International Commercial Arbitration and Conciliation in China

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I. Arbitration

The Chinese laws including arbitration laws are influenced by the Civil Code system particularly the German system. China has promulgated the following laws and regulations which involve international commercial arbitration:

(a) Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade, 1954;

(b) The Law of the PRC on Chinese- Foreign Equity Joint-Ventures, 1979;

(c) The Regulations of the PRC on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, 1982;

(d) The Law of the PRC on Civil Procedure (for trial implementation), 1982;

(e) The Regulations for the Implementation of the Law of the PRC on Chinese-Foreign Equity Joint-Ventures, 1983;

(f) The Law of the PRC on Economic Contracts Involving Foreign Interests, 1985;

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(g) The Law of the PRC on Chinese-Foreign Contractual Joint-Ventures, 1988;

(h) The Law of the PRC on Wholely Foreign-owned Enterprises, 1986; and

(i) The Law of the PRC on Civil Procedure, amended 1991.

The above-mentioned laws and regulations affirm:

(1) the Chinese court shall not take up any case for litigation if there is an arbitration agreement between the parties;

(2) parties to a dispute are free to refer their dispute to arbitration in China or outside China;

(3) arbitral awards rendered in China are final and no appeal is permitted;

(4) the Chinese court shall take preservative measures of protection if one party so requests in the process of arbitration and the court considers it necessary; and

(5) the Chinese court shall enforce an arbitral award if one party fails to comply with the award and the other party applies to the court for enforcement, unless there are reasons for refusal.

China is a contracting state of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention), which became effective in China on April 22, 1987. When joining the Convention, China made both "Reciprocal Reservation" and "Commercial Reservation".

The UNCITRAL Model Law on International Commercial Arbitration, not being adopted in China, served as a guide when the Chinese arbitration rules were amended in 1988, and it will be referred to when later this year (1993) those rules are amended again and a Chinese arbitration law separate from the Civil Procedure Law is drafted.

China has different legislation and mechanizm for domestic arbitration which are now undergoing a reform and will not be elaborated in this paper.

International commercial arbitration is popular in China. An arbitration clause is found in most of the commercial contracts and in almost all the investment con-

tracts signed between the Chinese and foreign parties. The Chinese laws endorse arbitration as a useful method for resolving international commercial and investment disputes. Often, there is a provision to encourage the settlement of disputes by arbitration in the bilateral trade and economic cooperation agreements concluded between the Chinese and foreign governments. The investment protection agreements signed between the Chinese and foreign governments also provide for arbitration in case of dispute.

China International Economic and Trade Arbitration Commission (CIETAC) is the sole international commercial arbitration body in China. CIETAC has two subcommissions, one in Shenzhen Special Economic Zone and the other in Shanghai.

CIETAC was established in 1956, when it was known as the Foreign Trade Arbitration Commission (FTAC). In 1980 it was renamed the Foreign Economic and Trade Arbitration Commission (FETAC), and in 1989 it was renamed again, settling on China International Economic and Trade Arbitration Commission (CIETAC), as it is known today.

CIETAC rules were amended in September 1988 and put into effect as of January 1989. The major changes in the rules are as follows:

(1) The jurisdiction of CIETAC is extended to cover cases between Chinese and foreign parties, cases between foreign parties and cases between Chinese parties involving foreign factors;

(2) The CIETAC's panel of arbitrators has been enlarged to include arbitrators of non-Chinese nationality;

(3) The presiding arbitrator of the arbitration tribunal is to be appointed by the chairperson of CIETAC instead of being chosen by the two arbitrators appointed by the parties;

(4) Hearings shall be conducted in closed sessions instead of open sessions;

(5) Explicit provisions are laid down to challenge arbitrators;

(6) Consolidated arbitration may be carried out by CIETAC; and

(7) CIETAC's arbitration tribunals may conciliate the cases under their jurisdiction with the consent of the parties, and if conciliation is successful, the tribunal will make an arbitral award in accordance with the content of the settlement agreement reached between the parties through conciliation instead of rendering a conciliation statement, for the purpose of enforcement.

In fact, the CIETAC rules, are similar to the rules in effect in countries using a Civil Code SYSTEM. Under the CIETAC rules, an arbitration agreement can be finalized in any form, but must be in writing (exchanges of letters, telexes, telegrams, cables or telefaxes are considered writings). Both an agreement to submit an existing dispute to arbitration and an arbitration clause in a contract relating to future disputes are recognized as valid arbitration agreements. In practice, CIETAC exercises jurisdiction over any case where one party applies to CIETAC for arbitration and the other party responds, even if no arbitration agreement has been previously concluded between the parties. CIETAC has the power to make a decision on disputes concerning the validity of an arbitration agreement or jurisdiction over a specific case. It is thus unnecessary to go the court for a decision on these issues.

When applying for arbitration in China, the claimant must submit to CIETAC a written AFFLICATION FOR ARBITRATION in which the following items shall be specified:

The name(s) and address(es) of the claimant and those of the respondent;
The arbitration agreement or arbitration clause relied upon by the claiment; and
The claimant's claim and the facts and evidence on which the claim is based.

At the same time, the claimant must appoint one arbitrator or authorize the chairperson of CIETAC to make such appointment, and the claimant shall pay an arbitration fee in advance to CIETAC according to an arbitration fee schedule.

After receipt of the claimant's APPLICATION FOR ARBITRATION, CIETAC will immediately send an arbitration notice, together with one copy of the claiment's APPLICATION FOR ARBITRATION, to the respondent and request the

respondent to appoint one arbitrator or authorize the chairperson of CIETAC to appoint one within 20 days. The respondent must then submit a defense and counterclaim, if any, within 45 days.

The parties may authorize Chinese and/or foreign attorneys to help or act on their behalf in CIETAC arbitration if they so wish.

When interim measures of protection are necessary, either of the parties may apply to CIETAC, which requests an order from the court.

The CIETAC arbitration tribunal is comprised of either three arbitrators or one arbitrator. When a tribunal is comprosed of three member, each of the parties may appoint one and the CIETAC chairperson appoints the third who serves as the presiding arbitrator. When a tribunal is comprised of a sole arbitrator, the parties may jointly appoint or authorize the chairperson to do so. If both parties have agreed on the appointment of a sole arbitrator to hear their case, but have failed to agree on the choice of such a sole arbitrator within 20 days, the chair appoints the sole arbitrator.

Usually three arbitrators are appointed. When there are two or more than two claimants and/or respondents in an arbitration case, the claimants' side and the respondents' side each shall, through consultaton, appoint one arbitrator. If the claimants' side fails to make such appointment at the time when the claimants submit their Application for Arbitration and/or the respondents' side is unable to appoint one arbitrator within 20 days or from the date on which the last respondent receives the arbitration notice, the appointment shall be made by the chairperson of CIETAC.

All of the arbitrators, including the presiding arbitrator, must be appointed from among CIETAC's panel of arbitrators.

Any appointed arbitrator who has a personal interest in the case will be withdrawn from the office upon a challenge by either party. The challenge must be made before the first oral hearing of the case. If a party dose not become aware of

the grounds for a challenge until after the first oral hearing, the challenge may raised before the conclusion of the last hearing. The chairperson of CIETAC shall decide on the challengs.

The arbitration tribunal must hold oral hearings for any case under its examination unless otherwise agreed by the parties. The hearing notice must be communicated to the parties 30 days before the date of the hearing. Either of the parties, with justification, may request a postponement of the hearing date. The request must be communicated to the secretariat of CIETAC 12 days before the date of the hearing. The arbitration tribunal decides on the postponement.

No cross-examination is used in oral hearings. The parties may question each other and question witnesses under the tribunal's control.

Should one of the parties or his attorney fail to appear at the hearing, the arbitration tribunal may proceed with the hearing and make an arbitral award by default.

During the hearing session, the secretariat of CIETAC may make a record of the hearing in writing or on tape-recorder, and the arbitration tribunal may order the parties and/or their attorneys, witnesses and/or other persons involved to put their signatures to the record if it deems necessary.

Hearing must be conducted in closed sessions unless otherwise requested by the parties and approved by the arbitratoin tribunal. All of the cases under cognizance of CIETAC shall be heard in Beijing unless the parties otherwise request and the chairman of CIETAC approves.

The parties must give evidence for the facts on which their claim or defense is based. However, the arbitration tribunal may make investigations and collect evidence on tis own initiative if it deems it necessary. CIETAC may obtain an order from the court to compel a witness to testify or give evidence and bring with him certain documents in his possession provided that the court deems it appropriate and necessary.

The arbitration tribunal may consult experts or appoint appraisers for the clarifi-

cation of special questions relating to the case. Such experts and appraisers can be Chinese or foreign citizens or institutions.

If a settlement of the case has been reached by the parties themselves outside the tribunal, the case will be dismissed by the tribunal upon the request of the claimant. Should the dismissed case be referred to CIETAC again for arbitraton, the chairperson of CIETAC shall decide whether to accept the case or not.

The arbitration tribunal may render interlocutory, partial and additional awards if necessary.

The arbitration tribunal is obliged to make a final award within 45 days after the closing of examination and hearing. Where a case is heard by an arbitration tribunal composed of three arbitrators, the award shall be made by all arbitrators or by a majority of the arbitrators. If by a majority of the arbitrators, the minority opiñion shall be written down in the record to be kept on the file. The arbitration tribunal shall state the reasons upon which the award is based unless the award is made in accordance with the settlement agreement reached by the parties through conciliation conducted by the arbitration tribunal in the course of arbitration proceedings. The award shall be signed by all or the majority of the arbitrators sitting in the tribunal and shall contain the date and place on and in which the award is made. The award is final and neither party may initiate a suit in a court or make a request to any other authorities for revising the award.

CIETAC's arbitration tribunal may conciliate cases during arbitration proceedings. This is a unique arbitration practice in China, known as the COMBINATION OF ARBITRATION WITH CONCILIATION. In case a settlement agreement is reached by the parties through such conciliation, the arbitration shall make an award in accordance with the content of the settlement agreement.

Deposit or registration of the award with the Chinese court is not required.

The parties must automatically execute the award within the time-limit specified in the award. If no time-limit is stated in the award, the parties must carry out the

award immediately. Should one party fail to comply with the award, the other party may apply to the Chinese court for enforcement according to Chinese law or apply to a competent foreign court for enforcement according to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards or other international treaties in which China has participated or concluded.

Setting aside of an award is not provided for in the Chinese law. However, the party against whom the enforcement of an award is sought may request the court to issue an order to refuse the enforcement if he can furnish proof that

1. the parties do not have an arbitraton clause in their contract and have not subsequently concluded an arbitration agreement in writing; or

2. the party against whom the enforcement is sought was not given due notice as to the appointment of arbitrators or the conduct of the arbitration proceedings, or was unable to present his case for reasons for which is not responsible; or

3. the formation of the arbitration tribunal or the arbitration procedure was not in conformity with the arbitration rules; or

4. the matters dealt with by the award fall outside the scope of the arbitration agreement or out-side the power of the arbitration tribunal.

Enforcement of an arbitral award shall be disallowed if its enforcement goes against social and public interest.

As to the application of substantive law, the Chinese and foreign parties to a sales contract are free to choose whatever law they like to apply in arbitration. In the absence of such a choice by the parties, the arbitration tribunal shall decide what law to apply. However, the arbitration tribunal has to apply the law which has the closest connection with the contract, such as the law of the place where the contract was concluded, the law of the place where the contract was, is or will be performed, or the law of the place where the arbitration body is located. In any way, the Chinese law must be applied to contracts of investment in China.

Up to now, arbitration in China has always been institutional and no Ad hoc arbi-

tration has been carried out.

Parties who wish to refer their disputes to arbitration in China may include in their contracts the following model arbitration clause:

"Any and all disputes arising from or in connection with this Contract shall be submitted to China Internatinal Economic and Trade Arbitration Commission for arbitration which shall be conducted by the Commission or its Shenzhen sub-commission or its Shanghai sub-commission at the option of the Claimant in accordance with its rules of arbitration. The arbitral award is final and binding upon both parties."

Physical and legal persons who can sue and can be sued may be parties to arbitration. States or state agencies can parties to international commercial arbitration if they waive their to immunity, in other words, if they are engaged in commercial transactions.

Under the existing Chinese laws, disputes concerning infringement on the right of trademarks, patents and copy-right and bankruptcy can not be arbitrated. However, the Chinese laws are silent about the non-arbitrability of other subject matters.

An arbitration clause can be separated from other provisions of a contract in accordance with Article 35 of the Law of the PRC on Economic Contracts Involving Foreign Interest which reads:

"The contractually agreed terms for the settlement of disputes shall not become invalid because of the rescission or termination of a contract".

In China, where a written arbitration agreement or an arbitration clause exists and one party brings an action before a court while the other party invokes the arbitration agreement or the arbitration clause as a defence, the court shall dismiss the action and refer the parties to arbitration unless the court finds that the arbitra-

tion agreement or the arbitration clause is invalid, inoperative or incapable of being performed.

The basic qualifications of an arbitrator are impartiality, fairness and justice. The nationality of an arbitrator does not count. According to the Chinese rules, the parties to an arbitration can only appoint their arbitrators from among a given panel of arbitrators of Chinese and foreign nationality. These arbitrators are selected from among well-known Chinese and foreign personages with special knowledge and practical experience in international trade and economics, science and technology, law and other professions. Some of them are from the commercial, industrial and law circles of the U.S.A., the United Kingdom, Singapore, Hong Kong, Macao, etc. More arbitrators of non-Chinese nationality will sit on the CIETAC new panel of arbitrators by the end of 1993.

Any arbitrator nominated by the parties and any arbitrator and the presiding arbitrator appointed by the chairperson of CIETAC shall hear their cases independently and impartially and shall not represent the interests of any party.

No provisions governing civil liability of arbitrators are found in the existing Chinese laws and rules. No previous Chinese court decisions in this regard can be traced, either.

The Chinese arbitration institutions do not conduct arbitartion in accordance with rules other than their own. The UNCITRAL rules are not used in institutional arbitration in China at the moment.

With regard to the application for the recognition and enforcement of a foreign arbitral award in China according to the 1958 New York Convention, the procedure is quite simple. All the applying party has to do is to submit to the Chinese court a written application annexed with one certified copy each of the arbitration agreement or arbitration clause and the arbitral award. The time-limit for application is one year if one or both parties are physical persons and six months if both parties are legal persons.

In recognition and enforcement of foreign arbitral awards where the 1958 New York Convention does not apply, the principle of reciprocity shall prevail in accordance with Article 269 of the Law of the PRC on Civil Procedure which reads:

> "If an award rendered by a foreign arbitration body requires the recognition and enforcement by the people's court of the PRC, the party concerned shall directly apply to the intermediate people's court in the place where the party subject to the enforcement has domicile or where his property is located. The court shall deal with the mater in accordance with the international treaties concluded or acceded to by the PRC or in accordance with the principle of reciprocity".

The concept of international public policy has not been developed in the Chinese court decisions. There is no control by the Chinese court on the merits of international arbitration awards, and no control as to the point of law under the existing Chinese law.

No Chinese law provides that the court may remit matters under international commercial arbitration to the arbitration tribunal for reconsideration, and in practice the court has never done so.

Under Chinese law and in the Chinese practice, the parties may not apply for reopening arbitral proceedings. However, according to the Law of the PRC on Civil Procedure, if the enforcement of an arbitration award is refused by an order of the court, the parties may apply for arbitration again in accordance with the written arbitration agreement reached between them.

Ⅱ. Conciliation

The following principles are observed in conducting conciliation in China:

1. Conciliation is not an inevitable procedure prior to arbitration and litigation.

2. Conciliation must be based on free will of the parties.

3. Counciliation must be conducted on the prerequisites of establishing the facts, distinguishing the right from the wrong and ensuring fairness and reasonableness.

4. Conciliation procedure can be conducted separately, or in combination with arbitration and litigation proceedings.

Generally speaking, conciliation in China falls into five categories i.e., people's conciliation, administrative conciliation, court conciliation, conciliation by international conciliation centre and conciliation by international arbitration commission. This article only deals with the last three categories which involve international factors.

Court Conciliation

The Chinese court conciliates civil cases during court proceedings. This is one of the important characteristics of Chinese court procedure, known as the COMBINATION OF LITIGATION WITH CONCILIATION.

Resolving disputes by conciliation is a traditional practice in China. According to the Chinese civil procedural law, the court shall carry out conciliation on the principle of voluntariness of the parties and in accordance with law. Conciliation must conducted on a fact-finding and liability-distinguishing basis. The parties are free to reach a settlement agreement. No compelling influence is allowed. The contents of settlement agreement must not violate the law. Conciliation can be conducted by a single judge or a collegial panel. When a settlement agreement is reached by the parties through conciliation during court proceedings, a Conciliation Statement shall

be made and issued by the court. The Conciliation Statement shall be signed by the judge or judges on the collegial panel and the court clerk and sealed by the court. Once the Conciliation Statement is served to the parties, it becomes legally effective. If the court deems it unnecessary to draw up a Conciliation Statement, the contents of the settlement agreement concluded between the parties shall be written into the record and become legally effective after being signed by the parties, the judge or the judges on the collegial panel and the court clerk and sealed by the court.

A Conciliation Statement made by the court has the same legal effect as a court judgement. If one party refuses to comply with it, the other party may apply to the court for compulsory enforcement.

The Chinese court does not conciliate any litigation cases which are brought forward against the administrative departments of the Chinese government concerning administrative treatment of economic disputes.

Conciliation by International Conciliation Centre

The Beijing Conciliation Centre (BCC) set up in 1987 to conciliate internatinal commercial and maritime disputes is the sole internatinal conciliation centre in China. Before the establishment of the BCC, applications for conciliation of international commercial and maritime disputes were all submitted to the international arbitration commissions (the China International Economic and Trade Arbitraton Commission and the China Maritime Arbitration Commission). Now, such applications may submitted either to the BCC or to the said two arbitration commissions.

Parties must reach an agreement for conciliation in writing before they apply to BCC for conciliation.

Upon receipt of a party's application for conciliation, BCC shall immediately notify the other party and send him one copy of the submitted application for conciliation and all the annexed supporting documents, requesting to respond. If the other party does not respond or refuses conciliation even if there is a conciliation agree-

ment previously concluded between the two parties, no conciliation will be conducted by BCC. If the other party responds, the two parties may each appoint one conciliator from among the BCC panel of conciliators to handle the case. The two parties may jointly appoint a sole conciliator from among the panel to deal with the case if they so wish. The two parties may authorize the chairman of BCC to make appointment of conciliator or conciliators on their behalf. The conciliator or conciliators thus appointed will, after examining all the written statements arranged documentary evidence submitted by both parties, explain through correspondence the case to the parties from the legal point of view as well as from the business point of view and promote a compromise between them. If the promotion is successful, the case will be brought to a close. If the promotion through correspondence does not work well, the conciliator or conciliators may call the two parties together to a face-to-face conciliation meeting. Such a meeting is usually held in Beijing where BCC is located and can be held in other places provided that the two parties so request and the conciliator or conciliators and BCC all agree. In a face-to-face conciliation meeting, the parties may bring with them their Chinese or foreign lawyers, or even authorize their Chinese or foreign lawyers to act on their behalf.

In the process of conciliation, the conciliator or conciliators must first of all clarify the facts, distinguish the right from the wrong and determine the liability, and then persuade the two parties to voluntarily reach a compromise through mutual understanding and mutual concession according to the principle of fairness and reasonableness. The conciliator or conciliators are not permitted to push conciliation by compulsion. They may, however, put forward settlement proposals to the parties for their consideration and acceptance when they think it fit at an appropriate stage. When a compromise is reached, the parties shall sign a settlement agreement and the conciliator or conciliators will make a Conciliation Statement in accordance with the contents of the settlement agreement to end the case.

Should conciliation come to no avail, the parties' views, proposals and admissions,

the conciliator or conciliators' proposals, the expressed willingness of either party to accept the conciliator or conciliators' proposals should not be used as supporting evidence in the subsequent arbitration or litigation proceedings. However, the same conciliator or conciliators are allowed to be appointed as arbitrator or arbitrators in the later arbitration proceedings.

In the course of conciliation, the conciliator or conciliators are allowed to meet or communicate with the parties together or with each one of them separately.

BCC has signed an agreement for cooperation in conciliation with the Beijing-Hamburg Conciliation Centre (BHCC) which is located in Hamburg, Germany. The two Centres have jointly formulated and promulgated the Beijing-Hamburg Conciliation Rules for their common use. As a result, JOINT CONCILIATION can be done by the two Centres to resolve international commercial and maritime disputes. Parties desirous to settle their disputes by JOINT CONCILIATION may approach either or both of the two Centres. After receiving their application for JOINT CONCILIATION, the two Centres will invite the two parties to appoint two conciliators to jointly conciliate the case, one from the panel of conciliators of the BCC and the other from the panel of BHCC. JOINT CONCILIATION can be conducted in Beijing or Hamburg or in any other places agreed upon by the two parties and the conciliator or conciliators. According to the Beijing-Hamburg Conciliation Rules, if JOINT CONCILIATION proceedings terminated without a success, the conciliator or conciliators can be appointed as arbitrator or arbitrators in the later arbitration proceedings unless otherwise agreed upon by the parties or otherwise provided by the law of the country where the subsequent arbitration proceedings are to take place.

BCC has signed similar agreements for cooperation in conciliation with the New York Conciliation Centre of the American Arbitration Association and with the Argentine Conciliation Centre and will sign an agreement of the same sort with Hong Kong International Arbitration Centre soon.

Conciliation by International Arbitration Commission

There are two international arbitration commissions in China, namely, the China International Economic and Trade Arbitraton Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC). CIETAC and CMAC handle international commercial and maritime conciliation cases in addition to arbitration cases.

If the parties refer their dispute to CIETAC or CMAC for conciliation, the case will be conciliated by the secretary general or deputy secretary general of CIETAC or CMAC or by an arbitrator jointly chosen by the parties from the panel of arbitrators of CIETAC or CMAC. Should the conciliation proceedings come to an end without results, the same conciliator is permitted to be appointed as arbitrator in the later arbitration proceedings.

CIETAC and CMAC adopt the same conciliation principles, procedure and practice as those observed by BCC.

CIETAC and CMAC emphasize conciliating arbitration cases under their cognizance. In other words, they do conciliation during arbitration proceedings. This is the striking feature of arbitration in China; known as the COMBINATION OF ARBITRATION WITH CONCILIATION. The process is as follows:

If the parties apply for arbitratoin which is accepted by CIETAC or CMAC and request a conciliation of their case before the arbitration tribunal is formed, CIETAC or CMAC will order its secretary general or deputy secretary general to conciliate the case, or the parties may jointly choose an arbitrator from the CIETAC or CMAC panel of arbitrators to conciliate the case. If the conciliation is successful, no arbitration tribunal will be formed and the case is brought to an end. If the parties request a conciliation after the formation of an arbitration tribunal, the case will be conciliated by the tribunal in the course of arbitration. If the parties request a conciliation in the course of an oral hearing, the tribunal will conduct conciliation during the hearing. Conciliation in the course of an oral hearing is usually conducted the following three ways:

1. the arbitration tribunal consults the two parties together;
2. the arbitration tribunal consults each of the parties separately; and
3. the parties consult with each other themselves.

In the process of conciliation, if either of the two parties requests a termination to the conciliation proceedings or if the arbitration tribunal deems that the conciliation has taken too much time without any results, or that there is no possibility for the parties to reach a settlement agreement, the conciliation proceedings shall be terminated immediately and arbitration proceedings shall be continually and speedily carried out so that an arbitral award can be rendered as soon as possible. If a compro mise is reached through conciliation during arbitration proceedings, the parties have to sign a settlement agreement, and then the arbitration tribunal will make an arbitral award (not a Conciliation Statement) according to the content of the settlement agreement reached upon between the parties.

Enforcement Problems

At present, the laws of almost all countries in the world do not give conciliation statements the legal effect as it should be given, and the courts of almost all countries do not applications for the enforcement of conciliation statements. In China, according to the Chinese Civil Procedure Law, a conciliation statement issued by the Chinese court has the same legal effect as a court judgement; if one party refuses to comply with it, the other party may apply to the court for compulsory enforcement. However, in the Chinese Civil Procedure Law and other laws, no provision is made as to the legal effect and enforceability of conciliation statements made and issued by the Chinese international conciliation centre BCC or by the Chinese international arbitration commissions CIETAC and CMAC. Up to now, the Chinese court does not accept applications for the enforcement of conciliation statements rendered by BCC, CIETAC and CMAC. With a view to resolving this problem, the

arbitration rules of CIETAC and CMAC provide the following;

> "In case a settlement agreement is reached through conciliation, the arbitraton tribunal shall make an award in accordance with the content of the settlement agreement reached by the parties".

By this way, the problem concerning the enforcement of conciliation statements issued by CIETAC and CMAC is resolved, but the problem relating to the enforcement of conciliation statements rendered by BCC is still pending for solution. Should one party decline to carry out a conciliation statement made by BCC, what the other party can do is to take it as a breach of contract and go for arbitration or litigation.

China is drafting her arbitratoin law separate from her Civil Procedure Law. A proposal has been put forward to the legislators, requesting that the conciliation statements issued by BCC, CIETAC and CMAC be given the legal effect necessary for the enforcement by the court. However, if China did it and other countries would not follow suit, the consequence would be that conciliation statements were only enforceable in China and not in other countries. Then it would be unfair.

Ⅲ. Case Examples

Example 1.

Arbitration Award (full text)

AWARD

The China International Economic and Trade Arbitration Commission (hereinafter referred to as the Arbitration Commission), pursuant to the arbitration clause set forth in the Contracts NO.82RJ80－947CK and 82RJ80－961CK signed by and between the Claimant, China ×××Corporation and the Respondent, ××× Company of ×××(country), and upon the application for arbitration filed by the Claimant took cognizance of this case of disputes arising out of the aforementioned two Contracts.

The Arbitration Commission, in accordance with its Arbitration Rules, formed an Arbitration Tribunal which was composed of the Presiding Arbitrator, Mr. ××× and two arbitrators, Mr, ××× and Mr. ×××, to hear the case.

Having examined the Claimant's Statement of Claims and the Respondent's defence, the Arbitration Tribunal held hearings in Beijing on September 26, 1988 and November 4, 1987. At the hearings, the Arbitration Tribunal, pursuant to the intention of the Claimant and the Respondent, conciliated the case but failed.

The facts of the case, the Arbitration Tribunal's opinion and award are as follows :

Ⅰ. Facts

The Claimant(Buyer), and the Respondent(Seller), signed on May 4, 1987 Contract No.82RJ80－947CK(hereinafter referred to as Contract 947) for the sale of

300tons of Low density Polyetheylene and concluded on August 17, 1987 Contract No.82RJ80－961(hereinafter referred to as Contract 961) for the sale of 1,000tons of Low Density Polyetheylene. The goods under Contract 961 arrived at the port of destination. Xingang. Tianjin on October 29, 1987. After arrival, the Tianjin Import and Export Commodity Inspection Bureau inspected the goods in accordance with the Inspection Clause laid down in the Contract and issued an inspection certificate on January 22, 1988. The inspection certificated stated that after inspection one pallet by on pallet. 764 bags were found damaged and the damaged goods amounted to 5.75tons. The certificate further stated that the loss in weight of the goods was due to the fact that the packings were not in conformity with the stipulations of the contract and not suitable for ocean transportation and for being moved several times. The goods under the said contract reached Wulumuqi by railway lot by lot during the time from November 22 to 28, 1987. The goods under contract 947, after arrival at the port of destination Xingang, Tianjin, also reached Wulumuqi by railway on November 9, 1987. When the Claimant(Buyer) received the goods under Contract 947, he discovered through test that the index of MI of the Low Density Polyetheylene delivered by the Seller was not in conformity with the index stipulated in the contract. Hence, the Claimant telexed the Respondent on November 20, 1987 demanding a return of the goods and claiming Indemnity for damages. When the Claimant received the goods under Contract 961, he also found that the index of MI of the goods in a larger quantity was not up to the contracted requirements and what is more, the index of MI of the goods in each lot was not unanimous at all. So the Claimant telexed the Respondent on November 25, 1987 requesting the Respondent to send someone to Xinjiang for a check-up. At the same time, the claimant invited Wulumuqi Import and Export Commodity inspection Bureau to have a quality inspection on the goods. The Wulumuqi Import and Export Commodity Inspection Bureau inspected the goods under the said two contracts respectively on December 8 and 18, 1987. The result of the inspection revealed that the index of

MI of the goods in six lot numbers under Contract 947 was not in conformity with the index specified in the contract, and there were different kinds of polyetheylene mixed up therein, and that the goods under Contract 961 were packed in four-ply-kraft paper bags. one kraft paper less that the requirement specified in the contract and the index of MI of the goods was also not in conformity with the stipulation of the contract.

On January 27, 1988, the representative of the Respondent, came to Wulumuqi together with the representative of his American supplier to examine the goods and to discuss with the claimant about the indemnity. The Claimant suggested two alternatives for claims. In the second alternative raised by the Claimant on January 28, 1988, the Respondent was asked to indemnify the Claimant in kind 307.918 tons of Low Density Polyetheylen. This caused dispute between the Claimant and the Respondent. On February 28, 1988, prior to the departure of the representative of the Respondent the Respondent, upon the request of the Claimant, signed a Claim Agreement with the Claimant. The Agreement provides that the Respondent shall deliver 307.918tons of Low Density Polyetheylene to the Claimant as an indemnity. However, the Respondent failed to perform the Agreement and therefore the Claimant applied to the Arbitration Commission for arbitration on June 28, 1998.

The Claimant's claims are :

Concerning Contract 947, the Respondent is demanded to indemnify the Claimant for his loss of US $ 31,017 incurred on account of the quality of the goods delivered being not in conformity with the stipulations of the contract, when the Claimant states that the quality of the goods is not in conformity with the stipulations of the contract, he means the index of MI of the goods specified in the contract is 4—5 grams/10 minutes but the index of MI of the goods actually delivered by the Respondent in six lot numbers are 5.75, 6.44, 9.87, 5.36, 5.54, 5.53 grams/10 minutes respectively.

Concerning Contract 961, the Respondent is demanded to indemnify the Claimant

a sum of US $ 204,765 equivalent to the value of 307.918 tons of Low Density Polyetheylene pursuant to the Claim Agreement signed by and between the Claimant and the Respondent of February 8, 1988. The sum of US $ 204,765 includes :

1. The indemnity to the Claimant for his losses incurred as a result of the index of MI of the goods delivered by the Respondent being not in conformity with the stipulations of the contract(the contracted MI is 2－2. 4grams/10 minutes.) but the MI of the goods delivered in seven lot numbers are respectively 1, 7.2, 7.1, 5.2, 9.3, 4.2, 8grams/10 minutes : the method of calculation being that, a reduction of price by 15% and 20% is made on the quantity of the used material(196.64tons) and the quantity of the unused material(659.126tons) respectively in accordance with the provisions laid down in the Claim Agreement signed by and between the Claimant and the Respondent on February 8, 1988 : the sum of indemnity converted into goods being 161.355tons.

2. The indemnity to the Claimant for the loss caused by the bag-damage which was found when the goods arrived at Wulumugi and which is the result of the packing of the goods being not in conformity with the stipulations of the contract ; the loss amounting to 92.827 tons of Polyetheylene.

3. Indemnity to the Claimant for the shortage of 1,164 bags of goods which was ascertained when the goods reached Wulumuqu, a loss of 27.026 tons of Polyetheylene.

4. Indemnity to the Claimant for other losses incurred as a result of the quality and the packing of the goods being not in conformity with the stipulations of the two contracts, including ; a sum of RMB 7,356.27 yuan for buying packing materials and repackaging the goods in Xingang, Tianjin ; a sum of RMB 25,267.41 yuan for bank-loan interest ; a sum of RMB 2,309.20 yuan for testing the materials and a sum of RMB 3,162 yuan for inspection fees charged by the Wulumuqi Import and Export Commodity Bureau Inspection

The Respondent's main Defence is as follows :

1. The basis on which the Claimant's claim for damages is lodged is the Claim Agreement. But the Claim Agreement is a product of coercion and lure, so it has no legal effect at all.

2. The quality inspection of the goods under Contract 947 and Contract 961, i.e. the inspection of the index of MI was conducted by the Wulumuqi Import and Export Commodity Inspection Bureau. However, according to the contracts, the valid inspection of the goods shall be made at the port of destination by the Tianjin Import and Export Commodity Inspection Bureau. Hence, the Claimant should file his claims on the basis of the inspection certificate issued by the Tianjin import and Export Commodity Inspection Bureau Any other evidence on which the Claimant claims are based is unacceptable to the Respondent.

3. The Claimant's assertion of 15% and 20% goods devaluation has been worked out on the assumption that the products made of such Polyetheylene not up to the standard and should be sold as inferior products with 5% devaluation and that the residual value of the rejected products is 50%, etc. Therefore, all this can not be used as grounds for raising claims.

4. According to Contract 961, the term of delivery is C & F Xingang Tianjin, China, The Respondent's Liability for damage to the goods is up to Xingang, at maxium. So, there is no liability on the part of the Respondent for goods damage caused during the inland transportation form Xingang to Wulumuqi.

5. The evidence on which the Claimant's claim for shortage of goods is based is a record issued by the Wulumuqi Railway Bureau. Such a record can not the taken a valid evidence for claim.

6. The Claimant claims against the Respondent for compensation of bank-loan interest on the ground that most of the goods has been stocked in the warehouse for several months as said by the Claimant himself. So far as this point is concerned, the Claimant's evidence for his claim is insufficient, and therefore, no compensation should be given.

7. Since it is lack of evidence and also unreasonable for the Claimant to claim for labour fees and expenses for testing the materials, the Respondant can not make any compensation at all.

8. The certificate of inspection on the damaged goods was issued by the Tianjin Import and Export Commodity Inspection Bureau on January 22, 1988. The date on which the certificate was issued is beyond the contracted time-limit of 60 days from the date on which the goods was unloaded from the ship. The Respondent, therefore, requests the Arbitration Tribunal to dismiss the Claimant's claim.

Ⅱ. Arbitration Tribunal's Opinion

The Arbitration Tribunal is of the opinion that

1. According to the Respondent's pleading and his evidential documents can not sufficiently prove the Claim Agreement signed by and between the Claimant and the Respondent on February 8, 1988 to be a product of coercion, nor that there was coercive behaviour on the part of the Claimant in the course of signing the Agreement. However, the Claimant and the Respondent have different interpretation and disputes over the indemnity and the amounts laid down the Agreement. Therefore, the compensation items and amounts should be checked up and decided one by one in accordance with the principle of fairness.

2. The goods under Contract 961, after unloading in Xingang, Tianjin, was in reality inspected by the Tianjin Import and Export Commodity inspection Bureau although the Bureau did not issue and inspection certificate until January 22, 1983. This can be proved by the original record done by the Bureau which was copied down by the Respondent in the courses of his investigation in Xingang and subsequently submitted to the Arbitration Tribunal. Hence, the figures of damaged bags set out in the inspection certificates issued by the Tianjin Import and Export Commodity inspection Bureau should be recognized.

3. With respect to the dispute over the quality of the goods under Contract 947 and Contract 961, i.e. the dispute over the index of MI of the goods being not in conformity with the contracted stipulations, the Tianjin Import and Export Commodity Inspection Bureau did not inspect the goods and the Buyer discovered the problem not long after the goods arrived at Wulumuqi and asked the Wulumuqi Import and Export Commodity Inspection Bureau to inspect the goods. The inspection revealed that the index of MI of the goods did not agree with the stipulations of the contracts and the index of Mi of the goods in each lot number was not unanimous. The Respondent (Seller) and his supplier did not have any different opinion when they came to Wulumuqi, Xinjiang to inspect the goods. As a matter of fact, the Respondent also recognized the fact that the goods did have quality defects. Furthermore, the quality of such kind of goods cannot be changed by and abroad transportation and storage and the Claimant(Buyer) is reasonable to point out that the goods quality is not in conformity the contracted stipulations and this creates difficulties to the production and affects the quality of the products to a certain extent. Therefore the price of the goods under Contracts 947 and 961 should be reduced.

4. The baging of the goods under Contract 961 was one kraft-paper less than the contracted requirement and many bags were already found damaged through inspection at the port of destination. The Claimant had to buy packing materials for repacking the goods and pay for labours in Xingang, Tianjin. These expenses should be compensated by the Respondent.

5. The test fees claimed by the Claimant should be taken into account when making a reduction of the price of the goods.

6. The claim lodged by the Claimant against the Respondent for indemnity for losses caused by bag-damage and shortage of goods found after the goods arrived at Wulumuqi should be rejected because of insufficient evidence. The Claimant's other claims should also be rejected since there is no justified reasons and sufficient

evidence.

Ⅲ. Arbitration Tribunal's Award

1. Concerning goods quality dispute, the price of the goods under Contract 947 shall be reduced 3.5%, i. e. US $ 6,982.50 and the price of the goods under Contract 961 shall be reduced 5%, i.e. US $ 33,250 Therefore, the Respondent shall compensate the Claimant in an amount of US $ 40,232.50

2. The Respondent shall indemnify the Claimant for his loss of 5.75 tons of goods caused by bag-damage in an amount US $ 3,823.75

3. The Respondent shall compensate the Claimant RMB 1,008 yuan for his expenses for the repacking materials RMB 735 yuan for labour fees for repacking the damaged goods in Xingang, Tianjin.

4. The Claimant's other claims shall be rejected.

5. The arbitration fees for the present case are RMB 7,000 yuan. The Respondent shall pay RMB 4,900 yuan and the Claimant shall pay RMB 2,100 yuan.

6. The Respondent shall pay the above-mentioned awarded amounts within three months after this AWARD is made. Any amount unpaid within the time-limit shall be paid plus interest at an annual rate of 7%.

This AWARD is final.

(Stamp of the Arbitration Commission)

Presiding Arbitrator : (signed)

Arbitrator : (signed)

Arbitator : (signed)

Example2.

Arbitration Award(full text)

AWARD

The Foreign Economic and Trade Arbitration Commission(hereinafter referred to as the Arbitration Commission) of the China Council for the Promotion of International Trade, upon a written Application for Arbitration filed by the Plaintiff. × × × Trading Company Ltd.(Seller) of × × (Country) on November 15, 1987 and pursuant to the Arbitration Agreement signed by and between the plaintiff and the Defendant, on july 29, 1987, took cognizance of this arbitration case of dispute arising from the Contracts signed by and between the Plaintiff and Defendant respectively on September 26, 1986 and October 11, 1986 for the sale of a Vessel "SAVIC I" and Steel.

The Arbitrator Tribunal hearing the case is composed of arbitrator × × × appointed by the Plaintiff and arbitration × × × appointed by the Defendant and the presiding Arbitrator × × × jointly selected by the two arbitrators.

Having examined the Plaintiff's Statement of Claims and the supporting documents and the Defendant's defence and counter claims with documentary evidence as well as the other related materials handed in by the two parties, the Arbitral Tribunal held hearings in Beijing on July 3, July 8 and July 29, 1988, Both the Plaintiff and the Defendant attended the hearings and made oral statements and arguments and answered questions raised by the Arbitration Tribunal.

The facts of the case, the Tribunal's opinion and award are as follows :

I. Facts

On September 26, 1986, the Plaintiff(Seller) and the Defendant(Buyer) signed in

Tanggu, Tianjin a contract in English language for the sale of a vessel "SAVIC" together with 15,300 tons of low carbon mild steel on board in a total amount of US $ 2,576,232.00 Description of the vessel and specification and type of the steel are concretely stipulated in the contract. It is also provided in the contract that the Seller shall deliver the goods in the period from December of 1986 to February of 1987 and the Buyer shall establish an irrevocable and assignable L/C in favour of the Seller with in 15 days as from the date of the signature of the contract (in the contract is signed in the afternoon, then the time-limit shall commence from the next day of the signature of the contract) : should the Seller fail to deliver the subject goods of the contract within the time-limit in conformity with the requirements set forth in the contract, the Buyer has the right to cancel the contract, withdraw the L /C and lodge a claim against the Seller for damages. If the Buyer does no establish the L/C within the contracted time-limit, he shall be fined one percent of the contract price per each 15 days, but the total amount of fine shall not exceed five per cent of the contract price. On the afternoon of October 11, 1986, the Plaintiff and the Defendant signed in Beijing an agreement in Chinese language, the terms and conditions of which compared with those of the contract in English language, have the following differences : (1) the name of the vessel "SAVIC" under Article 1 is changed into "SAVIC I" : (2) the generator provided by the Seller under Article 3, shall have 20 days bunker in stead of 6 days as stipulated in the contract : (3) under Articles 9 and 14, the time period within which the Buyer shall open the L/C is changed from 15 days into 15 working days as from the date of signature of the contract : (4) under Article 9, the irrevocable and assignable L/C to be opened by the Buyer is changed into an irrevocable and non-assignable L/C : (5) the place of arbitration which was New york and Hong Kong is changed into New York and Beijing. Furthermore, it is stipulated in the agreement in Chinese language that the English and Chinese version of this Contract shall come into effect at the same time.

On October 10, 1986, the Plaintiff telexed his representative in Beijing(i.e. the

person who signed the contract on the Seller's behalf) to notify the Defendant that the contracted steel was not available and a change of type and specifications of steel was necessary, to which the Defendant did not agree. In their agreement in Chinese language signed on October 11, 1986, the two parties agreed that the specification of the steel laid down in their contract in Engligh language should remain unchanged and were written accordingly in their agreement. On October 15, 1986 the Plaintiff telexed the Defendant requesting again a change of the type and specifications of steel, to which the Defendant did not respond. Later from October 19, 1986 to August of 1986, the two parties had several discussions on the problem of the type and specifications of the steel in question. The seller changed the specifications several times, but no agreement was reached between the Seller and the Buyer. The representative of the Plaintiff did express that he would keep contacts with the Defendant to find a solution for it. However, no solution for it. Howerer, no solution could be found at all. At the same time when the Seller and the Buyer negotiated the supply of the steel in question, they both consulted with the Buyer's principal about the securement of the necessary foreign currency under the L/C for the transaction. But, owing to the fact that steel supply problem remained unsolved and the contracted time of delivery as well as the time-limit for the establishment of L/C all expired and that the Seller and the Buyer were still unable to reach a new agreement, the Buyer did not open an L/C.

The Plaintiff (Seller), in his application for Arbitration submitted to the Arbitration Commission on November 15, 1987, points out that after signing the contract the Buyer failed to open as L/C within the contracted time-limit and never did so afterwards, thus causing substantial economic losses to the Seller and for this the Seller demands indemnity from the Buyer for his following economic losses :

1. US $ 26,275.00 of expenses for transport and boarding plus other related expenses incurred by the Seller who came to China to negotiate with the Buyer for a settlement.

2. US $ 12,400.00 of expenses for telephone and telex charges incurred by the Seller in communicating with the Buyer for a settlement.

3. A fine of US $ 128,811.00 for Buyer's failure to open an L/C within the contracted time-limit.

4. The Seller's loss of profit amounting to US $ 63,776

5. US $ 76,817.80 of expenses for attorney's fees and arbitration costs incurred by the Seller in arbitration which was brought about by the ship owner in the United States against the Seller for his breach of contract.

The above 5 claims come to a total amount of US $ 308.40 In addition, the Plaintiff demands that the Defendant shall bear all the arbitration costs for the present case.

However, the Defendant argues in his written defence that not long after signing the contract in English language, the Plaintiff requested a change of the contracted type and specifications of the steel, During the negotiations afterwards, the Plaintiff changed them again and again. As matter of fact the type and specifications of the steel specified in the contract have never been secured. This is the reason why the Defendant was unable to open the L/C and eventually the contract could not be performed. Therefore, the Defendant counterclaims the Plaintiff in his written statement filed with the Arbitration Commission on August 11, 1988. requesting the Plaintiff to indemnify him for the following economic losses incurred by him as a result of the Plaintiff's breach of contract ;

1. RMB 7,660.00 yuan of expenses for transport and travelling and other related expenses incurred by the Buyer for negotiating with the Seller for a settlement;

2. RMB 828 yuan of expenses for telephone and telex charges incurred by the Buyer when negotiating with the Seller for a settlement;

3. A fine of US $ 128,811.00 because of the Seller's anticipatory breach of contract;

4. A commission of US $ 25,762.32 due to the Buyer(one percent of the contract

price).

The above 4 counter-claims come to total amount of RMB 8,488 yuan and US $ 154,573.32. In addition the Defendant requests that the plaintiff shall bear all the arbitation costs for the present case.

Ⅱ. Tribunal's Opinion

After carefully examining the written statements and the evidential documents produced by both parties and listening to their oral statements and arguments, the Arbitral Tribunal is of the opinion that :

The economic losses for which the Plaintiff demands indemnity from the Defendant refer to the losses incurred by the Seller as a result of the Buyer's non-establishment of the L/C in accordance with the contract provisions The plaintiff insists that the time period for establishing the L/C shall be 15 working days commercing from the next date of the date of signing the contract in English language. However, there is a sentence in the agreement in Chinese language, which reads : "The English and Chinese versions of this contract shall come into effect at the same time". The date of signature of the contract in English language is not the same as the date of signature of the agreement in Chinese language. Therefore, the meaning of this sentence is ambiguous. So far as the contents of these two versions are concerned, the Chinese version has made modifications of the terms and conditions of the English version. As a matter of fact, the Chinese version is more complete and precise than the English one. It is, therefore, more reasonable and justified to have the time period for the establishment of the L/C commenced from the next date of the date of signature of the agreement in Chinese language (as the two parties signed the agreement in the afternoon, it shall commence to run from the next date). Accordingly, the Buyer shall open the L/C within the time period ranging from october 12, 1986 to October 29, 1986(containing 3 holidays and 15 working

days). The fact is that the Plaintiff telexed the Defendant as early as on October 10 and 15, 1986 stating that the contracted steel was unavailable and requesting that, the type and specifications of the steel in question be changed. But the Buyer has never accepted the Seller's request for a change of the type and specifications of the steel. Under such circumstances, it is neither realistic nor reasonable for the plaintiff to demand that the Defendant shall open the L/C within the said time period. Even if the Pliantiff's argument is acceptable, i. e., the time period for opening the L/C shall commence to run from the next date of the signature of the contract in English language (September 27, 1986) until October 16, 1986 (totalling 15 working days), the Plaintiff (Seller) and the Defendant (Buyer) have already in this time period opened up a new negotiation on the type and specification of the contracted steel. hence, it is also unrealistic and unreasonable for the Plaintiff (Seller) to demand the Defendant (Buyer) to establish the L/C within the said time period.

In conclusion, after signing their contract and agreement the two disputing parties to this arbitration case have carried out new negotiations on the contracted type and specifictions of the subject matter of the contracted steel (which must be delivered together with the vessel), in other words the two parties have opened up their contract for renegotiation and have never been able to reach an agreement.

Under such circumstances neither the Plaintiff's impeachment on the Defendant with his failure to open the L/C and claim for damages not the Defendant's reprimand on the Plaintiff for his failure to perform his obligations of delivery and claim for damages are justified.

Ⅲ. Award

The Arbitral Tribunal awards :

1. The claim lodged by the Plaintiff (Seller), against the Defendant (Buyer), and vise versa, for economic damages, are all dismissed :

2. The arbitation fee for this case amounting to RMB 15,000 yuan shall be borne by the two parties equally. The Plaintiff (seller) has paid in advance a sum of US $ 1,442 as a deposit for arbitration fee. After a conversion into RMB and a set-off, the Plaintiff (Seller) shall remit the balance of RMB 2,132.88 yuan to the Arbitration Commission. The Defendant (Buyer) has paid in advance a sum of RMB 2,900.00 yuan as deposit for arbitration fee. After a set-off, the Defendant (Buyer) shall remit a balance of RMB 4,600.00 yuan to the Arbitration Commission. The above payments shall be effected by the two parties to the Arbitration Commission within 30 days after receipt of this AWARD.

This AWARD is final. Presiding Arbitrator : (Signed)

(Stamp of the Arbitration Commission) Arbitrator : (Signed)

Arbitrator : (Signed)

Example 3

Conciliation Case

The Defendant, a Chinese Corporation, purchased a vessel from an American Company, After deilivery of the vessel, the Plaintiff, and European Company, filed a lawsuit with a Chinese court against the Defendant, the Chinese Corporation, for the payment of the vessel's debt, which amounted to 35,000 DM and more.

It was ascertained that the Plaintiff has supplied the vessel with stores, which was 35,000 DM and more in value, and not paid. So when the Plaintiff Learned that the vessel had been sold by the American Company to the Defendant at a price of more than US $ 437,000. he informed the Defendant by telex that the vessel still owed him a debt are requested a priority of claim for payment of the debt. The Defendant immediately telexed the American Company to the effect that he would not take delivery of the vessel unless the Amercian Company could guarantee that the Defendant sould not be held responsible for the debt. The Amercican Company replied in his telex that the Plaintiff's claim for payment was not reasonable, but, in order to ensure the sale of the vessel, he was willing to offer the Defendant a bank guarantee of 44,000 DM as compensation for the loss which the Defendant might incur because of his involvement in the lawsuit. The 44,000 DM bank guarantee covered 34,000 DM for payment of the above mentioned debt and 10,000 DM for the Defendant's expenses for the Lawsuit.

During court proceedings, the Plaintiff claimed that "the nature of this claim for the debt was a priority of claim on the vessel", while the Defendant pleaded that there was no debtor-creditor relations between the Plaintiff and the Defendant, the Defendant could not become a debtor to the Plaintiff due to the transfer of ownership of the vessel ; that the vessel had been already disassembled before the Plaintiff initiated the lawsuit ; that according to international practice, the Plaintiff's

suit had exceeded the time-bar of six months : that the bank the guarantee provided by the American Company to the Defendant was based on the Defendant's conditions for the acceptance of delivery of the vessel not on the Plaintiff's claim for debt.

During court procedings, the plaintiff and the Defendant themselves negotiated with each other. The Defendant proposed to pay the Plaintiff 50% of the above-mentioned debt to settle the dispute : the Plaintiff accepted the Defendant's proposal although he did not fully share the Defendant's view. Accordingly, the Plaintiff and the Defendant reached a settlement agreement. However, after examination the settlement agreement, the court held that the settlement agreement did not mention the Defendant's liability and the Plaintiff did not enter into the agreement of his own accord. The contents of the settlement agreement were obviously not fair and therefore could not be confirmed by the court.

The court was of the opinion that, the vessel of the American Company did owe a debt to the Plaintiff, which the Defendant knew before he took delivery of the vessel and accepted the American Company's bank guarantee. This proves that the Defendant had accepted a debt assigned to him by the American Company. The vessel was disassembled, in fact, after the Plaintiff had lodged his claim against the Defendant for payment of a debt and the Defendant's acceptance of the American Company's bank guarantee. The disassembly of the vessel did not mean that the debt had become void. Before the expiry of six months time-bar, the Plaintiff did raise claims against the American Company and the Defendant respectively for payment of the debt, and the American Company agreed to specify in the bank guarantee the date of December 31, 1984 as the last day for accepting claims. Therefore, the time-bar was suspended. Consequently, the Plaintiff's lawsuit was initiated within the time-limit.

Based on the above, the court determined

1. The debt was established ;

2. The Defendant has accepted the assignment of the debt ; and

3. The Defendant should pay the debt to the Plaintiff

Under these circumstances, the Defendant, pursuant to paragraph 1 of Article 45 of the law of the PRC on Civil Procedure (for trial implementation), which reades ; "the parties have the right…"to apply and the Plaintiff agreed to it. Through conciliation by the court, the Plaintiff and Defendant reached a settlement agreement to end the case on the following conditions :

1. The Defendant shall pay the Plaintiff a sum of 34,000 DM for the stores supplied by the plaintiff to the vessel :

2. The lawsuit fees of 711.23DM shall be born by the Defendant : and

3. The lawyer's fee of the Plaintiff and the Defendant shall be paid by themselves respectively.

Example 4

Conciliation Case

A foreign Company bought a large consignment of animal-by products from a Chinese Corporation. The Chinese Corporation failed to make delivery of the goods to the foreign Company at the contracted time of shipment and the international market price of the goods was on the increase. A dispute arose between the two parties. After a year of negotiation, no solution was found. The two parties applied to the Beijing Conciliation Centre for conciliation.

The foreign Company demanded the Chinese Corporation to deliver all the contracted goods within the shortest period of time, to which the Chinese Corporation replied that they could only ship 25% of the contracted quantity of the goods, however they were willing to make up the balance 75% by delivering another kind of goods to the foreign Company. The foreign Company did not accept the offer as the international market price of the contracted goods at the time of Conciliation by the Center had risen several times higher that that prevailed at the contracted time of shipment. The Chinese Corporation made another proposal either to deliver 25% of the goods and compensate the rest with a certain amount of money or make no delivery at all but to pay the foreign Company a certain amount of money as compensation. The foreign Company refused the proposal and demanded the Chinese Corporation to deliver all the contracted goods. In these circumstances, the conciliation explained to both parties that since no delivery was made at the contracted time of shipment, the Chinese Corporation should be responsible for it and indemnify the foreign Company for his loss, which was a loss of profit. However, the profit should be the difference between the contracted price and the international market price prevailing at the contracted time of shipment rather than the difference between the contracted price and the international market price prevailing at the time of conciliation conducted a year later. The facts that the international market price at the

contracted time of shipment had only increased by several percents whereas the international market price at the time when conciliation was conducted a year later was several times higher than the contracted price. Therefore, if the foreign Company insisted on delivery of all the contracted goods, the Chinese Corporation might prefer to take the responsibility for non-deilivery, as he knew that in case of arbitration or litigation, what he was obliged to do was to pay the foreign Company the several percent difference between the contracted price and the international market price-prevailing at the contracted time of shipment, not the several time difference between the contracted price and the international market price prevailing at the time of conciliation conducted a year later. The conciliator's explanations helped the two parties to narrow their gap by a great margin, and finally they reached a settlement agreement, by which the Chinese Corporation, based upon the difference between the contracted price and the international market price prevailing a the contracted time of shipment, made a reasonable indemnity to the foreign Company and brought the case to an end to the satisfaction of both parties.

Example 5

Conciliation Case

Two foreign companies (Party A and Party B) applied to the China International. Economic and Trade Arbitration Commission (CIETAC) for conciliation of their disputes. The facts of the case are as follows :

Party A had enjoyed a good business relations with a Chinese Corporation for some years, Later, a Senior staff of Party A left the Company and established a new Company (Party B) and became the manager of the new Company. Party B also developed a good business tie with the said Chinese Corporation. Party A complained that the manager of Party B used the experience and business "know-how" that he gained in doing business with the said Chinese Corporation while he was a senior staff of Party A to seize a lot of business from Party A and thus jeopardized the interest of Party A. Therefore, Party A sued Party B in an American Lawcourt for damages. The lawsuit lasted for a certain period of time, both parties incurring large amount of expenses. After consultation, the two parties agreed to make a joint application to the China International Economic and Trade Arbitration Commission(CIETAC) for conciliation in Beijing, The conciliator explained to both parties that there was no sufficient evidence to prove that Party B had seized business from Party A by using Party A's "Know-how", and as a matter of fact, party B was benefited, in one way or another, by the good business relations between Party A and the Chinese Corporation ; therefore, both parties should resolve the existing dispute through mutual understanding and mutual concession and then collaborate with each other to do still more and better business with the Chinese Corporation, and this would be the best solution. After the conciliator's explanations from the legal and business point of view, the two parties eventually reached a settlement agreement. Party A relinguished certain business opportunities to Party B and party B paid a reasonable sum of money to Party A to end the disputes, where-

upon Party A Withdrew his lawsuit in the American lawcourt, which saved both parties a lot of time and money.

Example 6

Conciliation Case

A foreign party and a Chinese party signed a contract for setting up an equity joint-venture enterprise in China. The contract stipulated that the foreign party should pay in his capital before a given date and that the Chinese party should provide the foreign party with a guarantee for the latter to borrow money from foreign banks as his capital to pay in. After the contract was signed, the foreign party brought some people from a foreign bank to negotiate with the Chinese party in Shanghai on the matter of bank loan guarantee. As a result, a Chinese financing organization, at the Chinese party's request, issued a Letter of Intent to the foreign party, which showed the willingness of the Chinese financing organization to provide a guarantee for the foreign party to get a loan from the foreign bank Specific conditions for the issuance of the guarantee were discussed but not agreed or confirmed by the parties concerned. Owing to some reasons, the total investment amount needed to be inceased but no money had been secured. The foreign party was unable to borrow his needed money from the foreign bank and failed to pay in his capital before the given date. Disputes arose between the foreign party and the Chinese party. No solution was found through negotiation between them. Then, the Chinese party applied to the China International Economic and Trade Arbitration Commission (CIETAC) for arbitration

The Chinese party claimed US $ 1,000,000 from the foreign party as indemnity for his loss due to the foreign party's failure to pay in his capital before the given date. The foreign party argued that this failure to pay in his capital was in reality due to the fact that Chinese party did not provide him with the loan guarantee as contracted and therefore, it was not him but the Chinese party that should be responsible for the failure. The Chinese party replied that he had given the foreign party a Letter of Intent issued by the Chinese financing organization to show its

willingness to provide a loan guarantee for the foreign party to obtain a loan from the foreign bank, and it was the poor creditablity and inablity of the foreign party that had prevented the foreign bank from lending money to the foreign party, and conseguently, the foreign party should be liable for it.

At the hearing, the arbitration tribunal carried out conciliation with the consent of both parties. The arbitration tribunal pointed out to the two parties that

1. Both parties did not carry out careful feasibility study on the joint-venture project ;

2. Both parties were to blame because they were still in the process of negotiaing an agreement on the specific conditions for the issuance of a bank loan guarantee when the time-limit for the foreign party to pay in his part of capital expired ;

3. The originally fixed total amount of investment needed to be increased while no money had been secured, as a result, the foreign bank refrained from lending money to the foreign party ; and

4. The Chinese party could not prove with sufficient evidence his alleged loss of US $ 1,000,000 and in fact the Chinese party had alreday avoided his loss by taking reasonable measures.

Based on the above facts nd reasons, the arbitration tribunal urged both partits to sincerely consult each other for a compromise on the principles of mutual understanding and mutual concession, fairness and reasonablness, and seeking truth from facts. In the end, the two parties reached a settlement agreement, by which the foreign party paid the Chinese party a reasonable small sum of money to bring the case to a close.