agreed to order provisional measures against East China Seas. Later, East China Seas raised objections to the provisional measures ordered by the court of Cádiz; however, on 7 July 2014, the court of Cádiz rejected these objections and sustained the provisional measures. The ruling further states that "if, during the objection procedure, the court were to adjudicate on the substantive issues involved, it would have been necessary to prematurely or concurrently hear arguments on the merits, thereby

25 Civil Judgment of the Second Beijing Intermediate People's Court (2017), *jing 02 min zhong* No. 5995 (7 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=7857c068-4ca6-4a23-bb83-a8330010dc19).

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giving rise to a procedural conflict." On 3 June 2016, the court of Cádiz responded to Caixa Bank's inquiry by saying that whether or not the provisional measures were to be sustained depended on the results of the pending case No. 1420/13 (*Deca v. East China Seas*) and the court would open a session to hear the case on 27 September 2017. In addition, a Brief Introduction to Spanish Provisional Measures submitted by Roca Junyent International S.L. Shanghai Representative Office (Spain) states that "[i]n order to ensure the enforceability of a judgment, a provisional measure aims to provide effective judicial protection to a future judgment in the proceedings [. . .] the provisional measure is not final. When circumstances change, or those procedures regarding provisional measures end with an effective judgment, the judge would deal with the provisional measure accordingly."[26]

18. In the present case, the plaintiff, East China Seas, requested for payment of the amount under the credit and its interest. The Dongcheng District People's Court of Beijing ("the Dongcheng Court") held that[27]:

I. Jurisdiction

Article 265 of the Civil Procedure Law of the PRC provides that "[i]n the case of an action concerning a contract dispute or other dispute over property rights and interests, brought against a defendant who is not domiciled within the PRC, if the contract is signed or performed within the PRC, or if the subject matter of the legal action is located within the PRC, or if the defendant has distrainable property within the PRC, or if the defendant has its representative office within the PRC, the People's Court of the place where the contract is signed or performed, or where the subject matter of the legal action is located, or where the defendant's distrainable property is located, or where the tort is committed, or where the defendant's representative office is located, shall have jurisdiction." In this case, the dispute between East China Seas and Caixa Bank is about payment under the documentary credit. The dispute is thus "[an]other dispute over property rights and interests" within the scope of Article 265. Caixa Bank is not domiciled within the territory of China, but the Beijing representative office of Caixa Bank is located within the jurisdiction of this court; East China Seas did not agree to subject itself to the jurisdiction of any other foreign courts or arbitral tribunals in the context of the transaction with Caixa Bank, and the amount of the subject matter in dispute does not exceed the specified limit that the Beijing High People's Court set for the court to hear a

26 The facts of the case are complicated. The author only picks up some important facts in order to understand the following discussion in the judgment.

27 Above n.25.

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foreign-related civil and commercial case of first instance. Accordingly, the Dongcheng Court has jurisdiction over this case.

Furthermore, the Dongcheng Court noted that, according to Article 1(1) of the Treaty on Judicial Assistance in Civil and Commercial Matters between the PRC and the Kingdom of Spain, "[t]he nationals of one Contracting Party shall enjoy, in the territory of the other Party, the same legal protection as its nationals and shall have access to the courts in disputes concerning civil and commercial matters, under the same conditions as its nationals." The court would abide by the principle of equality in hearing this case and would equally protect both East China Seas' and Caixa Bank's procedural rights under the law.

II. Applicable law

Since this case is a foreign-related commercial dispute, the law applicable to the case should be determined according to the conflict of law rules. Article 142(3) of the General Principles of Civil Law of the PRC (amended in 2009) provides that: "[i]nternational practice may be applicable to matters for which neither the law of the PRC nor any international treaty concluded or acceded to by the PRC has any provisions." Article 2 of the Provisions of the SPC on Certain Issues Concerning the Trial of Cases Involving Letter of Credit ("the SPC Provisions on Credits") provides that "[w]here the People's Court hears a case over letter of credit, if the parties agree on the application of relevant international practices or other provisions, this agreement shall prevail; in the absence of an agreement by the parties, the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce and other relevant international practices shall apply." In this case, the documentary credit clearly states that the applicable rules are the latest version of the Uniform Customs and Practice for Documentary Credits. The current version of the Uniform Customs and Practice for Documentary Credits is UCP 600. In the proceedings, East China Seas and Caixa Bank did not raise any objection to the application of UCP 600 to the documentary credit in dispute. Therefore, UCP 600 will be one of the sources of law to which the court refers.

Furthermore, Article 41 of the Chinese Private International Law 2010 provides that: "[t]he parties may agree to choose the law applicable to a contract. In the absence of such choice of law, the contract is governed by the law of habitual residence of the party whose performance of contractual obligations can best embody the characteristics of the contract or any other law with which the contract is most closely connected." In the first instance, East China Seas and Caixa Bank did not reach an agreement on the law governing issues, such as credit fraud, which were not covered by UCP 600. East China Seas asserted that the applicable law should be the PRC law because it is a PRC company. During oral arguments, Caixa Bank also invoked the PRC law, *i.e.*, relevant provisions

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of the SPC Provisions on Credits, to claim that East China Seas' acts constituted credit fraud. Thus, it can be understood that Caixa Bank reached a consensus with East China Seas on the applicability of the PRC law in identifying the credit fraud. In conclusion, the PRC law should be construed as the applicable law in governing the issue of credit fraud.

As for the issue raised by Caixa Bank in the first instance as to whether its civil capacity is limited by the stop-payment order issued by the court of Cádiz, the court of first instance held that the stop-payment order was an order to prohibit specific payment on a single occasion and had no impact on Caixa Bank's civil capacity in general. Caixa Bank also argued that the stop-payment order prohibited its capacity for payment since payment would violate the order of the Cádiz court. However, such order does not prevent Caixa Bank from being a subject of litigation. Therefore, the Dongcheng Court determined that Caixa Bank had civil rights capacity and civil conduct capacity to participate in the proceedings.

III. Suspension of proceedings

In its defense, Caixa Bank maintained that the ruling and the stop-payment order rendered by the court of Cádiz should be recognised in China. As provided for at Article 150 of the Civil Procedure Law of the PRC, "the adjudication of the case depends on the results of the trial of another case", which the court of Cádiz was in the midst of hearing, namely Case No. 1420/13 (*Deca v. East China Seas*), Caixa Bank thus argues that the case should be suspended until the court of Cádiz made its decision. Upon review, the Dongcheng Court held that the case was a dispute over the credit, which was independent of the underlying contract: the credit dispute before the Dongcheng Court did not conflict with Case No. 1420/13 before the court of Cádiz over the underlying contract between Deca and East China Seas. There were no circumstances requiring the trial results regarding the [underlying contract] for the adjudication of the case before the Dongcheng Court. Caixa Bank's claim, that the case should have been suspended while the underlying contract dispute was pending, was thus unfounded and rejected by the Dongcheng Court.

As for the recognition of the ruling and the stop-payment order in China, the court should evaluate this in accordance with the Treaty on Judicial Assistance in Civil and Commercial Matters between the PRC and the Kingdom of Spain and the Civil Procedure Law of the PRC. The Dongcheng Court did not opine on this issue, as it was unrelated to the dispute.

IV. Performance of payment obligations under the Credit

As a fundamental payment and settlement tool, the documentary credit has become a great pioneering undertaking for its ingenious institutional arrangement and process design in the history of international trade development.

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Documentary credit, by replacing commercial credit with bank credit, effectively eases the problem of trade settlement in transactions where parties are located in different countries. As an arrangement of trade payment, documentary credit has its unique operation mode and characteristics. Article 4(a) of UCP 600 provides that "[a] credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary. A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank." Article 5 provides that "[b]anks deal with documents and not with goods, services or performance to which the documents may relate." Article 7(a) of UCP600 states that "[p]rovided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if..." Article 15(a) of UCP600 states that "[w]hen an issuing bank determines that a presentation is complying, it must honour." Moreover, Article 5 of the SPC Provisions on Credits also provides that "[a]fter the issuing bank undertakes to honour, negotiate or fulfil any other obligations under the credit, if the documents appear on their face to comply with the terms of the credit and the documents appear on their face to comply with each other, the issuing bank shall fulfill the obligation to pay within the time limits specified on the credit. If a party raises a defence for the underlying transactions between the applicant and beneficiary, the People's Court shall not support such a defence, unless otherwise provided in Article 8 of the Provisions." The above provisions clearly show the credit's unique special principles of independence and strict compliance, *i.e.*, once the credit is issued, it is independent of the underlying contract, and independent of the issuing application. The rights and obligations should be determined according to the terms of the credit. The credit transaction is in fact a sale and purchase of documents. Banks only review the documents. Once the beneficiary presents documents complying with the credit, *i.e.*, a complying presentation, the issuing bank has a duty to make the first payment.

In this case, Caixa Bank received all the documents presented by the beneficiary, East China Seas. Caixa Bank was aware of the nonconformity of the documents upon initial review, but finally disregarded the discrepancies. On 8 October 2013, Caixa Bank transmitted, to the advising bank, a message in which it agreed to make payment on 20 November 2013. To sum up, Caixa Bank accepted all the documents presented by East China Seas, including their nonconformity. Thus, the documents presented by East China Seas could have

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been considered to comply with the terms of the credit involved in this case. Under circumstances where the documents comply with the terms of the credit and are consistent, Caixa Bank as the issuing bank should fulfill its obligation to pay under the credit in dispute and compensate the interest accrued by East China Seas [. . .]

V. Was the credit fraud committed by East China Seas?

Committing credit fraud is an exception to the independence principle and the strict compliance principle of the credit. Once a fraud occurs, the bank is exempted from making payment or accepting the bill of exchange; and a court may also issue an order to prohibit the bank's payment or acceptance. There is no provision regarding credit fraud in UCP 600 or other international practices. Credit fraud should be determined in accordance with the laws chosen by the parties to the credit. In this case, as discussed above, East China Seas and Caixa Bank have reached a consensus regarding the law of the PRC as applicable to the issue of credit fraud. Therefore, the issue of whether or not East China Seas has committed credit fraud should be identified and determined in accordance with the law of the PRC.

According to Article 8 of the SPC Provisions on Credits, "credit fraud shall be determined under any of the following circumstances: (a) where the beneficiary forges documents or presents documents containing false information; (b) where the beneficiary maliciously refuses to deliver goods or delivers valueless goods; (c) where the beneficiary colludes with the applicant or any other third party to present false documents without any actual underlying transactions; or (d) other circumstance of credit fraud." When adjudicating claims of credit fraud, we recognise the universal exception of credit fraud to the principle of independence but should adopt strict criteria for reviewing the credit fraud. In other words, only under circumstances where sufficient evidence can demonstrate the existence of a substantive fraud can the payment under the credit be stopped. The credit is a tool for payment, not a tool for refusal of payment. Despite a need to safeguard the security of transactions, we need to attach importance to enhancing transactional efficiency. On the basis of adjudication by evidence, we should give proper regard to the practice of "payment first and dispute later" having been established in the credit payment practices. In this case, Caixa Bank asserted that, according to the text of the ruling of the court of Cádiz which states that East China Seas "maliciously breached the contract, and with the inclination to committing fraud; delivered goods that did not comply with the specifications agreed in the contract, which led to a result that the goods could not be circulated or sold on the market", the goods delivered by East China Seas fell within the definition of "delivery of valueless goods" as specified in Article 8(b) of the SPC Provisions on Credits, and thus constituted

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credit fraud. However, East China Seas argued that it neither breached the contract, nor committed fraud. Taking into consideration both the ruling of the court of Cádiz and the statements of East China Seas and Caixa Bank, the Dongcheng Court held that the ruling and the stop-payment order of the court of Cádiz, being provisional measures, were temporary, remedial measures, that is, of a procedural nature. Whether the court should grant these provisional measures depends on the *prima facie* evidence presented by the applicant, and the court does not need to conduct a hearing and make a decision on substantive issues. In its reply of 3 June 2016, the court of Cádiz stated that whether the provisional measures were still maintained or stopped depended on the results of the pending case No. 1420/13 in the proceedings (*Deca v. East China Seas*). However, that case has not yet been heard.

In sum, the court of Cádiz has not yet decided and it would be impossible to make a final decision on whether or not East China Seas committed the credit fraud, as highlighted in the text of the last ruling. In addition, the refusal terms of the credit stipulated that "all the payment obligations under the credit should be stopped after submission to and declaration by the European Union/Spanish authorities that the goods under this documentary credit are not suitable for human consumption." However, Caixa Bank did not present such a declaration or any other conclusive evidence of East China Seas' "delivery of valueless goods", to prove the credit fraud. Therefore, there was insufficient evidence to establish Caixa Bank's allegation that a credit fraud was committed by East China Seas and the Dongcheng Court rejected this allegation. Therefore, Caixa Bank could not invoke the fraud exception principle to justify its refusal to pay under the credit.[28]

19. Dissatisfied with the first instance decision, Caixa Bank appealed to the Second Beijing Intermediate People's Court. Some opinions of the Second Beijing Intermediate People's Court are reproduced below:[29]

II. Were serious errors made in the application of law?

On appeal, Caixa Bank argued that it is the characteristic performance party of the contract and its habitual residence is located in the Kingdom of Spain; and the Kingdom of Spain is also the place with which the contract is most closely connected. In this case, as credit fraud was involved and no provision in the UCP 600 is involved, the law of the Kingdom of Spain should be the governing law. Although it did not expressly agree to the application of the law of the PRC in the first instance proceedings, Caixa Bank recognised that the law of the Kingdom of Spain regarding credit fraud is not substantially different from

28 Ibid.
29 Ibid.

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that of the law of the PRC. In the opinion of this court, the necessity to determine the governing law in foreign-related cases stemmed from the fact that different countries have different provisions on the same substantive issue. The conflict in legal provisions would, upon application of different countries' laws, substantively influence the resolution of the substantive issues in dispute. Thus, it is necessary to first determine the law applicable to the issues in dispute. If, on the same substantive issue, there is no conflict in provisions amongst different countries' laws, it is not necessary to discuss the issue of the applicable law at the expense of the litigation efficiency and litigation economy principles. In this case, Caixa Bank recognised that the law of the Kingdom of Spain on the credit fraud is not substantially different from that of the PRC. Accordingly, this court has no disagreement with the court of first instance which, upon recognition of credit fraud for which the UCP 600 made no provision, determined that the law of the PRC would be applicable.

Caixa Bank contends that its capacity for civil conduct is limited by the stop-payment order of the court of Cádiz. This issue should be governed by the law of the Kingdom of Spain, the place where Caixa Bank was registered. The stop-payment order is a provisional measure in the proceedings; such a measure only plays a role in prohibiting specific payment by Caixa Bank in an individual case, and does not influence its capacity for civil conduct in a general legal sense. Since this case does not need to review Caixa Bank's capacity for civil conduct, this court rejects Caixa Bank's argument in this regard on appeal.

III. Was the determination of the first instance court incorrect?

The refusal terms of the credit involved in this case stipulates that "all the payment obligations under the credit should be stopped after submission to and declaration by the European Union/Spanish authorities that the goods under this documentary credit are not suitable for human consumption." Article 10 of the SPC Provisions on Credits provides that where the People's Court determines that a credit fraud has been committed, it shall render a ruling to suspend the payment or a judgment to terminate the payment under the credit. If Caixa Bank argues that it has no obligation to make payment under the credit, it should bear the burden of proving the aforesaid declaration that "the goods under this documentary credit are not suitable for human consumption", or credit fraud has been committed in this case.

Article 8 of the SPC Provisions on Credits provides that "[t]he credit fraud shall be determined under any of the following circumstances: (a) where the beneficiary forges documents or presents documents containing false information; (b) where the beneficiary maliciously refuses to deliver goods or delivers valueless goods; (c) where the beneficiary colludes with the applicant or any other third party to present false documents without actual underlying

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transactions; or (d) other circumstances of credit fraud." From the above provisions, credit fraud differs from defective performance of the underlying contract. For the former, the beneficiary maliciously fails to perform the obligations of the underlying contract. If there is a certain discrepancy in the quantity or quality of the goods delivered by the beneficiary, this does not necessarily constitute "delivery of valueless goods". In this case, according to the ruling of the court of Cádiz which states that East China Seas "maliciously breached the contract, and with the inclination to committing fraud; delivered goods that did not comply with the specifications agreed in the contract, which led to a result that the goods could not be circulated or sold on the market", Caixa Bank asserts that East China Seas "deliver[ed] valueless goods", and thus committed credit fraud. This assertion is unfounded: Caixa Bank presented neither a declaration of "unsuitable human consumption", nor sufficient evidence to prove that the credit fraud had been committed by East China Seas, by for example, "deliver[ing] valueless goods". Therefore, the Dongcheng Court rejected Caixa Bank's allegation that credit fraud had been committed by East China Seas. Caixa Bank argues that as the legal effect of the ruling and the stop-payment order of the court of Cádiz prevail over the terms of the credit involved in this case and UCP 600, the ruling and the stop-payment order were duties compulsorily to be fulfilled by Caixa Bank. Or else, Caixa Bank will undertake the corresponding legal liabilities in accordance with the law of the Kingdom of Spain. Therefore, it is incorrect for the court of first instance in its judgment to determine that Caixa Bank should undertake the payment obligation under the credit. Because the ruling and the stop-payment order of the court of Cádiz only take effect in the Kingdom of Spain, the ruling and the stop-payment order, without certain [recognition] procedures, could not take legal effect in the territory of the PRC. This court therefore rejects Caixa Bank's argument in this regard.

IV. Does the first instance court's determination violate legal procedures?
Caixa Bank at first argued that the ruling and the stop-payment order of the court of Cádiz should be recognised by Chinese courts. Although Article 17(1) of the Treaty on Judicial Assistance in Civil and Commercial Matters between the PRC and the Kingdom of Spain provides that [j]udicial decisions in civil and commercial matters rendered by the courts of a Party (with the exception of proceedings relating to bankruptcy, composition with creditors and nuclear damage) shall be recognised and, where appropriate, enforced by the courts of the other Party, the Treaty also contains the provisions on refusal of recognition and enforcement, and the procedural provisions including that any recognition and enforcement of judicial decisions shall be determined by the court at the locality of the requested Party in accordance with its domestic legal procedural

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provisions. The ruling and the stop-payment order of the court of Cádiz, without specified procedures, could not automatically be recognised by Chinese courts. Therefore, the above argument of Caixa Bank is rejected by this court.

Caixa Bank also argues that Case No. 1420/13, *i.e.*, *Deca v. East China Seas*, pending in the court of Cádiz, calls for the suspension of proceedings as provided for at Article 150 of the Civil Procedure Law of the PRC ("the adjudication of the case depends on the results of the trial of another case"). As such, the proceedings should be suspended before the court of Cádiz makes the decision. The court of first instance held that the credit dispute and the dispute over the underlying contract were independent of each other and did not conflict; the proceedings of this credit dispute should not be suspended because they did not depend on the results of the hearing of the underlying contract dispute. This court has no different opinion from the court of first instance and rejects Caixa Bank's argument.[30]

V.C. Financial Loan Contract

20. The case, *Export-Import Bank of Malaysia Berhad v. Shenyang Shenyang Amusement Park Co., Ltd.*,[31] has raised a complicated applicable law issue. In 2007, the Export-Import Bank of Malaysia Berhad ("Bank of Malaysia") entered a loan agreement with Shenyang Shenyang Amusement Park Co, Ltd. ("Shenyang Amusement"). Article 2.1 of the loan agreement stipulates that Bank of Malaysia was to provide a loan of $70 million to Shenyang Amusement for a period of 60 months. In the performance of the agreement, Bank of Malaysia made the loans of $70 million, but Shenyang Amusement did not repay the principal and interest. Bank of Malaysia filed a lawsuit with the High People's Court of Liaoning Province. As for the jurisdiction, choice of law, lawyer fees and other issues, the High People's Court of Liaoning Province ("Liaoning High Court") held as follows:[32]

A. Jurisdiction issue. The plaintiff, Bank of Malaysia, is a Malaysia corporation, so this case is a foreign-related case according to Article 522(a) of the Interpretations of the Civil Procedure Law. The case is a dispute over the financial loan contract because the two parties disputed the performance of the loan agreement. According to Article 21(2) of the Civil Procedure Law, a civil lawsuit brought against a legal person or any other organisation is within the jurisdiction of the People's Court of the place where the defendant is domiciled.

30 Ibid.

31 Civil Judgment of the SPC (2017), *zui gao fa min zhong* No. 636, (http://wenshu.court.gov.cn/content/content?DocID=af491eca-23c8-4132-bfdf-a88f00beee07).

32 Ibid.

Article 23 further provides that a lawsuit brought for a contract dispute is within the jurisdiction of the People's Court of the place where the defendant is domiciled or where the contract is performed. In this case over a financial loan contract, the domicile of the defendant, Shenyang Amusement, is located in Liaoning Province. Thus, the Liaoning High Court had jurisdiction over the case. Article 17.21(b) of the loan agreement stipulated that "[t]he parties irrevocably agree that the court of Malaysia has non-exclusive jurisdiction, and is entitled to hear and judge any lawsuit and proceedings, is also entitled to deal with any disputes arising out of or in connection with the loan agreement and any other guarantee documents." In this choice of court clause, the jurisdiction of the court of Malaysia did not exclude the jurisdiction of other countries' competent courts. Article 17.21(f) stipulates that "a lawsuit brought to the competent court of Malaysia does not restrict Bank of Malaysia's rights to file legal proceedings against the borrower in any other jurisdictions. Where Bank of Malaysia initiates a lawsuit in one or more jurisdictions, such lawsuit does not exclude its rights to bring legal proceedings at any other jurisdictions." The above clause further clarifies that Shenyang Amusement should not restrict the rights of Bank of Malaysia to file a lawsuit in other competent courts. Accordingly, it is not improper for Bank of Malaysia to file a lawsuit against Shenyang Amusement with the Liaoning High Court, and the court has jurisdiction over the case. Shenyang Amusement's argument that this case should only be within the jurisdiction of the court of Malaysia is unfounded both in law and in fact and is rejected by the Liaoning High Court.

B. Applicable Law. Since this case is a dispute over a foreign-related financial loan contract, according to Article 3 of the Chinese Private International Law 2010, the parties may, in accordance with the provisions of law, expressly choose the law applicable to a foreign-related civil relationship. In this case, Article 17.21(a) of the loan agreement stipulates that "this agreement is governed by the law of Malaysia, and is construed in accordance with the law of Malaysia. If the law of Malaysia is not applicable or not enforceable, each party should agree to apply the law of China or other law that Bank of Malaysia recognizes. The law applicable to the guarantee documents is the same as the above law." In this case, the two parties agreed that Malaysian law was applicable, and did not exclude the application of Chinese laws. Bank of Malaysia claimed the application of Chinese law, but Shenyang Amusement argued that the parties had agreed on the application of Malaysian law, so the case should be governed by the law of Malaysia. According to Article 10 of the Chinese Private International Law 2010, parties choosing a foreign law shall ascertain the foreign law. Where the foreign law cannot be ascertained or contains no relevant provisions, the law of the PRC applies. Although Shenyang Amusement argues in favour of the application of Malaysian law, it did not, during the first instance

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proceedings, prove the content of Malaysian law prior to the conclusion of oral arguments. Therefore, this court rejects Shenyang Amusement's arguments regarding the application of Malaysian law. This case is a dispute over a financial loan contract, and Shenyang Amusement is a company of Liaoning Province. In addition, the place of performance of the loan agreement is Liaoning Province. According to Articles 10 and 41 of the Chinese Private International Law 2010, this case involving a financial loan contract should be governed by the PRC law. Article 16.1 of the Guarantee Agreement involved in this case also stipulated that "the law of the PRC is applicable to the signature and interpretation of this agreement, as well as the resolution of relevant disputes." The two parties agreed upon PRC law as applicable to the guarantee dispute in their Guarantee Agreement. This agreement conformed to the provisions of Chinese law, and should be confirmed subject to that law. In sum, the law of the PRC is found to be applicable to both the loan relationship and the guarantee relationship.[33]

[. . .]

D. Lawyer's Fees. At the conclusion of oral arguments during the First Instance proceedings, Bank of Malaysia had already paid 4,037,944.14 yuan in lawyer fees. Thus, Bank of Malaysia requested that Shenyang Amusement pay these fees. In the opinion of the Liaoning Court, Article 17.23 of the loan agreement between Bank of Malaysia and Shenyang Amusement stipulated that any costs, expenses, travel and cash expenditure suffered by Bank of Malaysia and its lawyers, which resulted from the matters specified in the loan agreement and the guarantee documents, was to be paid by Shenyang Amusement. These proceedings fell within the scope of Article 17.23 of the loan agreement. Moreover, the lawyers fees, stipulated in the contract between Bank of Malaysia and its agency, does not exceed the professional standard for fees charged by lawyers. The Liaoning Court therefore accepted Bank of Malaysia's claim for lawyer fees.[34]

21. In its judgment, the Liaoning Court upheld Bank of Malaysia's claim and ordered Shenyang Amusement to repay the principal and interest. Dissatisfied with the first instance judgment, Shenyang Amusement appealed to the SPC. Shenyang Amusement alleged that Bank of Malaysia had brought a lawsuit against its guarantor to a court in Malaysia, which had rendered a judgment and enforced against the guarantor's properties. The court of first instance did not identify such facts, which resulted in the duplication of repayment to the creditor. To this issue, Bank of

33 Ibid.

34 Ibid.

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Malaysia alleged in its defence that it had not yet received any compensation although it had won a favorable judgment against the guarantors. The lawsuit filed by Bank of Malaysia against the guarantors did not influence the Bank's right to initiate a lawsuit against the debtor. The judgment rendered by the court of Malaysia had not yet been recognised and enforced by Chinese courts, and that judgment did not have any influence on the Chinese judicial proceedings. In its judgment, the SPC dismissed the appeal and affirmed the original judgment. As for the two key issues, the applicable law and the effectiveness of the Malaysian judgment, the SPC held that[35]:

> This case is a dispute over a foreign-related financial loan contract. According to Article 41 of the Chinese Private International Law 2010, the parties may agree to choose the law applicable to a contract. Article 17.21(a) of the loan agreement clearly stipulates that "this agreement is governed by the law of Malaysia, and is construed in accordance with the law of Malaysia. If the law of Malaysia is not applicable or not enforceable, each party should agree to apply the law of China or other law that Bank of Malaysia recognizes. The law applicable to the guarantee documents is the same as the above law." In the proceedings of first instance, Shenyang Amusement asserted that the parties agreed to the application of Malaysian law in the loan agreement, so this case should be governed by the law of Malaysia, but Shenyang Amusement failed to ascertain the relevant Malaysian law at first instance. Article 10(1) of the Chinese Private International Law 2010 provides that "the parties choosing a foreign law shall ascertain the foreign law." Article 17(2) of the SPC Private International Law Interpretation 2012 further provides that "[w]here, pursuant to Article 10(1) of the Chinese Private International Law 2010, a party is required to provide a foreign law but fails to provide such foreign law without justifiable cause within the reasonable time limit designated by a People's Court, the People's Court may determine that the foreign law cannot be ascertained." Furthermore, according to Article 10(2) of the Chinese Private International Law 2010, "where the foreign law cannot be ascertained or contains no relevant provisions, the law of the PRC applies." Since Shenyang Amusement has the obligation to ascertain the law of Malaysia but failed to do so without justifiable cause, it is correct for the court of first instance to apply Chinese law to hear the case according to the above provisions. In the second instance proceedings, Shenyang Amusement clearly recognises both the law of Malaysia and the PRC as applicable, and agrees to the latter as the governing law. Therefore, there are no grounds for Shenyang Amusement's appeal that the case should be governed by the law of Malaysia.[36]

35 Ibid.

36 Ibid.

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22. As for the issue of whether the judgment of the court of Malaysia influences the repayment liabilities of Shenyang Amusement in this case, the SPC held as follows:

> Although Shenyang Amusement argues that the court of Malaysia judged that the Malaysian guarantors of the loan assumes the guarantee liabilities, it does not provide any evidence to demonstrate that the judgment has been executed and the rights of Bank of Malaysia has been enforced. On the contrary, according to the statements of Bank of Malaysia, the judgment of the court of Malaysia is still in the process of execution; the company as the guarantor who is judged to undertake the liability is in the process of liquidation; as for the two other guarantors, Guanren Zeng and Miaohua LUO, Bank of Malaysia has applied for bankruptcy and the court concerned is hearing the application. Even if the judgment of the court of Malaysia has been executed, and the creditor's rights could be fully or partially enforced, Shenyang Amusement can still obtain remedies in the process of execution of the judgment of the present case according to the law. This would not result in Bank of Malaysia obtaining double compensation. Therefore, there are no grounds for Shenyang Amusement's appeal that the judgment of first instance will result in double compensation for Bank of Malaysia.[37]

V.D. Construction contract

23. In the case of *Changkui Li v. Fugong Tenghong Foreign Trading Co Ltd.*,[38] Changkui Li entered a labour contract for a construction project in 2013 with the defendant, Fugong Tenghong Foreign Trading Co Ltd. ("Tenghong"), which stipulates that Changkui Li was to construct a 20 kilometer highway in Myanmar. After signing the contract, the plaintiff finished the construction, but Tenghong did not pay all the construction costs. Changkui Li filed a lawsuit to the Intermediate People's Court of the Lisu Autonomous Prefecture of Nujiang against Tenghong. The contract was found to be invalid, but Tenghong should pay the construction costs to Changkui Li.[39] Tenghong did not abide by the judgment and appealed to the High People's Court of Yunnan Province. On the issue of applicable law, the High People's Court of Yunnan Province held that:

> This case is a dispute over a foreign-related construction contract. First, on the issue of whether or not the present case should be governed by Myanmar law,

37 Ibid.

38 Civil Judgment of the High People's Court of Yunnan Province (2015), *yun gao min san zhong zi* No. 90 (15 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=65ecd087-ff1b-4b75-b57d-d64b48d75bc9).

39 Civil Judgment of the Intermediate People's Court of the Lisu Autonomous Prefecture of Nujiang (2014), *nu zhong min san chu zi* No. 5.

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> the appellant requests that Myanmar law govern this case, as the subject matter of this case is located in Myanmar, and the project was also constructed in Myanmar; thus, Myanmar law is most closely connected with the case. However, the appellant failed to ascertain the Myanmar law, whether the basic text of law or relevant guidance. According to Article 10(1) of the Chinese Private International Law 2010 and Article 17(2) of the SPC Private International Law Interpretation 2012, the parties choosing a foreign law shall provide the foreign law; where a party is required to provide a foreign law but fails to do so without justifiable cause within the reasonable time limit designated by a People's Court, the People's Court may determine that the foreign law cannot be ascertained. In such a case, the law of the PRC applies. Thus, in the original judgment, it is right for the court of first instance to apply the law of the PRC. This court upholds the grounds for determination of the applicable law in the original judgment.[40]

24. Dissatisfied with the jurisdiction and applicable law determinations by the courts of first and second instance, Tenghong applied for reconsideration to the SPC. On these two issues, the opinions of the SPC were as follows[41]:

> The first issue is whether the case should be under the jurisdiction of the People's Court. Tenghong asserted that the case should be subject to the court of the place where the real estate is located, *i.e.*, the court of Myanmar, in accordance with Article 33 of the Civil Procedure Law of the PRC. As for the jurisdiction issue, on the basis of the principle of judicial sovereignty, the exclusive jurisdiction of the court of the place where the real estate is located provided in Article 33 of the Civil Procedure Law of the PRC is based on the premise that the case is subject to the jurisdiction of the People's Court. This article should not be used as a basis to exclude the jurisdiction of the People's Court.[42] Although this case involves foreign elements, the two parties did not agree upon

40 Civil Judgment of the High People's Court of Yunnan Province (2015), *yun gao min san zhong zi* No. 90.

41 Civil Ruling of the SPC (2017), *zui gao fa min shen* No. 629 (15 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=a3746db8-4477-4455-b00d-a80b00efa85a).

42 Author's note: according to the above SPC's opinion, Article 33 in Chapter 2 of the Civil Procedure Law is an article only allocating the jurisdiction of domestic courts. This opinion is not completely correct because, in Part IV of the Civil Procedure "Special Provisions for Civil Procedure of Cases Involving Foreign Elements", Article 259 clearly provides that "[t]he provisions of this Part shall be applicable to civil proceedings within the territory of the PRC in regard to a case involving foreign elements. Where it is not covered by the provisions of this Part, other relevant provisions of this Law applies." Because there is no special provision on jurisdiction over

the choice of foreign courts. It is proper for the original court to hear this case. Therefore, the first ground of Tenghong's application for reconsideration is rejected by this court.

The second issue is whether or not the case should be governed by Chinese law. Article 41 of the Chinese Private International Law 2010 provides that "the parties may agree to choose the law applicable to a contract. In the absence of such choice of law, the contract is governed by the law of habitual residence of the party whose performance of contractual obligations can best embody the characteristics of the contract or any other law with which the contract is most closely connected." In this case, the two parties did not agree upon the law applicable to their disputes in the labour contract related to the construction project. Tenghong also did not provide any evidence that the two parties had reached an agreement regarding the choice of foreign law. Both parties are Chinese natural or legal persons domiciled in China, and the place of the contract's performance is also in China. Moreover, the contract specially stipulates that "according to the provisions of the Labour Contract Law of the PRC and the current relevant laws and regulations ... the following terms are concluded..." Hence, it is proper for the original court to apply the PRC law according to the principle of the closest connection. Tenghong asserts that the applicable law should be determined in accordance with Article 36 of the Chinese Private International Law 2010, which provides that "the real right concerning an immovable is governed by the law of the place where the immovable is situated". This assertion is inconsistent with the nature of the contract dispute in this case. Therefore, the second ground of Tenghong's application for reconsideration is rejected by this court.[43]

V.E. Land Contract

25. In *Mingshui Hong v. Hainan State-owned Nanbin Farm Company & Sanya Nanbin Investment Co, Ltd.*,[44] Hainan State-owned Nanbin Farm Company ("Nanbin Farm"), which entered a land contract with Mingshui Hong in 1994, decided in 2011 to discharge the land contract according to its discharge clause, but was refused by Mingshui Hong. The parties failed to negotiate and Nanbin Farm filed a lawsuit with the Sanya Intermediate People's Court. Dissatisfied with the first

real estate disputes in Part IV, Article 33 should also be a legal basis to deal with jurisdiction in a real estate dispute.

43 Above n.41.

44 Civil Judgment of the High People's Court of Hainan Province (2017), *qiong min zhong* No. 373 (16 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=57029c80-9379-4495-99fa-a8490033774c).

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instance judgment, Mingshui Hong then appealed to the High People's Court of Hainan Province. To determine the applicable law, the High People's Court of Hainan Province applied the doctrine of the closest connection, not the law of place where the land is situated:

> In the opinion of this court, based on the parties' claims and arguments, this case is a dispute over the land contract involving Taiwan region since Mingshui Hong is a citizen of Taiwan region. By reference to Article 259 of the Civil Procedure Law of the PRC and Article 1(c) of the Provisions of the SPC on Certain Issues Concerning Jurisdiction over Civil and Commercial Cases Involving Foreign Elements, the court of first instance has jurisdiction over the present case. Article 41 of the Chinese Private International Law 2010 provides that "the parties may agree to choose the law applicable to a contract. In the absence of such choice of law, the contract is governed by the law of habitual residence of the party whose performance of contractual obligations can best embody the characteristics of the contract or any other law with which the contract is most closely connected. The parties to this case failed to choose the applicable law. The place of signature and performance of the contract is Hainan Province in Mainland China. Therefore, the law of Mainland China is most closely connected with the case and should apply.[45]

V.F. Property Relationship between Husband and Wife

26. In *Chunhua Chang v. Qiang Fu & Meiying Yin*,[46] former spouses, Chunhua Chang ("Chunhua") and Qiang Fu ("Qiang"), who married in 1987, went to court regarding a property dispute. In 2006, HK New Food Style Foodstuff Ltd ("New Food Style") was established in Hong Kong with an equity value of 10,000 Hong Kong dollars. Qiang was the only shareholder of New Food Style. On 7 January 2013, he was held in criminal detention for bigamy. On the same day, he resigned from the position of director, and entrusted his mother, Meiying Yin, to be the director of New Food Style. Qiang also transferred all the shares to Meiying Yin, who became the only shareholder of the company. Later, he was sentenced to one year in prison for bigamy. On 16 January 2013, Chunhua filed for divorce in the Qingdao Intermediate People's court, and requested the partition of the couple's joint property. Chunhua also claimed that

45 Ibid.

46 Civil Judgment of the High People's Court of Shandong Province (2016), *lu min zhong* No. 2343 (16 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=1bfd3a3e-0610-4599-ab1e-3ad7f354adc7).

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the transfer of the shares of New Food Style was invalid. On this issue, the Qingdao Intermediate People's court held as follows:

> This case is a dispute resulting from an infringement on the common property rights of husband and wife. The disputed company involved in this case, New Food Style, is a Hong Kong company. Therefore, this case should be heard with reference to the foreign-related civil procedure. Because the two defendants, Qiang and Meiying Yin, are domiciled in Qingdao city, Shandong Province, this court of the place of the defendant's domicile has jurisdiction. In this case, two issues require the determination of the applicable laws. The first issue is the law applicable to the property relationship between husband and wife. Qiang and Chunhua are citizens in Mainland China, and their habitual residences are also in Mainland China. According to Article 24 of the Chinese Private International Law 2010, in the absence of the parties' choice of law, the law of the place of the parties' common habitual residence applies. Therefore, the law of Mainland China should govern this issue. The second issue relates to the tortious act. According to Article 44 of the Chinese Private International Law 2010, where the parties have a common habitual residence, the law of the common habitual residence applies. In this case, both Qiang and Chunhua habitually reside on the Chinese Mainland. Therefore, the tort issue should be governed by the law of the Chinese Mainland. In conclusion, the law of the Chinese Mainland should be the law applicable to the merits of this case.
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> New Food Style was established during the marriage between Qiang and Chunhua. The evidence submitted by Qiang is not enough to prove that the financial contribution to New Food Style comes from other properties outside their couple's joint property. Hence, the company should be identified as set up using joint property of husband and wife. According to Article 17 of the Marriage Law of the PRC, husband and wife shall enjoy equal rights in the disposition of their jointly possessed property. If husband or wife makes an important decision on their joint property for the necessities of daily life, they should equally negotiate and reach a consensus. Qiang transferred his shares of New Food Style to his mother, Meiying Yin, but no evidence submitted by Qiang and Meiying Yin demonstrates that Meiying Yin has paid any corresponding consideration. Moreover, at this time, Meiying Yin should have been fully aware of the deterioration of the marital relationship between Qiang and Chunhua. According to Article 58 of the General Principles of Civil Law of the PRC, a civil act shall be null and void if it is performed through malicious collusion and impairs the interests of a third party. Accordingly, this court confirms that the transfer of shares from Qiang to Meiying Yin is invalid. In sum, during Qiang's criminal detention for the suspected crime of bigamy, his disposal of his shares in New Food Style without authorisation caused prejudice to the

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property rights of Chunhua. Therefore, the transfer of shares in New Food Style by Qiang to Meiying Yin is invalid.[47]

27. On appeal, the judgment of the Qingdao Intermediate People's Court was upheld by the court of second instance, the High People's Court of Shandong Province. Qiang then applied for reconsideration to the SPC. The opinions in the above judgment of first instance were confirmed by the SPC.[48]

V.G. Application of International Conventions

28. The first case illustrating the application of international conventions, *Youlchon Chemical Co, Ltd. v. Tianjin Gaosheng Technology Development Co, Ltd.*,[49] involves the application of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). Youlchon Chemical Co, Ltd. ("Youlchon") claimed that it conducted an international sale of goods, and the place of delivery was Hong Kong, China. Tianjin Gaosheng Technology Development Co., Ltd. ("Gaosheng") recognised that it sent an order to purchase relevant goods to Youlchon on 13 March 2014, but the place of delivery was Xingang, located in Tianjin, not Hong Kong. On 3 April 2014, Youlchon sent, via e-mail, commercial invoices and an electronic bill of lading to Gaosheng, and Gaosheng acknowleged their receipt of the same. In the proceedings, Youlchon failed to produce evidence to prove that Gaosheng had changed the port of delivery and that Gaosheng had actually received the goods. Youlchon claims the price of goods, but Gaosheng argued that it did not receive the goods. The court of first instance, the First Intermediate People's Court of Tianjin, held that "Youlchon is a company registered in the Republic of Korea, so this case is a foreign-related case. The two parties choose in writing to apply the law of the PRC. Thus, this case should be governed by the PRC law." In its judgment,[50] the First Intermediate People's Court of Tianjin applied Articles 13, 30 and 141(1) of the Chinese Contract Law in its judgment. Although the results of the judgment of the High People's Court of Tianjin Municipality are very similar to those of the judgment of first instance,

47 Ibid.

48 Civil Ruling of the SPC, (2017) *zui gao fa min shen* No. 2350 (16 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=cb98515c-952d-4232-bee6-a8120100d6a5).

49 Civil Judgment of the High People's Court of Tianjin Municipality (2017), *jin min zhong* No. 21 (16 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=9ef13050-452b-4e55-b730-a7920086a176).

50 Civil Judgment of the First Intermediate People's Court of Tianjin (2016), *jin 01 min chu* No.82.

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the law applicable to the case is different. In this regard, the judgment of second instance states as follows[51]:

> The present case is a dispute over an international sale of goods contract. Since Youlchon is a company registered in a foreign country, this case is a civil case involving foreign elements. According to Article 3 of the Chinese Private International Law 2010, the parties may, in accordance with the provisions of law, expressly choose the law applicable to a foreign-related civil relationship. Now, the two parties explicitly choose the law of the PRC as the law applicable to the contract dispute, so the law of the PRC should be the applicable law to resolve the present dispute. Because Youlchon and Gaosheng are separately located in the Republic of Korea and the PRC, and the two countries are Contracting States of the CISG, and the two parties do not exclude the application of the CISG, the contract dispute in this case should firstly be governed by the CISG.
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> [. . .]
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> Article 32(2) of the CISG provides that "[i]f the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation." In this case, Youlchon recognises that it is bound to arrange for carriage of the goods. Thus, it should transport the goods to Xingang, China, which is the port of termination of delivery of goods specified in Gaosheng's order. However, the place of delivery of the goods that is specified in the commercial invoices and an electronic bill of lading, issued by Youlchon, is Hong Kong, China. Youlchon argues that Gaosheng has changed the place of delivery, but this is denied by Gaosheng. Youlchon cannot provide evidence to prove its claim. Therefore, this court rejects its claim. Correspondingly, Youlchon did not deliver the goods to Gaosheng at the port of Xingang, China, and violated the above provisions. It is proper for the court of first instance to reject Youlchon's claim that Gaosheng should pay the price of the goods. Youlchon alleges that Gaosheng received the commercial invoices and the electronic bill of lading and did not raise any objection, so Gaosheng should be the buyer of the goods involved in this case based on its behaviour. On this issue, this court holds that the absence of an objection by Gaosheng to these documents cannot be the basis for maintaining that Gaosheng recognised the change of the place of delivery of goods involved in this case, and actually received the goods. Therefore, Youlchon's allegation is unfounded.[52]

51 Above n.49.

52 Ibid.

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29. The second case, *Heyuan Zheng v. AirAsia of Malaysia, et al.*,[53] involves the application of the Montreal Convention (formally, the Convention for the Unification of Certain Rules for International Carriage by Air). On 23 January 2013, Heyuan Zheng took the flight of AirAsia of Malaysia from Kota Kinabalu International Airport to Guangzhou, but his baggage was lost after consignment in Kota Kinabalu International Airport. On the issue of applicable law, the People's Court of Baiyun District (Guangzhou, Guangdong Province) held that:

> [. . .] According to Article 4 of the SPC Private International Law Interpretation 2012, where the application of law to a foreign-related civil relation involves an international convention, the People's Courts shall apply such international convention in accordance with the provisions of law, such as Article 142(2) of the General Principles of Civil Law of the PRC, Article 95(1) of the Law of the PRC on Negotiable Instruments, Article 268(1) of the Maritime Law of the PRC and Article 184(1) of the Civil Aviation Law of the PRC, except for international conventions in the field of intellectual property that either have already been transformed or must be transformed into domestic law. Article 184(1) of the Civil Aviation Law of the PRC provides that "[w]here an international treaty concluded or acceded to by the PRC contains provisions different from those in the PRC civil laws, the provisions of the international treaty prevail, except those on which the PRC has declared a reservation." Since the countries of the parties to the passenger air transport contract involved in this case are Contracting States of the Montreal Convention, this case should be governed by the Montreal Convention.[54]

VI. Recognition and Enforcement of Foreign Judgments

30. In 2017, three cases involved recognition and enforcement of foreign monetary judgments. The first is *French LaSARL K.C.C Ltd. v. Chenzhou Hualu Digital Technology Co, Ltd.*[55] The French judgment was refused recognition and enforcement because the judgment was not served to the respondent. The judgment of the Chenzhou Intermediate People's Court of Hunan Province states as follows:

53 Civil Judgment of the Guangzhou Intermediate People's Court (2017), *yue 01 min zhong* No. 6146 (16 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=86e4e110-ddee-4800-83e7-a8400095392c).

54 Ibid.

55 Civil Ruling of the Chenzhou Intermediate People's Court of Hunan Province (2016), *xiang 10 xie wai ren No.1* (1 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=13f06219-9d69-4aea-8b73-a7a60119af55).

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> In the proceedings, the applicant neither supplied the original proof of service nor other documents to prove that judgment No. RG2013F00048 of the Commercial Court of Compiègne, France, was served to the respondent. Moreover, upon request by the applicant, this court has been to the Ministry of Justice of the PRC and the SPC to investigate the service of the judgment, but no records of acceptance and service of legal documents in relation to the French case were found since April 2013. Since the French judgment, rendered on 23 April 2013, there has been no evidence proving that the judgment was ever served to the respondent [. . .] The fact that the respondent has not yet received the judgment actually deprives the respondent of its right of appeal. Such a situation violates the principle of equity prescribed in the Civil Procedure Law of the PRC. Therefore, this court refuses to recognise and enforce civil judgment No. RG2013F00048 of the Commercial Court of Compiègne, France.[56]

31. The second case is *Mr. Herbert Truhe et al. v. Jiangxi lidu Fireworks Group Co, Ltd.* (the "*Truhe* case").[57] The Nanchang Intermediate People's Court held that reciprocity does not exist between the two countries, China and the US. The case was about compensation and liability for personal injury caused by firework products. In the judgment, rendered by the Court of Common Pleas of Philadelphia County of the First Judicial District of Pennsylvania, the respondent was ordered to pay USD 4,626,064.89 to Mr Herbert Truhe and Mrs Maryellen Truhe, and USD 10,440,068.35 to Mr Joseph Mascaro and Mrs Lori Mascaro. In the ruling, the Nanchang Intermediate People's Court held that:

> Article 282 of the Civil Procedure Law of the PRC further provides that "[for] an application or request for recognition and enforcement of a legally effective judgment or ruling, the People's Court shall examine the application or request in accordance with international treaties concluded or acceded to by the PRC or with the principle of reciprocity. If the application or request does not violate the fundamental principles of the laws of the PRC, or national sovereignty, security and social public interests of the PRC, the People's Court shall recognise the validity of the foreign judgment or ruling, and, if required, issue a writ of execution to execute it in accordance with the relevant provisions of this Law; if the application or request contradicts the fundamental principles of the law of the People's Republic of China or violates national sovereignty, security or

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56 Ibid.

57 Civil Ruling of the Nanchang Intermediate People's Court, Jiangxi Province (2016), *gan 01 min chu* No. 354 (17 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=edfc0de2-ad91-4dd1-b8e8-a7af0021740c).

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social public interest of the country, the People's Court shall not recognize and execute it." There are no international treaties concluded or acceded to by China and the US on the recognition and enforcement of judgments or rulings, nor has the reciprocity relationship been established. Therefore, the application by Mr Herbert Truhe, Mrs Maryellen Truhe, Mr Joseph Mascaro and Mrs Lori Mascaro should be rejected as unfounded at law. The applicants can re-initiate a lawsuit to the People's Court according to Article 544 of the Interpretations of the Civil Procedure Law.[58]

32. The holding in the third case, *Li Liu v. Li Tao & Wu Tong* ("*Li Liu* case"),[59] is contrary to the holding in the *Truhe* case. The ruling in the *Li Liu* case was rendered only two months after that of the *Truhe* case. In the *Li Liu* case, the Wuhan Intermediate People's Court held that reciprocity exists between China and the US, and thus recognised and enforced the US Court's judgment. The respondents, Li Tao & Wu Tong, and the applicant, Li Liu, entered an agreement for a transfer of shares in the US on 22 September 2013. The agreement stipulated that Li Tao was to transfer 50% of the shares of Jiajia Management Inc., registered in California to Li Liu. Then Li Liu paid USD 12,500 to Wu Tong (Li Tao's husband). However, Li Tao breached the contract. Therefore, Li Liu initiated an action (case No. EC062608) before the High Court of Los Angeles County, California, to request the return of the price and payment of interest. The court, after service of summons and a hearing by default, delivered a judgment in favour of the plaintiff. Because the two defendants had left the US and returned to Wuhan, China, Li Liu applied to the Wuhan Intermediate People's Court for recognition and enforcement of the Californian judgment. She also submitted the case report, *Hubei Gezhouba Sanlian Indus Co. v. Robinson Helicopter Co.* ("Sanlian"),[60] in which the US Court of Appeals

58 Author's note: Article 544 Where a party applies to a competent Intermediate People's Court of the PRC for recognition and enforcement of a legally effective judgment or ruling rendered by a foreign court, in the absence of any international treaty concluded or jointly acceded to by the foreign country and the PRC, and in the absence of reciprocal relationship, the Intermediate People's Court shall dismiss the application, unless the party applies to the People's Court for recognition of a legally effective divorce judgment rendered by the foreign court.

Where the application for recognition and enforcement is dismissed, the party may file a lawsuit with the People's Court.

59 Civil Ruling of the Intermediate People's Court of Hubei Province (2015), *e wu han zhong min shang wai chu zi* No. 00026 (15 July 2018), (http://wenshu.court.gov.cn/content/content?DocID=498d1508-6e7a-4f61-9a54-a7b6012dafaa).

60 No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187 (C.D. Cal 22 July 2009), aff'd, 425 F.App'x 580 (9th Cir. 2011). On 29 March 2011, the US Court of Appeals for the Ninth Circuit (the Ninth Circuit Court) affirmed the judgment of the US District Court for the Central District of California in the case of *Hubei Gezhouba*

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for the Ninth Circuit recognised a judgment rendered by the High People's Court of Hubei Province in 2011. As for the present case, the Wuhan Intermediate People's Court held that:

> This is an application for recognition and enforcement of a foreign judgment. Article 281 of the Civil Procedure Law of the PRC provides that "if a legally effective judgment or ruling made by a foreign court requires recognition and enforcement by a People's Court of the PRC, the party concerned may apply for recognition and enforcement directly to the competent Intermediate People's Court of the PRC. The foreign court may also, in accordance with the provisions of international treaties concluded or acceded to by that foreign country and the PRC or with the principle of reciprocity, request recognition and enforcement by a People's Court." Article 282 of the Civil Procedure Law of the PRC further provides that "[for] an application or request for recognition and enforcement of a legally effective judgment or ruling, the People's Court shall examine the application or request in accordance with international treaties concluded or acceded to by the PRC or with the principle of reciprocity. If the application or request does not violate the fundamental principles of the laws of the PRC, or national sovereignty, security and social public interests of the PRC, the People's Court shall recognize the validity of the foreign judgment or ruling, and, if required, issue a writ of execution to execute it in accordance with the relevant provisions of this Law; if the application or request contradicts the fundamental principles of the law of the People's Republic of China or violates national sovereignty, security or social public interest of the country, the People's Court shall not recognize and execute it." In the current case, the respondents Li Tao and Wu Tong have apartments or houses in Wuhan. This court, as the court at the place where the respondents' property is located and where the respondents habitually reside, has jurisdiction over the present case.
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> The applicant, Li Liu, submitted the certified copy of judgment No. EC062608, rendered by the High Court of Los Angeles County, California, and its Chinese translation at the time of submission of the application for recognition and enforcement. The application satisfies formal requirements for recognition and enforcement of a foreign judgment. Because no treaty concerning recognition and enforcement of a civil judgment between the US and China has been concluded or acceded to, the question of whether or not the

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Sanlian Indus. Co v Robinson Helicopter Co. That decision recognised the judgment of the High People's Court of Hubei Province, China, in favour of Hubei Gezhouba Sanlian Indus. Co. and Hubei Pinghu Cruise Co, Ltd. against Robinson Helicopter Co., a California corporation. The case resulted from a helicopter accident in 1994 in which three people died and multiple damages occurred. The helicopter was manufactured by Robinson, owned by Sanlian and operated by Pinghu.

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application is supported should be reviewed according to the principle of reciprocity. Upon review, the evidence supplied by the applicant has proved that a precedent made by the US court on recognition and enforcement of a civil judgment of Chinese court exists. Thus, the existence of reciprocity in the field of mutual recognition and enforcement of a civil judgment between the two countries can be determined. At the same time, the above judgment rendered by the High Court of Los Angeles County, California, is about the contractual relationship of transfer of shares between the applicant and the respondent, and recognition of this judgment does not violate the fundamental principles of the laws of China, or national sovereignty, security and social public interests. As for the two respondents' defence that they did not receive any notice to take part in the proceedings in the US court: upon review, the above judgment clearly states that the case was judged by default. Furthermore, the applicant has submitted the documents including the survey of the respondents, the order approved by the High Court of Los Angeles County for service by publication, the service published by the newspaper. Those documents demonstrate that the two defendants had been legally summoned by the High Court of Los Angeles County. Therefore, this court rejects the two respondents' defence. The two defendants argue that the agreement on transfer of shares is not genuine, legal or valid, so they should not return the price of the transfer of shares to the applicant. Because this case is a judicial assistance case and review of the parties' substantive rights and obligations is not necessary in a case where the US court has made a judgment on the merits, this court rejects the defendants' argument and accepts the applicant's request for recognition and enforcement of the US court's judgment[. . .][61]

61 Above n.59.

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