Dispute Resolution Monthly Review

天同律师事务所
TIANTONG & PARTNERS

About Tiantong

Tiantong & Partners was founded in 2002. As one of the leading Chinese law firms, it is solely dedicated to complex civil and commercial dispute resolution. Headquartered in Beijing, Tiantong has approximately 150 people nationwide, many of whom had served as senior judges for years at different levels of Chinese courts, including the Supreme People's Court and high courts of China. In the recent years, it has established 6 branch offices in Shenzhen, Nanjing, Chongqing, Shenyang, Xi'an and Zhengzhou, where the 6 circuit courts and 2 international commercial courts under the auspice of the Supreme People's Court are seated.

In the past decade, Tiantong has been keeping one of the highest winning rates among all Chinese law firms before the Supreme People's Court and various high courts of China. Over 30 cases won by Tiantong have been publicized as landmark guiding cases for national trial work on some of the most authoritative law journals in China.

Tiantong advises on all types of commercial disputes, including but not limited to litigation, arbitration, contentious bankruptcy and enforcement proceedings with its most impressive achievements in banking and finance, construction and engineering, corporate and M&A disputes etc. Its clients range from foreign governments such as the US Department of Justice, multinational corporations such as RBS to large Chinese companies such as Bank of China, China Construction Bank, Agriculture Bank of China, Sinopec, Sinochem, China Datang Corporation and Ping An Insurance etc.

In addition to its traditional advantages in litigation before Chinese courts, Tiantong has extensive experience in representing clients before domestic and international commercial arbitration proceedings. Tiantong lawyers previously worked for leading arbitration institutions as case manager (e.g. the Permanent Court of Arbitration in Hague, Netherland and Hong Kong International Arbitration Centre in Hong Kong) or clerked with the Justice of the UN International Court of Justice in Hague, Netherland. Some of them once worked at leading international law firms on international arbitration matters conducted before CIETAC, HKIAC, SIAC, ICC, SCC and LCIA, where the seats of arbitration include Beijing, Shanghai, Hong Kong, Singapore, Stockholm and London.

Tiantong is also specialized in advising clients for recognition and enforcement of foreign arbitral awards and judgments before Chinese courts, and is capable of effectively working together with leading international law firms and local counsel overseas to handle multi-jurisdiction disputes.

Contact Persons

Huafang Zhu
Senior Partner
zhuhuafang@tiantonglaw.com

David Gu
Partner
david.gu@tiantonglaw.com

Ying Wu
Of counsel
wuying@tiantonglaw.com

Featured Article

Evidential Grounds for Setting Aside Domestic Arbitral Awards under Chinese Law

Introduction

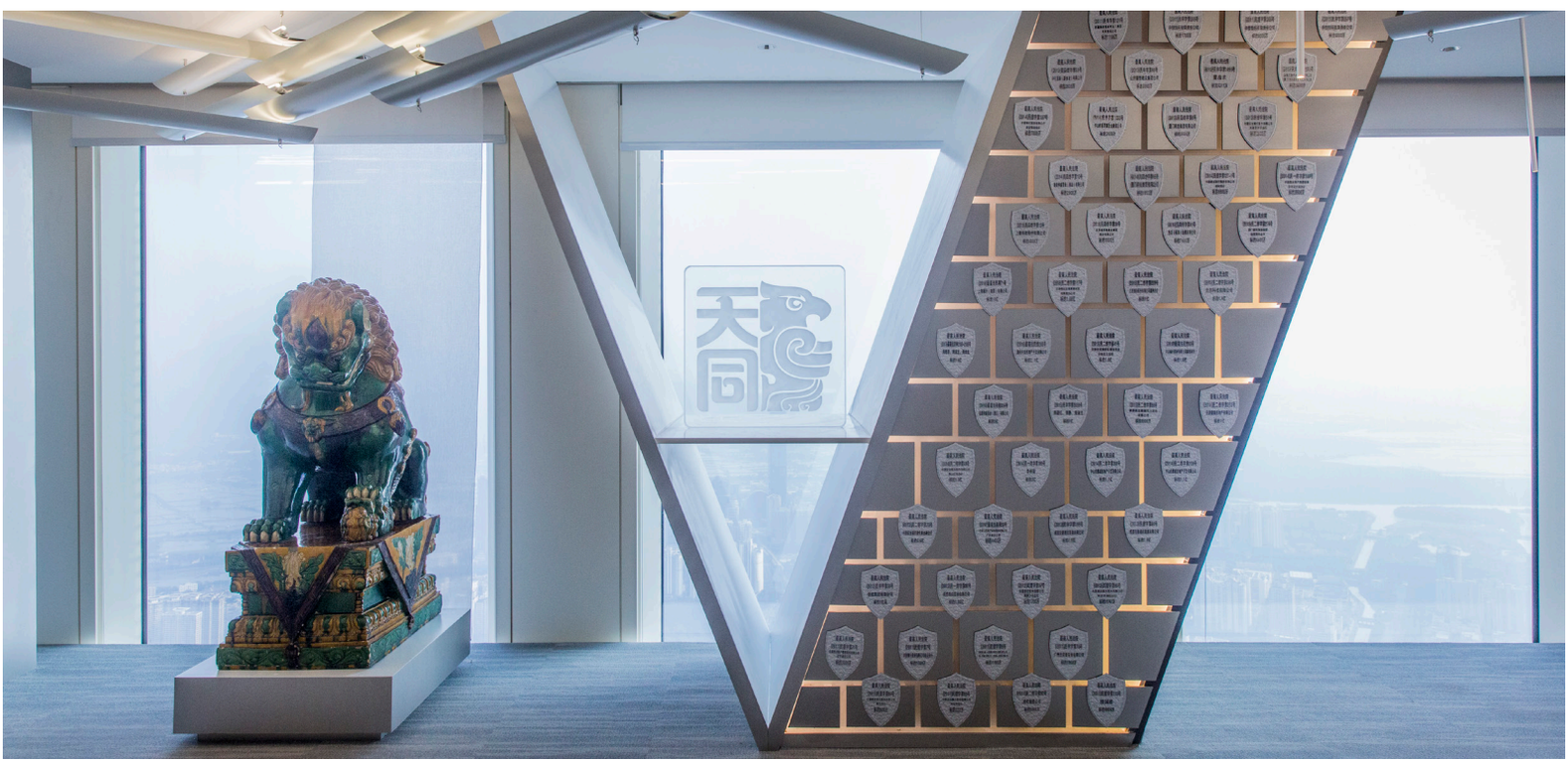
Under the Chinese arbitration law regime, there are two types of arbitration: one is domestic arbitration and the other is foreign-related. The distinction between the two lies in whether an arbitration involves any foreign element. Such "foreign element" refers to (i) any party is foreign, (ii) the legal relationship between the parties is foreign, (iii) the situs of the subject matter is foreign, or (iv) any other foreign indicator. The domestic arbitration and foreign-related one are Chinese arbitration, in contrast to foreign arbitration where the seat of arbitration is outside the territory of mainland China.

Under Article 274 of the *Civil Procedure Law of the People's Republic of China* (the "*Civil Procedure Law*"), there are several grounds for setting aside a foreign related arbitral award, which mirror those grounds under Article V of the *New York Convention*. Although in-house counsel of multinational companies and foreign lawyers are used to pay much attention to Article 274 of the *Civil Procedure Law*, increasing

significance is attached to another question, *i.e.* how to set aside or challenge the enforceability of a domestic arbitral award under Chinese law? This is because more WOFEs (wholly owned foreign enterprises, which are corporate legal persons under Chinese law) enter into transactions in China and are more inclined to refer the dispute to domestic arbitration institutions such as CIETAC or BAC. Many arbitral awards rendered to these WOFEs, are domestic in nature.

The issues are mainly addressed in Article 58 of the *Arbitration Law of People's Republic of China* (the "***Arbitration Law***") and Article 237 of the *Civil Procedure Law*, under which six grounds are set out to enable a Chinese court to set aside or refuse to enforce a domestic arbitral award: (i) there is no arbitration agreement between the parties; (ii) the matters decided in the arbitration exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission; (iii) the formation of the arbitral tribunal or the arbitral procedures were not in line with the statutory procedures; (iv) the basis for the ruling is forged; (v) the other party has concealed to the arbitration institution evidence that is sufficient to affect the impartiality of arbitration; and (vi) the arbitrator has committed embezzlement, accepted bribes or conducted malpractices for personal benefits or perverted the law in the arbitration.

Among the aforesaid six grounds, two of them relate to evidential issues in the arbitration, which are "*the basis for the ruling is forged*" and "*the opposing party has concealed to the arbitration institution evidence that is*



sufficient to affect the impartiality of arbitration".

This article is derived from *A Practical Observation Report of PRC Courts Judicial Review on Arbitration in 2018* (Chinese version) prepared by Tiantong & Partners. It will firstly offer a brief discussion on the difficulties arising in cases related to these grounds before the *Provisions of the Supreme People's Court on Several Issues concerning the Handling of Cases regarding the Enforcement of Arbitral Awards by the People's Courts* (the "**Provisions**") came into force.[1] Thereafter, the article will provide detailed analysis of the developments of those two grounds after the Provisions became effective.

A. Difficulties Predated the Provisions

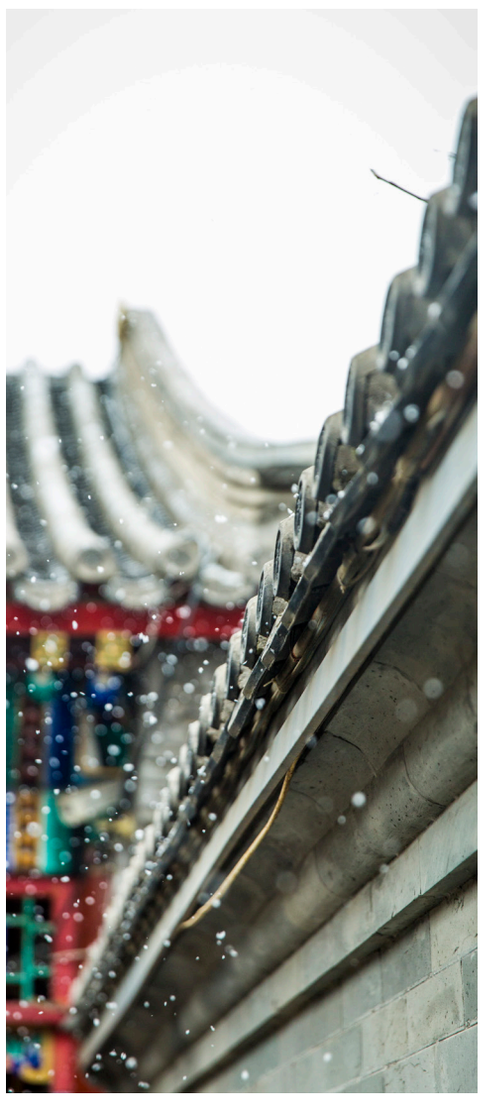
Before the Provisions coming into force, there are two thorny questions about evidence in domestic arbitration. Firstly, it is difficult to determine the standard of proof applicable to these two evidential grounds. For instance, how should a court conclude whether the concealment of evidence is sufficiently serious to affect the impartiality of the award? Since no clear standard has been set in the *Arbitration Law* or the *Civil Procedure Law*, the outcome of cases could be vastly different.

Secondly, it is difficult to determine the scope of judicial review under these two grounds. When deciding whether the evidence is being forged or concealed in an arbitration, the court would inevitably review the

[1] The Provisions has come into force since 1 March 2018.

evidence relating to the substance of the underlying case. If the court cannot strike the right balance during the process, it might intrude on the jurisdiction of the arbitral tribunal.

To overcome the aforementioned difficulties, local courts have developed some discrete standards.[2] Nonetheless, there is no uniform national standard until the release of the Provisions last year. In the sections below, this article will address the standards set out in the Provisions in relation to the two evidential grounds in more detail.



B. The Ground of Forged Evidence

Article 15 of the Provisions clarifies that the term "*the basis for the ruling is forged*" in Article 237 of the *Civil Procedure Law* can be established if: (i) the evidence has been adopted by the tribunal in deciding the arbitral award; (ii) the evidence is material to the crucial factual and evidentiary findings; and (iii) it is established that the evidence is truly formed or obtained by illegal means such as fabrication, alteration and provision of false certificates, which violates the objectivity, relevance and legality of evidence. It should be noted that there is no requirement that the forged evidence is made by one of the parties, nor does it require the evidence to be substantially untrue.

Firstly, that the forged evidence is not necessarily produced by one of the parties reflects the very nature of judicial review. The aim of judicial review about arbitration is to remedy the negative impact on the objectivity and impartiality of the arbitration caused by the forged evidence, other than to punish the party that had benefited from the forged evidence. In this vein, an arbitral award may be set aside or not enforced where the evidential basis for that award is forged, even if the forged evidence is made by a third party.

Secondly, it is appropriate to only require the evidence

[2] For example, the forged/concealed evidence has to be the material evidence that the arbitration award relies upon (河南济源中院（2017）豫 96 民特 3 号; Jiyuan Intermediate People's Court (2017) Yu 96 Min Te No.3).

to be "formed or obtained by such illegal means", but not require the evidence to be substantially untrue. This approach is corroborated by a case judgment of Guangdong High People's Court, in which the court set aside an arbitral award because the seal being used in the contract was falsified, without ascertaining whether or not the content of the contract was substantially true.[3] This approach prevents the court from reviewing substantive issues of an arbitration, which in turn safeguards the independence of the arbitral tribunal.

C. The Ground of Concealed Evidence

Under Article 16 of the Provisions, the ground of "the opposing party has concealed to the arbitration institution evidence that is sufficient to affect the impartiality of arbitration" can be established if: (i) the allegedly-concealed evidence is material for crucial evidentiary findings in the arbitration; (ii) the allegedly-concealed evidence was only possessed by or under the sole control of the party who failed to produce it to the arbitral tribunal; and (iii) the party who took possession or control of the allegedly-concealed evidence was required by the other party or ordered by the tribunal to produce such evidence but failed to do so without any

[3] For ease of reference, we include the citation in both Chinese and English, (2017) 粤 03 民特 259 号 , (2017) Yue 03 Min Te No. 259.

justifiable reason. However, if the arbitral tribunal has refused to order the production of the evidence in dispute, the ground of concealed evidence cannot be established.[4] Moreover, this law provision prohibits a party who has concealed evidence during the arbitration proceedings from later applying to set aside the award on the ground of concealed evidence, *i.e.*, benefiting from its own wrongdoing.

Since the Provisions came into force, the court in practice has strictly followed the standards it sets out, which is a narrower ground compared to that of forged evidence. This makes the establishment of this ground relatively difficult, as demonstrated by the case *Application to Set Aside Arbitral Award by Fujian Zhongji Yuanyang Company*.[5] In this case, the applicant and the respondent had signed a guarantee agreement, in which the applicant acted as guarantor to a loan between the respondent (a bank) and another company (borrower). The applicant later commenced arbitration to revoke the guarantee agreement at Fuzhou Arbitration Commission pursuant to the arbitration clause of the contract. The arbitral tribunal refused to revoke the guarantee agreement.

The applicant attempted to set aside the arbitral award on the ground of concealed evidence under Article 58 of the *Arbitration Law*. It alleged that, *inter alia*, the respondent had concealed the key evidence in its possession that could reveal the exact execution date of the agreement, the absence of which misled the arbitral tribunal to conclude that the contract had been validly formed at the material time. The applicant contended that, in fact, the respondent only executed the contract after 28 March

[4] (2018) 京 04 民特 532 号，(2018) Jing 04 Min Te No.532.
[5] 福建省中际远洋渔业有限公司、中国工商银行股份有限公司连江支行申请撤销仲裁裁决纠纷（2019）闽 72 民特 39 号；Application to Set Aside Arbitral Award by Fujian Zhongji Yuanyang Company (2019) Min 72 Min Te No. 39.

2018, when the applicant revoked its offer to act as the guarantor. This had affected the impartiality of the arbitration, as the arbitral tribunal might have decided otherwise had the relevant evidence been provided.

The court dismissed the application to set aside the arbitral award. In reaching its decision, the court firstly made it clear that all criteria as set out in the Provisions need to be satisfied to establish the ground of concealed evidence. With regards to the instant case, despite the applicant's allegations, the applicant failed to prove the existence of such specific piece of evidence that was alleged to be concealed by the respondent. Therefore, the court could not decide whether there was any evidence concealed by the respondent, let alone deciding whether the evidence is 'material evidence' or whether the evidence is 'only possessed by or under the sole control of the opposing party' as required by criteria (i) and (ii). In addition to that, the court also found that the applicant failed to prove that 'the presence of the evidence is known during the arbitration proceeding' or that it had requested the arbitral tribunal to order the respondent to submit it, as required by criterion (iii). Therefore, in that case, none of the requirements set forth in the Provisions was satisfied, so that the application must be dismissed.

Conclusion

The development on the aforementioned evidential grounds enabled Chinese courts to adopt a principled and transparent approach when deciding on whether a domestic arbitral award must be set aside or enforced. And the Provisions seem to encourage Chinese courts to take a more prudential approach when reviewing domestic arbitral awards, as demonstrated by the cases analysed above, which reflects a "pro-arbitration" judicial attitude.

Chinese Law Updates

BAC/BIAC Releases New Rules on International Investment Arbitration

On 13 September 2019, the Beijing Arbitration Commission/Beijing International Arbitration Centre (the "BAC/BIAC") released the BAC/BIAC Rules for International Investment Arbitration 2019 (the "Rules"), which will take effect on 1 October 2019.

The Rules consist of six chapters and six appendices. The chapters of the Rules include a "General Provisions" (Chapter I) and "Final Provisions" (Chapter VI), and set out the rules on "Commencement of Arbitration" (Chapter II), "Arbitral Tribunal" (Chapter III), "Arbitral Proceedings" (Chapter IV) and "Arbitral Award" (Chapter V). The appendices contain a Fees Schedule (Appendix A), an Indicative Timetable for Arbitration Proceedings (Appendix B), a set of Expedited Procedures (Appendix C), Emergency Arbitrator Procedures (Appendix D), rules for Appeal Proceedings (Appendix E) and Procedural Guidelines for Arbitration under the UNCITRAL Arbitration Rules (Appendix F).

The BAC/BIAC has identified five major highlights of the Rules. Firstly, the Rules can be applied to both the institutional arbitrations submitted to the BAC/BIAC as well as the *ad hoc* arbitrations under the UNICITRAL Arbitration Rules where the BAC/BIAC provides services as the appointing authority.

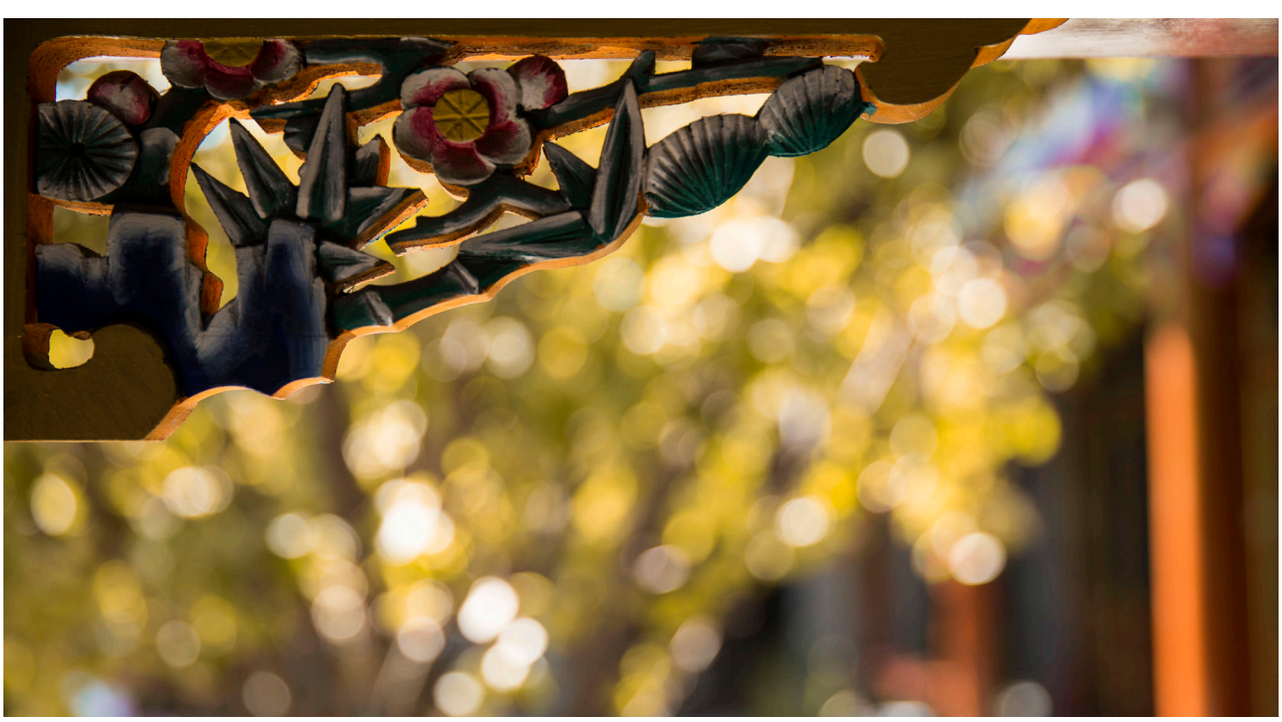
Secondly, appeals against the arbitral awards are allowed where parties have so agreed in writing under the Rules. Thirdly, efforts have been made to improve procedural efficiency and to reduce arbitration costs, such as providing a timetable for the tribunal to conduct the case management. Fourthly, transparency of arbitration is enhanced under the Rules. Lastly, stricter requirements on the qualifications of arbitrators are imposed by the Rules.

The Rules are considered to be at the cutting-edge of innovation and would further enhance BAC/BIAC's profile as one of the leading arbitration institutions in China.

NPC Scrutinises Draft Bill on PI Protection

On 23 August 2019, the Standing Committee of the National People's Congress ("**NPC**") scrutinised the *Compilation of Personal Rights in the Civil Code (3rd Draft)*. Within the bill, heavy emphasis has been put on the protection of personal information ("**PI**").

The Bill enhances the protection of PI in three ways. Firstly, it clearly defines PI as "any information that (by itself or combined with other information) could lead to the identification of a specific person, including but not limited to a person's name, date of birth, ID number, biometric information, residence address, telephone number, email address and tracking information". Secondly, it sets out specific conditions for business to collect PI and the individual's right to control their PI. For instance, PI can only be collected with consent from that individual (or the guardian of that individual). Thirdly, it sets out the responsibilities and obligations for business entities when they possess the PI of individuals.



Previously, PI protection was achieved in China by the provisions set out in the *General Provisions of Civil Law*. Compared to the previous legislation, the instant bill sets out more clear-defined standards, which are expected to enhance the PI protection under Chinese law. Having said that, the bill would not become effective until the final approval of the NPC.

SPC Releases Typical Maritime Disputes Precedents

The Supreme People's Court (the "SPC") has recently released 10 typical maritime landmark cases, which are expected to be the guidance for lower courts when dealing with similar cases.

The batch of landmark cases performed three important functions. Firstly, they have set out the uniform benchmark for trials of certain types of cases, and examples of such types include the determination of applicable law for international multimodal transport disputes. Secondly, they have enhanced the regulatory framework for the shipping industry. For instance, insurer's liability might be exempted if the incident is caused by seafarers who do not have the "Certificate of Proficiency for Seafarers of PRC". Thirdly, they have provided solutions for cases with novel facts.

It should be noted that landmark cases (including the typical ones released by SPC) are not binding legal authorities under Chinese law. Nevertheless, they are still being widely construed as persuasive authorities and lower courts are unlikely to depart from them when adjudicating similar types of cases.

CBIRC Releases New Regulations on Affiliate Transaction

On 9 September 2019, the China Banking and Insurance Regulatory Commission ("CBIRC") has released the *Administrative Measures on Affiliate Transactions of Insurance Companies* (the "regulations"), which contains seven chapters and sixty-four provisions.

The new regulations have enhanced the regulatory framework in five ways. Firstly, it has set out a clear definition of "*Affiliate Party*". Secondly, it has clarified the standard (*e.g.* the size of the transaction) that would amount to an "*Affiliate Transaction*" under the regulation. Thirdly, it has set out stricter compliance requirements for insurance

companies to follow. Fourthly, it has enhanced the insurance companies' obligations to disclose relevant information. Lastly, it has conferred upon the regulators with more power to monitor relevant activities of insurance companies.

CBIRC stated that it will continue to publish new regulations on the insurance industry to eliminate loopholes in the current regulatory framework, so that potential risks caused by irregular operation could be minimised.

Trans-Region Filing Has Been Achieved Among the Maritime Courts

On 30 August 2019, trans-region filing has been achieved among all maritime courts in China. This means a claimant can file claim documents of a maritime dispute at any one of the ten maritime courts or thirty-nine detached maritime tribunals around the country regardless of the court's jurisdiction over the dispute. This mechanism makes the filing process much more convenient and cost-efficient than it used to be. Until the time of writing, eight trans-region fillings have been lodged among eight maritime courts.

According to the SPC, trans-region filling mechanism is especially essential to maritime disputes, because the competing court is usually not located at the city where the parties reside due to the nature of such disputes (*e.g.* often foreign-related) as well as the wide jurisdiction of maritime courts. The filing mechanism is only the first step to improve trans-region services of maritime litigation. In the future, the maritime courts would attempt to establish further cooperation on matters such as service of process, investigations of facts and arrest of ships, *etc.*