

Yuan Wang

The Role of the Supreme People's Court in Chinese International Commercial Arbitration



Band 23

Schriften zum Transnationalen Wirtschaftsrecht

(n.F.)

Herausgegeben von

Christian Tietje
Martin-Luther-Universität Halle-Wittenberg

und

Matthias Lehmann
Rheinische Friedrich-Wilhelms-Universität Bonn

Yuan Wang

**The Role of the Supreme People's Court
in Chinese International Commercial Arbitration**

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Zugl.: Halle, Univ., Diss., 2015

CXC

© Universitätsverlag Halle-Wittenberg, Halle an der Saale 2018

Printed in Germany. Alle Rechte, auch die des Nachdrucks von Auszügen, der photomechanischen Wiedergabe und der Übersetzung, vorbehalten.

ISBN 978-3-86977-189-2

Table of Contents

Abbreviations	13
A. Introduction	15
B. The SPC as a Legislative Power in Chinese International Arbitration	21
I. The Rationale for the Delegation of Legislative Power to the SPC	21
1. Legal Basis	22
2. Historical Origin	23
3. The Effects of Chinese Legislative Practices on the SPC's Express and Implied Powers of Judicial Interpretation	24
4. Analysis	25
II. The Characteristics of SPC Judicial Interpretation	26
1. The Legal Sources of Legislative Power	26
2. The Legislators and Interpreters	28
a) The NPC	28
b) The Standing Committee of the NPC	29
c) The SPC	29
3. Procedures of Legislation	30
a) NPC Legislative Procedures	31

b)	Legislative Procedure of the Standing Committee.	32
c)	Legislation Procedure of the SPC	33
d)	Conclusion	34
4.	Applicability of the SPC Judicial Interpretation	35
a)	The Constitution	35
b)	The Law	35
c)	The Administrative Regulations	36
d)	Juridical Interpretation	36
e)	International Legal Sources	36
f)	Conclusion	37
III.	The Changes Made by the SPC in International Arbitration Rules (STOP 7/22)	38
1.	The PRC Arbitration Law	38
2.	Challenges Met by the AL in International Arbitration	40
a)	Validity of Arbitration Agreement	40
b)	Limited Party Autonomy	42
c)	Conclusion	44
3.	The Modifications Made by the SPC in International Arbitration	44
a)	The Modifications on the Rules Regarding the Validity of Arbitration Agreement	45
b)	Modifications made by the Interpretation on Applicable Law	47
c)	Function of the Interpretation	49
4.	Judicial Notices and Regulations of the SPC	50
IV.	Conclusion	51
C.	The Judicial Role of the SPC in Chinese International Arbitration	53
I.	Introduction	53
II.	Ultimate Position of the SPC in Chinese Court System	54
1.	Introduction and Features of Chinese Court System	55

a) Comprehensive Jurisdiction of Ordinary Courts	57
b) Grade Jurisdiction and Subject Matter Jurisdiction	57
c) Appellate System and the Second Instance is the Last Instance	58
d) Participation of State Attorney's Office	59
2. The SPC, the Higher Courts and Intermediate Courts	60
a) The SPC	60
b) Higher People's Courts	61
c) Intermediate People's Courts	62
d) Other Competent Courts for Foreign-related Arbitration Disputes	63
3. "Prior-reporting" System	64
a) The Notification of the SPC	65
b) Challenges of the "Prior-Reporting" System	66
(1) Confidentiality	66
(2) Efficiency	67
4. Analysis	67
D. The Chinese Characters the SPC Implanted in International Arbitration Agreement	69
I. Arbitrability	70
1. Arbitrability Under Chinese Law	70
2. Commercial Reservation of the New York Convention and "Contractual and Property" disputes in Chinese Arbitration Law	71
3. The Development in the Arbitrability of Tort Disputes	72
a) China National Technical Import & Export Corp. v. Swiss Industrial Resources Corp.	73
b) Yuyi Case	74
3. Limit for Arbitrability of Tort Claim	75
4. Conclusion.	77
II. Competence-Competence	77
1. Institutional-Centered Approach of the Arbitration Law	78

2. Jurisdiction Dispute between the Courts and the Arbitration Institutions	79
a) The Competence Allocation between the Courts and Arbitration Institution according to the AL	79
b) Reply of the SPC to the Competence Allocation	80
c) Problems and Advices	81
III. Writing Agreement Requirement	82
1. International Background	82
2. Chinese Methodology	83
3. Signature	84
IV. Applicable Law to the Validity of Foreign-related Arbitration , Agreement	85
1. Practice before the Interpretation.	85
2. SPC Interpretation	87
a) Party Autonomy	87
b) Arbitral Venue and Locality of Court	88
c) Applicable Law to the Main Contract	89
3. Law at the Locality of Arbitration Institution	91
4. Conclusion	92
V. Appointment of an Arbitration Institution	94
1. Multiple Selections of Dispute Settlement Methods	96
a) Multiple Choices of Arbitration Institutions	96
b) Cross Selection of Two Arbitration Institutions	97
c) Selection of both Litigation and Arbitration	99
2. Designation of Arbitration Rules	100
a) Background	100
b) Choice of Arbitration Rules	102
(1) Positive Tendency before the Interpretation	102
(2) Interpretation and its Influence	104
3. Conclusion	106
VI. Conclusion and Economic Speculation	107
1. Background of Court Fees System	108

2. The Stage Court Fees System	109
3. Conclusion.	111
E. Chinese Characters Implanted by the SPC in Enforcement of Foreign-related Awards	113
I. Categories of Foreign-Related Arbitral Awards and Applicable Rules . .	114
1. “Nationality” of Awards in China	114
a) Institutional Standard	114
(1) The Headquarters of an Arbitration Institution	116
(2) Awards Made by a Foreign Institution in China	118
(3) Non-Domestic Awards.	120
b) Ad hoc Awards	122
c) Conclusion	124
2. Categories of Foreign-related Awards	125
a) Foreign Awards	126
b) Foreign-related Domestic Awards	126
(1) Definition	127
(2) Applicable Rules	127
(3) Cancellation and Re-arbitration	129
c) Hong Kong, Macau and Taiwan Awards	132
(1) Hong Kong Arrangement	132
(2) Macau Arrangement	134
(3) Taiwan Regulation and Ordinance	134
d) Conclusion	135
II. Awards and the Validity of Arbitration Agreement	136
1. Tacit Acceptance: Concordia Trading B.V. v. Nantong Gangde Fats Ltd.	137
a) Facts	137
b) Decision of the Arbitral Tribunal	138
c) Decision of the SPC	139
d) Analysis	139
2. Multiple Parties	141
a) Facts: Succession in a JV after Transfer of Shares	142

b)	Court Decision	143
c)	Analysis	144
3.	Fraudulent parties: Hong KongYongkaili Co., Ltd. v GXIMP Wuzhou branch	145
a)	Facts	145
b)	Court Decision	146
c)	Background and Analysis	146
4.	Conclusion	147
III.	Non-enforcement of Awards on the Ground of Procedures	148
1.	The Differences between Civil Procedure Law and the New York Convention	149
2.	Unable to Present His Case: Hong Kong Charter Harvest Shipping Co. Ltd. v China Sinotrans Shenyang Group Co.	151
a)	Basic Facts	151
b)	Court Decision	152
c)	Analysis	152
d)	Appeal System	153
3.	Appointment of Arbitrators: China Shipping Development Co., Ltd Tramp. Co. v. Anhui Technology Imp. & Exp. Co., Ltd.	154
a)	Facts	154
b)	Decisions by the Courts	155
c)	Applicable Law to Arbitration Procedures	156
d)	The Arbitration Agreement	156
e)	Analysis	158
4.	Requirement on the Time Frame: Huasheng Paper v. Weibei Hongli Co. Ltd.	158
a)	Facts	159
b)	Court Decisions	159
c)	Analysis	160
5.	Truncated Tribunal:First Investment Corp.(Marshall Island) v. Fujian Mawei and Fujian Ship Industry& Fujian Shipbuilding Industry Group Corporation	161
a)	Facts	161
b)	Court Decision	162
c)	Analysis	162
6.	Other Irregularities in Procedures	164

7. Conclusion.	165
IV. Enforcement of Arbitration Awards and Public policy	165
1. Cases in which Public Policy is Violated.	167
a) Tom Hulett & Associates v. Travel Agency of Chinese Women . . .	167
b) Yongning v Hemofarm	168
2. Public Policy beyond Domestic Law and Governmental Regulations . . .	170
3. Conclusion.	172
V. Conclusion	173
1. Pro-foreign-related Arbitration Standpoint of the SPC.	173
2. Validity of Foreign-related Arbitration Agreement.	174
3. Non-recognition and Enforcement of Arbitral Awards	175
F. Cultural Exploration and Advices for Practitioners and Arbitrators	177
I. Cultural Exploration for Chinese Characters	177
1. Legislative Mentality towards International Law	177
2. History of Body and Function Theory	178
3. Modern Application: Socialist Rule of Law	179
II. Conclusion	180
1. Legislator and Supervisor.	181
2. Coordinator.	181
3. Reformer	183
III. Advice for Practitioners and Arbitrators	183
1. Instructions for Conclusion of an Arbitration Agreement	184
a) Specify the Applicable Law	184

Abbreviations

AL	Arbitration Law of the People's Republic of China
BAC	Beijing Arbitration Commission
BITs	Bilateral International Treaties
CCP	Chinese Communist Party
CIETAC	China International Economic and Trade Arbitration Commission
FEAC	Foreign Economic Arbitration Commission
FOSFA	Federation of Oils, Seeds and Fats Associations
Hong Kong SAR	Hong Kong Special Administrative Region
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
Interpretation	Interpretation of the SPC into Chinese Arbitration Law
JV	Sino-foreign joint venture
LCL	Law on Choice of Law for Foreign-Related Civil Relations
LCIA	London Court of International Arbitration
L.M.A.A.	London Maritime Arbitrators Association
Macau SAR	Macau Special Administrative Region
NPC	National People's Congress of the People's Republic of China
Resolution	Resolution on Strengthening the Legal Interpretation by the Standing Committee of the National People's Congress
SAC	Shanghai Arbitration Commission
SPC	Supreme People's Court
PRC	People's Republic of China
UNCITRAL	United Nations Commission on International Trade Law

A. Introduction

In the aftermath of the global economic crisis, the trade and investment opportunities present in the Asia-Pacific region have gained it recognition in numerous circles as the leader of world economic growth. As the [see comment] main destination of export, the People's Republic of China (PRC) is at both the regional and the international forefront of Asian trade. In the year 2014 alone, the Chinese government approved 10,973 new enterprises backed by foreign investors. Total foreign investment reached 63.33 billion United States dollars (USD).

The growth of Chinese international trade has brought with it a substantial increase in claims brought before Chinese arbitration institutions. International arbitration as a dispute settlement measure for commercial participants between China and the rest of the world is highly important in increasing international trade and investment. For example, from 1991 to 2011, the cases accepted by the China International Economic and Trade Arbitration Commission (CIETAC) increased from 274 to 1,435. After the 1997 transfer of sovereignty over Hong Kong from the United Kingdom to the PRC, the caseload of the Hong Kong International Arbitration Centre (HKIAC) increased from 218 disputes in 1997 to 502 disputes in 2011.

The growth in international trade and investment with China has also drawn greater academic attention to Chinese international arbitration. The content of Chinese arbitration law (hereinafter "AL"), the arbitration procedures and institutional rules used by the CIETAC, and Chinese legal procedures for enforcing arbitration awards have been the subject of numerous studies. For a full understanding of international arbitration in China, however, the Supreme People's Court (SPC) of the PRC, which sits atop the pyramid of the Chinese court system, is of ultimate significance. The influence of the SPC in Chinese international arbitration reaches farther than does that of many analogous judicial bodies in jurisdictions elsewhere in the world, not least because the SPC has both legislative competence and judicial influence in arbitration-related matters and uses its incomparable influence to impress distinctively Chinese characteristics upon China's international arbitration rules and practice.

The National People's Congress (NPC), the legislative pillar of the Chinese national government, has delegated to the SPC the power to promulgate Chinese

law in a manner that is referred to as judicial interpretation but also includes the authority to modify existing laws. Although the NPC promulgated the AL in 1994, many ambiguous provisions remain and many practical problems with its implementation persist. The SPC has promulgated a number of interpretations of international commercial and investment arbitration law. As of this writing, these interpretations underlie China's international arbitration system and remain the most significant rules governing its everyday application.

As far as adjudication is concerned, the SPC has ultimate power to decide two significant aspects of international commercial arbitration cases, namely *a*) whether an arbitration agreement involving foreign parties and/or law is valid and *b*) whether a foreign arbitration award is binding and, if so, whether and how that award is to be enforced. In other words, among all the domestic courts in China, only the SPC has the authority to deny the validity of a foreign-related arbitration agreement, and only the SPC has the competence to refuse to recognize and/or enforce of a foreign award. Although domestic courts at lower levels may accept arbitration-related disputes in which these issues are in play, they have to report their tentative rulings and reasonings as to these two aspects of their decisions to the SPC for final adjudication. This mandate arises from the "prior-reporting" system created by the SPC. Accordingly, on issues of jurisdiction and enforceability, it is the SPC whose policy judgments and decisions are ultimately dispositive.

In addition to exercising judicial and legislative power, as a practical matter the SPC plays the role of a mediator with an executive touch and the missions of adding Chinese character to international arbitration rules and of promoting social harmony.

Social harmony is a guiding political concept in twenty-first-century China. In 2004, China's Communist Party developed a formulation of this concept that draws on Confucian and Marxist theories of what constitutes and characterizes a harmonious society. The concept comprises six parts: democracy and rule of law, equity and justice, honesty and friendliness, creativity and vitality, peace and order, and a harmonious relationship between human and nature.

Generally, Chinese society interprets "social harmony" to be embodied in outcomes reflecting compromise between various interests. The SPC, as the highest judicial body of the People's Republic, plays an important role in achieving such outcomes in the judicial context with respect to the different interests in the international arbitration community and disputes between parties.

The relevant participants include the disputing parties, the numerous arbitration institutions, relevant arbitral tribunals, the Chinese local courts, and even China's

system of administrative agencies. In addition, in certain specific cases, the SPC balances Chinese local interests against international conventions. From its internal decision-making mechanisms to its public actions and their implications, the SPC serves as a moderator in the complex web of interests in play in modern arbitral disputes.

First, the SPC gives priority in its judicial work to the maintenance of stability in social relationships. The SPC is called on to intervene in major commercial and investment conflicts whose outcomes have influence on a nationwide scale, and resolving those disputes in a non-hostile process enhances social harmony. Second, the SPC supervises national judicial decisions in cases involving international arbitration. Both the internal organization of the SPC and that of the Chinese court system reflect their being designed to operate as a compatible joint force. Third, in the structure of the Chinese government, the judicial system is not strictly independent from the administrative pillar and the legislative pillar. Other state powers have certain influence on the judicial branch. In practice, the SPC works together with legislative as well as administrative powers to avoid structural confrontation.

Most importantly, the SPC balances international influences on arbitration rules against the requirements imposed by the socialist domestic legal system. Among other things, the guiding principle of “socialism with Chinese characteristics” instructs the SPC both to carry forward the traditions of Chinese legal culture and to maintain conformity with internationally prevailing practice and theory while learning from the law-related experience and achievements of other countries. For one of many examples, international commercial arbitration rules have very strong international features. China recognizes the importance of an international presence of its arbitration rules and has invested significant efforts in catching up with international trends. At the same time, the SPC uses its ultimate influence in arbitration to impart, among others, five distinctively Chinese features to Chinese international arbitration rules. The five features are the rules’ limits on arbitrability, their strict prerequisites for the validity of an arbitration agreement, the severity of their consequences for procedural irregularities, and their concern for public policy.

Part B of the dissertation discusses the “legislative” role of the SPC and explores its legal origin and historic background. It goes on to compare the legislative power of the SPC against that of the Chinese government’s expressly legislative branch and the NPC in order to illustrate the mechanism through which they interact to produce a harmonious judicial result.

Part C explores the SPC's status and role as the highest judicial body in the hierarchy of Chinese courts. In international arbitration, the SPC has exclusive power to invalidate an arbitration agreement or to refuse to enforce a foreign award. It exercises this exclusive power through the "prior-reporting system", which Part C introduces and discusses as the court mechanism most important both in determining whether an international arbitration agreement is valid and in deciding whether a foreign arbitral award is to be recognized and enforced.

Parts D and E focus on the Chinese features that the SPC tries to impart to the Chinese international arbitration system. These Parts analyze various cases to illustrate these Chinese features. They include but are not limited to the four features mentioned above:

First, mainstream opinion in Chinese legal circles holds that only contractual disputes under civil law may be resolved through arbitration and that arbitration is inappropriate for the resolution of other kinds of disputes, such as tort claims. Moreover, among disputes related to sino-foreign joint ventures, only pure "investment" disputes can be resolved through arbitration.

Second, the AL sets strict prerequisites for the validity of an arbitration agreement. When Chinese law governs whether an arbitration agreement is valid, the parties' agreement must unambiguously designate a single institution as the forum for arbitration. If the parties' agreement provides for *ad hoc* arbitration or lists multiple arbitration institutions from which one is to be selected at a later date, the portion of that agreement calling for arbitration is not valid under Chinese law.

Third, at the stage of deciding whether to recognize and enforce foreign arbitral awards, the SPC conducts a strict review of the award process for procedural compliance. Some minor violations of procedural rules, including the institutional rules of the selected arbitration institution, could lead to non-enforcement of a foreign award.

Last, the SPC interprets Chinese public policy as consisting of the interest of its domestic public. Its decisions have mentioned notions such as Chinese national economic order, cultural interests, and sovereign judicial independence as falling within this category.

The author concludes that the opinions of the SPC on questions involving international arbitration are largely determined by Chinese local legal theories and local laws. In addition, the SPC's consideration of "public policy" factors under Article V of the New York Convention is influenced by Chinese national laws and administrative policies of the national government.

The role of the SPC in Chinese international commercial arbitration is a new area of research. Understanding the role of the SPC as ultimate rule-maker, super-

visor, and enforcer helps unify the heretofore disparate research into the legal background of, standards for agreements' validity in, and the enforcement process in Chinese international arbitration.. Moreover, a practitioner equipped with this background knowledge of the SPC's role is better prepared for both the Chinese arbitration process and the process of Chinese review of foreign arbitration awards, even to the point of being better able to predict the outcome of a given proceeding.

The following clarifies some basic concepts in this dissertation:

First, the geographic scope of research in this dissertation is restricted to mainland China; it deals exclusively with the arbitration rules and factual circumstances in place there. The SPC does not directly influence the arbitration policies in the Hong Kong Special Administrative Region ("Hong Kong SAR"), the Macau Special Administrative Region ("Macau SAR"), or Taiwan because the three regions have comparative judicial independence and distinctive judicial systems.

Second, the disputes over international arbitration law studied in this dissertation include not only the commercial disputes between China and other countries but also the inter-regional disputes in the Greater China Region. PRC law contains special sets of rules governing arbitration disputes between mainland China and the Hong Kong SAR, the Macau SAR, and Taiwan. All disputes related to Hong Kong SAR, Macau SAR and Taiwan are considered "foreign-related".

Third, this dissertation discusses only commercial arbitration and investment arbitration involving parties having equal status. This dissertation does not explore the unequal relationship in arbitration in which the Chinese government is a party to the dispute. In the PRC, international commercial arbitration is primarily governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The UNCITRAL Model Law also has considerable influence on both Chinese AL and the institutional rules of Chinese arbitration commissions. Chinese law governing foreign investment allows the foreign investors and Chinese investors in various joint ventures to settle their investment disputes through international investment arbitration.

Fourth, as noted above, that this dissertation does not address disputes between foreign investors and the government of the country hosting the proceedings. Other legal documents govern this "investor-state arbitration." China has signed many bilateral investment treaties (BITs) with other countries and in 1993 ratified the Washington Convention. The framework of the Washington Convention along

with China's BITs with other countries govern these international investment disputes.

As the number of China-related transnational disputes rises along with the development international trade and commerce, the dispute resolution relating to a Chinese party gains increasing interest for the academia and practitioners. As both the “legislator” and the highest judiciary, in Chinese context, what reveals more truth of international commercial arbitration practice than the decisions of the Supreme People’s Court of the People’s Republic of China?

After a careful study of all the model judgment published by Chinese Supreme Court for almost three decades, the features of the foreign-

related arbitration in China are distinctive from the practice of many other countries. The idiosyncrasies not only exist in the aspect of the validity of an arbitration award, but also from the enforcement stage.

This work sheds light on the unique role of the Supreme Court in Chinese legislation process and the court system. Then the practice of the Supreme Court with regard to foreign-related arbitration rules are analyzed in details. One may notice the culture background behind the special features of Chinese arbitration rules in contrast with international common practice and find practice guide from it.

