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## Lecture

### **Arbitration — A Method Used by China to Settle Foreign Trade and Economic Disputes**

**TANG HOUZHI†**

#### Part I

Arbitration is one of the principal methods used by China to solve disputes arising from trade and economic transactions involving foreign interests. According to the Provisional Civil Procedural Law of the Peoples Republic of China (PRC), the Law of the PRC on Joint Ventures Using Chinese and Foreign Investment, and the Regulations of the PRC on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, disputes arising in import and export business, economic dealings, joint ventures, transfer of technology and offshore petroleum exploration can be settled by arbitration. A provision for arbitration is often seen in the bilateral economic and trade agreements concluded between the Chinese and foreign governments. For example, the China-Philippines trade agreement, the China-Japan trade agreement, the China-Germany (Federal Republic) economic cooperation agreement, the China-US trade relations agreement, the General Conditions for Deliv-

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ery of Goods signed between China and the USSR and between China and the eastern European countries, all have provisions to encourage the parties to refer their disputes to arbitration in case of failure to reach an amicable solution through negotiation. In China's contracts for foreign trade, transfer of technology, bank loans, investment, joint ventures, exploration of petroleum and other natural resources, there is very often an arbitration clause which reads: In case of a dispute, it shall be first settled through friendly negotiation and if negotiation fails, it shall be submitted for arbitration.

In order to solve disputes by arbitration, the former Administration Council of the PRC, as early as 1954, made a decision concerning "The Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (CCPIT)." In accordance with this decision, the CCPIT set up the Foreign Trade Arbitration Commission and adopted its Provisional Rules of Procedure in 1956. To meet the needs of development which have increased since the open door policy was adopted in 1979, the State Council of the PRC decided in 1980 to rename the Foreign Trade Arbitration Commission as the Foreign Economic and Trade Arbitration Commission (FETAC), enlarge the scope of disputes it may handle, and increase the number of its members (arbitrators). The disputes handled by the FETAC include any disputes arising from joint ventures involving Chinese and foreign investments, partnership, joint exploitation of natural resources, transfer of technology, financing and loans, foreign investment in China, disputes arising from foreign trade (including processing material and assembling parts), agency to purchase or sell merchandise, disputes arising from goods transportation, insurance and safe-keeping, and any disputes arising from other business in foreign trade and economic dealings with foreign countries. The members (arbitrators) of the FETAC have increased from twenty-one to sixty-five.

When handling cases, the FETAC adheres to the following three principles:

- Independence and initiative;
- Equality and mutual benefit; and
- Reference to international practice.

In arbitration, the FETAC abides by the Chinese law as

much as it emphasizes terms of the contract and international practice. In pursuance of these principles, the FETAC has settled a number of cases to the satisfaction of the Chinese and foreign parties. As a result, there are more and more contracts providing for arbitration to be conducted by the FETAC and applications to the FETAC for arbitration have also increased. In the last ten months, the FETAC had a record of sixteen arbitration cases, more than seventy conciliation cases and 120 consulting cases.

An important feature of China's arbitration work is the combination of arbitration with conciliation. Conciliation, as an instrument for solving civil disputes, has a long history and tradition in China. Since its inception, the FETAC has always placed emphasis on giving full consideration to this traditional practice in dealing with disputes by bringing the parties into conciliation whenever possible. But conciliation is conducted on a voluntary basis with the consent of both disputing parties. It is not compulsory. It is not an inevitable procedure prior to arbitration proceedings. Not all the cases should go through this process first. Conciliation is not conducted without principles. It is conducted on the basis of discerning where the problems exist and ascertaining liabilities. Subject to the consent of both disputing parties, conciliation can be conducted at any time prior to or after the commencement of arbitration procedures before an arbitral award is granted. In the process of conciliation, if no compromise agreement can be reached between the disputing parties or either party is not willing to proceed with conciliation after a reasonable period of time, conciliation should be stopped immediately. Arbitration proceedings should then be carried out swiftly in accordance with the rules of procedure and an arbitral award should be rendered as soon as possible. Conciliation is conducted by the FETAC before the arbitration tribunal is formed and by the tribunal after it is formed. The FETAC may, at the request of the disputing parties, conduct conciliation for cases without an arbitration agreement. The actual work of conciliation is done by the secretariat of the FETAC. Conciliation may be conducted through informal discussions or through correspondence. A conciliatory statement is made by the FETAC to close the case in accordance with the compromise agreement between the disputing parties if such an agreement can be reached.

Our experience proves that in this practice the disputing parties are satisfied and can voluntarily execute the conciliatory statement. No instance of withdrawal and refusal to execute the conciliatory statement has occurred in the past twenty years.

In recent years, a new method of conciliation has been created by us, namely, joint conciliation. In case of a dispute, the Chinese party applies to the Chinese arbitral institution and the foreign party applies to a corresponding arbitral body in his own country for joint conciliation. Upon such application, the Chinese arbitral institution and the corresponding arbitral body appoints one or more conciliators on an equal basis to conciliate the case jointly. If conciliation succeeds, the dispute is then solved. However, if conciliation fails, the dispute will be referred to arbitration in accordance with the arbitration clause specified in the contract. Using this new method, two cases involving rather large financial disputes arising from China-US trade were solved to the satisfaction of all the parties concerned. Later, provisions for joint conciliation appeared in the *Protocol for Settlement of Disputes Arising from China-France Trade in Industrial Properties* signed between the CCPIT and the Bureau of Industrial Property of France as well as in the *Arbitration Cooperation Agreement* concluded between the FETAC and MAC (Maritime Arbitration Commission) on the one side and the Italian Association for Arbitration on the other. Now, conciliation is drawing more and more international attention. The United Nations Commission on International Trade Law (UNCITRAL) attached importance to China's practice and experience when drawing up its conciliation rules for worldwide recommendation. At the special invitation by the International Council for Commercial Arbitration (ICCA), China's representative was present at the Seventh International Arbitration Congress held in Hamburg in 1982 to make a presentation on China's experience in this field.

China's arbitral institution maintains contacts and friendly relations with the major arbitral bodies of all countries. Verbal and written agreements for cooperation in arbitration and conciliation have been concluded with the Japan International Commercial Arbitration Association, the Maritime Arbitration Commission of Japan Shipping Exchange, Ltd., the Italian Association for Arbitration, the Commercial Arbitration Chamber of

the Republic of Ghana, and the American Arbitration Association. Similar agreements are being considered and negotiated with Austria, Belgium, and other countries.

## Part II

China is planning to draft her Arbitration Act and amend her Arbitration Rules of Procedure to meet the needs of commercial development. China's existing procedure is similar to arbitration procedures of other countries.

Arbitration can be conducted only when there is an arbitration agreement concluded between the disputing parties prior or subsequent to the occurrence of the dispute. The arbitration agreement should be a written one which includes the arbitration clause stipulated in the contract or any other form of agreement in respect to submission to arbitration (such as special agreement, correspondence between the parties or any other specific stipulations contained in other relevant documents).

The contracting parties may include the following arbitration clause in their contract if they agree to submit disputes for arbitration in China:

Any disputes arising from the execution of or in connection with this contract shall be first settled amicably through friendly consultation. In case no settlement can be reached through consultation, the dispute shall be submitted to the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, Beijing, for arbitration in accordance with its Provisional Rules of Procedure. The arbitral award is final and binding upon both parties.

The Chinese courts of law do not hear cases of foreign trade and economic disputes where an arbitration clause or an arbitration agreement in other forms is in force.

When applying for arbitration in China, a written application for arbitration must be submitted and the following items must be specified:

1. Names and addresses of the plaintiff and defendant;
2. Statement of facts;
3. Claim of the plaintiff and the facts and evidence upon which the claim is based;
4. Name of an arbitrator chosen by the plaintiff from

among the members of the FETAC or a statement authorizing the Chairman of the FETAC to appoint an arbitrator for the plaintiff.

Originals or copies of documentary evidence (such as contracts, arbitration agreements, correspondence between the parties concerned) must be attached to the application for arbitration.

When submitting an application for arbitration, the plaintiff shall pay a sum equivalent to 0.5% of the amount of the claim as a deposit for the arbitration fee. The arbitration fee collected by the FETAC shall not in any case exceed 1% of the amount of the claim. The cost incurred by the winning party in arbitration can be compensated by the losing party, but the amount of compensation shall not in any case exceed 5% of the sum awarded to the winning party.

When submitting a dispute for arbitration, the disputing parties shall each choose an arbitrator from among the members of the FETAC. The arbitrators so chosen shall jointly select from among the members of the FETAC a presiding arbitrator to form an arbitration tribunal to examine and hear the case. The disputing parties may also jointly choose from among the members of the FETAC a sole arbitrator to arbitrate singly. If one of the parties fails to choose an arbitrator within the prescribed time limit, the Chairman of the FETAC shall, upon the request of the other party, appoint the arbitrator on the former's behalf. If the arbitrators so chosen or appointed cannot agree upon the choice of the presiding arbitrator within the prescribed time limit, the Chairman of the FETAC shall select a presiding arbitrator for them.

Either of the parties in dispute may authorize the Chairman of the FETAC to choose an arbitrator. If both parties authorize the Chairman to choose the arbitrators, the Chairman may, with the consent of both parties, appoint a sole arbitrator from among the members of the FETAC to arbitrate the case singly.

The appointed arbitrators and the presiding arbitrator shall work independently and impartially, without representing any party's interests. If a party makes a challenge against any of the arbitrators or raises an objection upon the validity or other matters relating to the arbitration agreement, the FETAC is empowered to render a decision. The date of hearing shall be fixed by the Chairman of the FETAC in consultation with the presiding

arbitrator or the sole arbitrator as the case may be. The FETAC shall notify the parties in time of the date of hearing. Hearings are generally held in Beijing where the FETAC is seated. Where necessary, hearings may, upon the approval of the Chairman of the FETAC, be held at other places within the territory of China.

The disputing parties may confer with the FETAC on matters relating to the arbitration proceedings in person or by attorney. Such attorneys may be citizens of the PRC or foreign citizens. The attorneys must have power of attorney issued by the parties concerned. The authorized attorneys may attend the hearings on behalf of the authorizing parties.

The arbitration tribunal may conduct oral or written examinations. In general, the arbitration tribunal hears cases in open sessions, but it may, upon the request of both or either party, decide to hold the hearings in closed sessions. The arbitration tribunal may consult experts on professional matters and such experts may be citizens of the PRC or foreign nationals.

According to the provisions of the Provisional Civil Procedural Law of the PRC which came into force as of October 1, 1982, the FETAC shall, upon the request of one of the disputing parties, apply to the Intermediate People's Court for decisions on taking security measures if the FETAC deems it necessary.

If one of the disputing parties or his agent (attorney) fails to appear at the hearing, the arbitration tribunal may, upon the request of the party present, proceed with the hearing and render an award by default.

When the arbitration tribunal is composed of three arbitrators, the award is decided by majority vote and the minority opinion may be made in writing and filed. The arbitration tribunal may render a provisional award or partial award which shall be in writing. Reasons for the decision shall be given in the award and the award shall be signed by the presiding arbitrator and the other arbitrators or by the sole arbitrator. The award is final and neither party shall bring an appeal for revision before a court of law or any other organization. An arbitral award once made has the force of law and there is no need either to register it or keep it in a law court.

In case an award which is to be executed in China is not executed by the losing party, the winning party may petition the



People's Court of China to enforce it according to law. During the past thirty years, there has never been a situation where the award has had to be enforced by the People's Court. Where it is their obligation to execute an arbitral award, the Chinese foreign trade and economic corporations and enterprises will execute it as a matter of course. As to the enforcement of foreign arbitral awards in China, although China is not a signatory to the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, the Chinese corporations and enterprises will, in fact, execute foreign arbitral awards so long as they are fair and not in violation of the Chinese laws and policies. In some of the bilateral economic and trade agreements signed between the Chinese and foreign governments, there are provisions for mutual assurance of enforcement of arbitral awards. For example, provisions of this kind are seen in the economic and trade agreements signed between China and Japan, the Federal Republic of Germany, the United States of America and other countries. Foreign parties who win the case may seek enforcement of the arbitral awards pursuant to these agreements. In other words, whether the award is made in China or in foreign countries, there is no difficulty in having it enforced in China.

### Part III

I have raised some questions which should be of interest to many foreign friends.

#### (1) *Must arbitration be held in China?*

There is no such compulsory provision in the existing law of China. This matter could be negotiated and decided between the contracting parties and specified in the contract. If the contract is silent on this issue, then the parties may, after the occurrence of a dispute, proceed to negotiate and decide where to arbitrate their dispute. In practice, the Chinese corporations and enterprises have different provisions in their contracts which may specify a place for arbitration in China, in the other party's country, in the defendant's country or in a third country.

(2) *Must the Chinese arbitral rules of procedure be used?*

It is necessary to use the Chinese rules if the parties agree to have arbitration conducted by the Chinese arbitral institution in China. However, if the parties agree to hold arbitration in a place other than China, the Chinese rules are not necessarily used. As a matter of fact, wherever the arbitration is held, the Chinese corporations and enterprises prefer to have arbitration conducted by a permanent arbitral body and employ its rules of procedure. As to the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Rules), they can be used only in cases of ad hoc arbitration or upon agreement by the parties with an approval by the arbitral body concerned. This is due to the fact that the United Nations does not have a permanent arbitral body of its own. Of course, all this is subject to the agreement between the parties.

(3) *What substantive law is applied?*

This is a very complicated problem. Thus far, no satisfactory solution has been found globally. In China's practice, if the applicable substantive law is specified in the contract, that is the law to be applied; if no applicable law is stated in the contract, then the arbitration tribunal or the sole arbitrator shall, ad hoc, decide what substantive law is applicable.

(4) *Can foreigners be appointed as arbitrators when arbitration is held in China?*

As to the appointment of foreigners as arbitrators, different practices are seen in the international sphere. In general, the national permanent arbitral bodies have their own lists of arbitrators. On some lists, the arbitrators are all nationals of the country in which the arbitral body exists and, on other lists, most of the arbitrators are nationals of the country and the remaining are foreigners who are often local residents. In some countries, the parties must appoint arbitrators within the given list of arbitrators while in other countries, the parties may choose arbitrators outside the list, regardless of the nationality of the arbitrators. In China, according to the existing arbitral rules of procedure, the parties can only appoint arbitrators from among

those who are on the list. Could this be unfair or unjust? No it could not. The Chinese arbitrator, no matter which party appoints him, does not work in the interest of any party but hears the case independently and impartially.

(5) *Will China consider acceding to the 1958 New York Convention?*

Acceding to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York in 1958 could ensure smooth enforcement of arbitral awards. I believe China is now studying this matter.

#### Part IV

With a view to promoting better understanding of how the Chinese arbitral body handles and decides cases, some examples are given below.

(1) In September 1980, a foreign buyer X Company bought Y metric tons of minerals from a Chinese trading corporation with unit price US\$Z per m/t C&FC 3%. The contracted time of delivery was November 1980. On November 11, 1980, the buyer opened four letters of credit in the names of four different firms. It was stipulated in the letters of credit that shipment should be effected not later than March 31, 1981. The seller accepted these letters of credit. In January 1981, the seller booked space on s/s xxx and had the goods ready for shipment. The sub-buyer, the buyer of those who had opened the letters of credit, cabled the seller on January 23, 1981, demanding that shipment be made after July 1981, and at the same time requesting that the expiration date of the letters of credit be postponed until October 31, 1981. The seller refused to delay the shipment and informed the buyer X Company of his disagreement on February 2, 1981. In his cable reply of February 8, 1981, the buyer X Company agreed to ship the goods in February 1981, as originally agreed. The seller then instructed the carrier to load the goods on board s/s xxx and notified the buyer X Company of the loading twice, on February 16 and 18, 1981, respectively. However, in the course of loading, the sub-buyer cabled the seller again on February 23, 1981, insisting on the postponement of shipment as demanded in his cable of January 23, 1981, and stating that should

the seller refuse his demand, the contract would be cancelled. Under the circumstances, the seller instructed the carrier to stop loading and took back the loaded goods. As a result, the validity of the letters of credit expired and the goods were not shipped out. The buyer X Company took exception to this and lodged a claim against the seller for indemnity for the following losses incurred:

Import license fee	US\$Z
Premium on transfer of import license	US\$Z
Banking charges for opening letters of credit	US\$Z
Commission 3%	US\$Z

The seller rejected the buyer's claim. The buyer applied to the FETAC for arbitration in accordance with the arbitration clause in the contract. The FETAC established an arbitration tribunal to hear the case.

In his defence, the seller pleaded that he was compelled to take back the loaded goods as the letters of credit were unilaterally amended with the buyer X Company's authorization. Therefore, the failure to deliver the goods was due to no fault on his part. He counterclaimed against the buyer X Company for compensation of his expenses totalling US\$Z, incurred as a result of taking back the loaded goods, plus interest accrued, requesting at the same time that the buyer X Company bear all the arbitration costs.

The buyer X Company further stated that the firm that asked for postponement of shipment was neither the contracting party nor the letters of credit opener, being only the buyer's buyer. The seller should not have followed his instructions to withhold the shipment. Furthermore, upon receipt of the seller's notification that the firm had asked for postponement of shipment and amended the letters of credit, the buyer X Company timely cabled the seller, agreeing to ship the goods in February 1981, and asking the seller for the return of the letters of credit amendment notice. The seller also notified the buyer X Company twice by cable that the goods had been shipped. Therefore, non-performance of the contract was a responsibility on the part of the seller and the seller should indemnify the buyer for his losses.

The arbitration tribunal held:

After the establishment of letters of credit, the buyer's customer asked the seller to postpone the shipment of the goods and unilaterally amend the established letters of credit; the seller did not agree and informed the buyer X Company accordingly, who timely notified the seller by cable and agreed to ship the goods in February 1981, as set out in the original contract. However, the seller, after the return of the letters of credit amendment notice, decided unilaterally to stop shipping the goods and did not inform the buyer X Company of the fact that the goods were eventually not shipped out.

Therefore, the seller should be responsible for the non-performance of the contract. But among the items of losses claimed by the buyer X Company for compensation, the premium on transfer of import license was not justified. Thus, the seller should compensate the buyer X Company for all the items of losses claimed except the premium on transfer of import license, i.e., to compensate for import license fee. Banking charges for opening letters of credit and commission 3% totalling US\$Z and all arbitration costs should be borne by the seller.

(2) A foreign buyer entered into a contract with a Chinese seller for purchasing 3000 tons of goods in three shipments. The seller failed to deliver the last shipment within the contracted time limit. On the fifth day after the expiration of the time limit, the seller cabled the buyer requesting an extension of the validity of the letter of credit for executing the delayed shipment. The market price of the goods was then increased. The buyer, however, did not agree to extend the validity of the letter of credit unconditionally. No agreement was reached through mutual consultations. The buyer then applied to the FETAC for arbitration. The arbitration tribunal granted an award in favour of the buyer. The Chinese seller lost the case. The award read:

The seller failed to ship the goods within the contracted time of shipment and did not inform the buyer of the delay during the shipment period. Not until the fifth day after the expiration of the contracted shipment time, the seller cabled the buyer asking for an extension of the letter of credit's validity. Therefore, the seller shall bear the liability for the failure of shipment according to the contract and shall indemnify the buyer for his losses incurred as a result. The amount of the losses incurred shall be determined by the difference between the contracted price and the international market price of the goods at the time when the last

shipment ought to have been made.

(3) A foreign buyer contracted with a Chinese seller to buy 30,000 tons of goods at FOB price. It was explicitly set out in the contract that the goods should be shipped to a given destination port only and re-export to other territories was not allowed. After the conclusion of the contract, the seller discovered that the buyer sold the goods at Hong Kong for re-export. Immediately, he demanded the buyer to provide him with a letter of guarantee assuring that the goods would not be sent to any place other than the contracted area or the contracted terms of FOB would be changed into C&F or CIF. The buyer would not agree and the seller refused to deliver the goods. Mutual consultation was to no avail. The buyer submitted the dispute to the FETAC for arbitration. Investigation made by the arbitration tribunal confirmed the information about the re-export. An award was then given to the effect that "the seller shall agree to deliver the goods if the buyer accepts the change of the terms of FOB into C&F or CIF; however, if the buyer does not accept the . . . condition within one month from the date of the granting of the award, the contract shall become invalid."

(4) A Chinese buyer purchased from a foreign seller Y tons of commodity, in partial shipments, to be loaded at Hamburg or Rotterdam or Antwerp at seller's option. The contracted terms of payment provided that the seller was obliged to advise the buyer of the expected date of shipment and the quantity ready for shipment before the buyer opened letters of credit, while the terms of shipment laid down in the contract read:

If the seller fails to advise the buyer, within the contracted time limit, of the quantity, loading port, date of arrival of goods at the loading port, it shall be considered as seller's readiness to deliver the goods at any date within the contracted time of shipment and the buyer shall arrange for shipping space accordingly; however, in the event of dead freight, demurrage and/or fines, the seller shall bear all the losses thus incurred.

After the conclusion of the contract, the buyer wrote to the seller asking the seller to fix the port for loading. The seller did not respond. The buyer opened a letter of credit in advance on his own initiative. In his reply to the buyer, the seller admitted his suppliers' failure to provide him with the contracted com-

modity and apologized for the delay in giving advice. At the same time, the seller requested an increase of the contracted price and proposed a new shipment arrangement. The buyer accepted the seller's new shipment arrangement but did not agree to increase the price. After the agreement on the new shipment arrangement, several times the buyer requested the seller to designate and inform him of the loading port and the date of readiness for shipment. The seller again made no response. Then, the buyer wrote a letter to the seller declaring that he would apply for arbitration against the seller for indemnity for his losses if the seller failed to carry out his obligation of delivery of the goods within forty-five days after receipt of the letter. The seller wrote back to the buyer saying that he was under no obligation to deliver the goods since no new letter of credit had been established by the buyer. Eventually, the buyer applied to the FETAC for arbitration. The arbitration tribunal examined the documents handed in by both disputing parties, investigated the facts, and held:

First, after the new shipment arrangement was agreed upon by both parties, the seller failed again to fulfill his obligation to designate and inform the buyer of the loading port and the date of readiness for shipment as demanded by the contract. Therefore, the seller shall be held responsible for the buyer's non-establishment of the letter of credit. In international trade practice, if the buyer, on his own initiative, volunteers to open a letter of credit before receiving the required advice from the seller, he is free to do so. But it is not his contractual obligation. The buyer did open a letter of credit on his own initiative without receiving the advice from the seller and subsequently suffered losses because the seller failed to execute his obligation of delivery. It is therefore justified for the buyer to take this as a lesson.

Second, the terms of payment stipulated in the contract is constructed to meet the requirements of payment while the terms of shipment is formulated to satisfy the needs of shipment. They are two independent clauses. The seller's advices required by these two clauses are not the same advices and their purposes, functions and contents are not identical either. To exempt the seller from his obligation to serve the advice to the buyer under the terms of shipment by quoting the terms of payment would be in violation of the spirit of the stipulations of the contract.

Third, the key fact of the case is that after signing the contract, the market price of the contracted commodity went up by

large margins, the currency concerned was devalued and the seller was unable to procure supplies for delivery. In his written defense, the seller admitted that he did have difficulties in delivery of the goods. Therefore, it did not conform to the real facts and was against the stipulations of the contract when the seller charged the buyer with failing duly to open a letter of credit, thus setting himself free from his own contractual obligations and blamed the buyer for breaching the contract.

Thereupon the arbitration tribunal decided that the seller should indemnify the buyer for his losses a sum which was fixed on the basis of the difference between the contracted price and the market price prevailing on the last date of each shipment period.

(5) A foreign buyer ordered 500 cases of goods from a Chinese seller. According to the contract, the goods were to be shipped from a Chinese port to Hong Kong and then transshipped from Hong Kong to the port of destination. Upon arrival at the port of destination, part of the goods were found damaged. The buyer claimed against the seller for compensation of the losses incurred, totalling US\$Z, on the ground that the packing was defective. The seller argued that the packing was not defective because it was the normal packing he had used for exporting the goods and no extra or special requirements for packing were specified in the contract. The damage was caused in the course of transportation. The buyer did not cover the risk of breakage in insurance and therefore the insurance company refused his claim for compensation. The seller concluded that the buyer should take the responsibility and bear the losses. The buyer then applied to the FETAC for arbitration. With the consent of both parties, the arbitration tribunal decided the case according to principles of conciliation. It was the opinion of the arbitration tribunal that although no extra or special requirements for packing were specified in the contract, the seller knew that the goods were to be transshipped at Hong Kong, which was different from shipment directly from a Chinese port to the port of destination. The packing should be suitable for that specific transportation. However, the nails and the wood used for the packing were not appropriate for the purpose. The arbitration tribunal proposed an appropriate compensation to the buyer for his losses. The seller accepted the arbitration tribu-



nal's proposal but pointed out that the amount claimed by the buyer was too large and asked for a reduction. The arbitration tribunal consulted the buyer and eventually the buyer agreed to reduce his claim by seventy percent. Both parties came to a compromise agreement from which the arbitration tribunal delivered a Conciliatory Statement and closed the case.

(6) A foreign firm bought *Y* tons of goods from a Chinese corporation on FOB terms. The contract provided for partial shipments. Both parties agreed to a penalty for non-performance. The penalty was fixed at five percent of the non-performed amount of the contract. The necessary export license was obtained and the first lot of goods was ready at the port for shipment. However, the Chinese corporation shipped the goods to another foreign firm inadvertently. Afterwards, the Chinese corporation had difficulties in obtaining a second export license and was thus unable to make delivery. Cancellation of the contract was proposed by the Chinese corporation. The foreign firm disagreed and applied to the FETAC for arbitration, claiming from the Chinese corporation a penalty in the amount of US\$Z and damages for loss of profit amounting to US\$Z plus expenses incurred. The Chinese corporation argued that the failure to deliver the goods was due to the fact that an export license was not granted and to circumstances beyond its control. Therefore, it was not liable for the non-performance of the contract. With the consent of both parties the arbitration tribunal began conciliating the case. In the process of conciliation, the arbitration tribunal made it known to both parties that the Chinese corporation should at least be responsible for its failure to deliver the first lot of goods since it had an export license for that particular lot and the foreign firm should not claim both penalty and damages for its loss of profit. The arbitration tribunal succeeded in bringing both parties to a reasonable compromise, i.e., the Chinese corporation would pay the foreign firm US\$Z as a compensation for its losses and sixty percent of the arbitration costs while the foreign firm would pay forty percent of the arbitration costs. Accordingly, the arbitration tribunal made a Conciliatory Statement and closed the case to the satisfaction of both parties.

(7) A foreign buyer purchased from a Chinese seller 17,000 tons of cargo in one bulk shipment. After arrival of the goods at the port of destination in Europe, the buyer declared a shortage

of several hundred tons. The buyer claimed that judging from the nature of the goods and the magnitude of the shortage, the loss in weight could not have taken place during transportation; the seller must not have shipped enough goods. He therefore asked the seller to pay for his losses incurred as a result. The seller argued that the bill of lading was clean and all the other shipping documents were in good order; there was no short-loading of the goods at the port of loading. If there was any shortage found at the port of discharge, it was because of the inaccurate calculation of the total weight of the cargo based on the weight of part of the goods loaded in a barge. This was because the density of the goods in the barge was different from that of the goods in the hold of the seagoing vessel. Furthermore, the evaporation of the moisture content of the goods in the course of long distance transportation did substantially reduce the weight of the goods. Therefore, he was not obliged to pay for the shortage declared by the buyer. Mutual consultation produced no agreement. The buyer then referred the dispute to the FETAC for arbitration. The FETAC investigated and found it was inaccurate, at the port of loading, to calculate the total weight of the cargo simply by looking at the draft marks on one side of the carrying vessel. Experiments proved that the maximum weight per cubic meter of the cargo was only Y kilos. Multiplying this figure by the total volume of the holds of the carrying vessel, it was not possible to reach the weight of 17,000 tons. On the other hand, the method of calculation adopted at the port of discharge was not precise. The moisture content of the goods might indeed have substantially evaporated. The FETAC conciliated between the two disputing parties during arbitration proceedings and informed the parties of the above findings. As a result of conciliation, both disputing parties came to an agreement that the seller should indemnify the buyer half of the amount claimed by the buyer. Accordingly, the FETAC made a Conciliatory Statement and closed the case.

(8) A firm in Hong Kong had two managers, actually two shareholders. One of them representing the firm signed an agreement with a corporation in Guangdong for setting up a factory in Guangdong to produce a certain commodity. The firm in Hong Kong supplied equipment and technology. The corporation in Guangdong provided raw material, factory buildings, and

labour force. The products were sold to the firm in Hong Kong for re-export abroad. Both sides cooperated and the production went quite smoothly. Suddenly there was a split inside the firm in Hong Kong. The manager who did not sign the original agreement with the corporation in Guangdong, informed the corporation that since the manager who did sign the agreement had left the firm, the corporation should sign another agreement with him to carry on the business. The corporation in Guangdong mistakenly signed an agreement with him. Later, the one who signed the original agreement with Guangdong returned to Guangdong asking the corporation to execute the original agreement. No result was obtained after mutual consultations. The manager then applied to the FETAC for conciliation. Through conciliation, the head office of the Guangdong corporation in Beijing found a place in Beijing to establish another factory and the supply of raw material and other facilities for production were better than those of the factory in Guangdong. The dispute was solved to everyone's satisfaction.

I hope this presentation and examples of arbitral law help you to understand more clearly the work of arbitration in China and thus promote trade, economic, and technological cooperation on the basis of equality and mutual benefits.