

Hammonds' Commercial & Dispute Resolution Group presents the second issue in a series introducing the various alternative options available for arbitrating disputes for Chinese enterprises.

希文律师事务所商业和争议解决团队现为您提供关于中国企业通过仲裁解决争议的各种选择方案的系列介绍之第二篇

#### International Chamber of Commerce (ICC) International Court of Arbitration

The ICC International Court of Arbitration (the "Court" or "ICC") was established in 1923 and is a leading institution for resolving international commercial and business disputes. The dispute resolution mechanisms offered by ICC are specifically designed for resolving disputes in an international setting, where parties are usually of different nationalities, may speak different languages and often belong to different legal and cultural traditions.

In order to provide more effective service to ever increasing Asian parties, ICC opened its first Asia office in Hong Kong late in 2008.

#### Caseloads

In 2007 the ICC accepted 599 cases, and the total number of ongoing cases at the end of the year was 1,285. The overall number of parties in the 599 new cases being 1,611 came from 126 countries and independent territories. 190 parties came from East and South Asia accounting for 11.8%, among which 22 were from mainland China with 7 claimants and 15 respondents respectively. There were also 5 parties associated with Hong Kong with 3 claimants and 2 respondents.

Out of the total number of new cases accepted in 2007, construction and engineering disputes, where ICC arbitration has a strong tradition, accounted for 14.3%. Further, energy and information technology disputes represented 10.8% and 10.2% respectively. There was an increase in the number of cases from several other sectors, including finance and insurance, general trade and distribution, and the health and food industries.

The amount in dispute for each case in 2007 ranged from less than US\$50,000 to over US\$1 billion. To be precise, 13.2% were unquantified, 3.0% were for US\$50,000 or less, 26.3% were between US\$50,000 and US\$1 million, 37.6% were between US\$1 million and US\$10 million, 15.6% were between 10 million and 100 million and 4.3% were for 100 million or more.

#### Appointment of Arbitrators

In ICC arbitration, the disputes are decided by a sole arbitrator or by three arbitrators. Unlike CIETAC arbitration, the Court has no panel of arbitrators from which the parties must choose. The parties are free to appoint any person to act as arbitrator subject to the confirmation of the Court. In confirming the arbitrator, the Court shall consider the prospective arbitrator's nationality, residence and other relationship with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the ICC Arbitration Rules.

#### Arbitral Tribunals

Where the parties do not agree upon the number of arbitrators, the Court appoints a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.

If the parties fail to nominate a sole arbitrator, or in a three arbitrator procedure, the chairman of the Arbitral Tribunal, who is to be nominated jointly by the parties by agreement, the sole arbitrator or the chairman shall be appointed by the Court.

In appointing the sole arbitrator or the chairman of the Arbitral Tribunal, in addition to applying the same criteria as is applied to the confirmation of an arbitrator nominated by the parties, ICC arbitration is different to a CIETAC arbitration in the following respects:

- (1) Where the Court is to appoint a sole arbitrator or the chairman of an arbitral tribunal, it shall make the appointment upon a proposal of a National Committee of the ICC that it considers

#### 国际商会仲裁院

国际商会仲裁院创建于1923年，是世界上最富盛名的解决商事争议的仲裁机构之一，尤其擅长于解决来自于不同国家、语言、法律制度和不同的当事人之间的争议。

为向不断增加的亚洲当事人提供更有效的服务，国际商会仲裁院于2008年末在香港设立了其在亚洲的第一个办事处。

#### 案件数量

2007年国际商会仲裁院共受案599件，正在办理过程中的案件数为1,285件。新受理的599件案件的当事人数为1,611个，来自126个不同的国家和地区。其中，有190个当事人来自东南亚，有22个来自中国大陆。其中，中国当事人为申请人的有7个，被申请人的有15个。另外，还有5件来自中国香港特别行政区，其中香港当事人为申请人的有3个，被申请人的有2个。

在所有的新受理的案件中，建筑工程争议占14.3%，能源和信息技术争议分别占10.8%和10.2%。同时，在金融、保险、贸易、健康和食品等领域，案件数量都有显著的增加。

争议金额从50,000美元到超过一亿美元不等。其中，13.2%的案件美元最终确定争议金额；3%的案件争议金额小于50,000美元；26.3%的争议金额为50,000美元到一百万美元；37.6%的争议金额为一百万美元到一千万美元；15.6%的争议金额为一千万美元到一亿美元；4.3%的争议金额为一亿美元以上。

#### 仲裁员的指定

在ICC仲裁，仲裁庭由独任仲裁员或者三人仲裁庭构成。与中国国际经济贸易仲裁委员会仲裁不同的是，ICC没有当事人可供选择的仲裁员名册。当事人可以指定任何人，只要能够得到国际商会仲裁院的确认。在确认当事人指定的仲裁员时，国际商会仲裁院通常会考虑仲裁员的国籍、住所、与当事人所在国的关系、该仲裁员有无时间和精力担任该案件仲裁员、有无能力根据ICC仲裁规则推进仲裁程序等因素。

#### 仲裁庭

如果当事人没有约定仲裁员的人数，原则上国际商会仲裁院将采取独任仲裁员的形式审理该案件。但仲裁院认为组成三人仲裁庭更为适宜除外。

如果在独任仲裁庭的情形下，当事人不能共同指定独任仲裁员，或者在三人仲裁庭的情形下，当事人不能共同指定首席仲裁员，将由国际商会仲裁院指定仲裁员的方式与我们所熟悉的中国国际经济贸易仲裁委员会的规则有着显著的区别。

- (1) 在当事人不能就独任仲裁员或者首席仲裁员的人选达成一致的情况下，国际商会仲裁院应根据其认为合适的某一国家的国际商会委员会的推荐指定。如果国际

appropriate. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request or may request a proposal from another National Committee that it considers to be appropriate.

- (2) The sole arbitrator or the chairman of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time limit fixed by the Court, the sole arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national.
- (3) Where the Court is to appoint an arbitrator on behalf of a party which has failed to nominate one, it shall make the appointment upon a proposal of the National Committee of the country of which that party is a national. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time limit fixed by the Court, or if the country of which the said party is a national has no National Committee, the Court shall be at liberty to choose any person whom it regards as suitable.

### Language of Arbitration

In the absence of an agreement by the parties, the Arbitral Tribunal determines the language or the languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

Among the range of languages in which awards were rendered, the great majority of awards continue to be made in English (some 70%) other languages used for drafting awards in 2007 were, in decreasing order of frequency: French, Spanish, German, Italian and Portuguese, followed by Chinese.

### Applicable Rules of Law

The parties are free to agree upon the rules of law to be applied by the Arbitral Tribunal. In the absence of any such agreement, the Arbitral Tribunal applies the rules it determines to be appropriate, taking account of the provisions of the contract and the relevant trade usages.

In 79.8% of the contracts giving rise to disputes referred to ICC arbitration in 2007, the parties had specified the law applicable. English law was the most frequent choice (11.9%), followed by Swiss law (10.2%), German law (7.2%), US law (7.1%) and French law (6.7%). The range of laws chosen encompassed 69 different nations and independent territories.

Another significant difference with CIETAC arbitration is that the Arbitral Tribunal shall assume the powers of an amiable compositeur or decide *ex aequo et bono* (Latin for "according to the right and good" or "from equity and conscience") only if the parties have agreed to give it such powers.

### Terms of Reference

As soon as it has been constituted, the Arbitral Tribunal then must draw up its Terms of Reference, based on relevant documents or in the presence of the parties or taking into account submissions received from the parties. The Terms of Reference, will include, among other things, details of the parties and arbitrator(s), a summary of the parties' respective claims and the relief sought by each party, with an indication to the extent possible of the amounts claimed or counterclaimed. After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorised to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.

### Establishing the Facts of the Case and Closing of the Proceedings

The Arbitral Tribunal establishes the facts of the case by all appropriate means including studying the written submissions of the parties and all documents relied upon and organising oral hearings. Additionally the Arbitral Tribunal may, at its discretion, hear from or receive written submissions from witnesses or

商会仲裁院不接受该国国际商会委员会的推荐, 或该委员会未能在限定的时间内推荐, 国际商会仲裁院要么要求该某国委员会重新推荐, 要么要求其他国家的国际商会委员会推荐。

- (2) 独任仲裁员或首席仲裁员不应与当事人任何一方拥有相同的国籍, 除非有特殊情况, 且当事人在限定的时间内没有表示反对。
- (3) 如果在三人仲裁庭的情形下, 一方当事人没能指定仲裁员, 由国际商会仲裁院代为指定, 其应根据该当事人所属的国家的国际商会委员会的推荐指定。如果国际商会仲裁院不接受该国国际商会委员会的推荐, 或该委员会未能在限定的时间内推荐, 或者在该国没有国际商会委员会, 国际商会仲裁院有权指定任何其认为合适的人担任仲裁员。

### 仲裁语言

如当事人未就仲裁语言达成一致, 将由仲裁庭根据案件的相关情况, 包括合同语言等情况, 确定仲裁语言。

从2007年的案件情况来看, 有70%左右的裁决书是用英语做出的。其他语言的排列顺序依次为: 法语、西班牙语、德语、意大利语、葡萄牙语和中文。

### 适用法律

当事人可以约定仲裁庭在仲裁过程中对案件的适用法律。如无约定, 仲裁庭可以根据案件的的有关情况, 如合同条款和相关的惯例, 来确定案件的准据法。

在2007年的案件当中, 有79.8%的案件当事人约定了仲裁的准据法。其中, 英国法是选择最多的法律, 有11.9%, 其他依次为瑞士法(10.2%)、德国法(7.2%)、美国法(7.1%)和法国法(7.1%)。当事人选择的准据法包括上述几个法律, 一共涵盖了69个国家和地区。

另外一个与中国国际经济贸易仲裁委员会的仲裁不同的是, 仲裁庭只有在当事人明确授权的情况下, 才能将公平合理的原则置于法律规定之上作为裁决的依据。

### 仲裁庭的审理范围 ( Terms of Reference )

仲裁庭组庭之后, 应根据掌握的文件或与当事人当面协商, 或者依据当事人提交的书面材料, 确定案件的审理范围(以下简称Terms of Reference)。Terms of Reference一般包括以下几项内容:

- (1) 当事人的名称住所等情况
- (2) 仲裁员的情况
- (3) 当事人各自的仲裁请求和寻求的救济
- (4) 在可能的情况下提出当事人寻求的仲裁或反请求的具体金额

在Terms of Reference经国际商会仲裁院签署之后, 当事人均不能修改其也已确认的仲裁请求和反请求, 除非仲裁庭根据案件的性质、程序的所处阶段以及其他情况, 准予修改。

### 事实的认定和终止接受其他证据和主张 ( Closing of Proceedings )

仲裁庭通过审阅当事人提交的材料以及进行开庭审理等任何其认为合适的方式, 对案件的事实进行认定。同时, 仲裁庭也可以听取和接受专家意见。在合理地认为当事人已经就案件充分陈述了各自的意见之后, 仲裁庭

experts. When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal shall declare the proceedings closed. Thereafter, no further submission or argument may be made, or evidence produced, unless requested or authorised by the Arbitral Tribunal.

### Time to be consumed in ICC Arbitration

The time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the issuance of the Terms of Reference. The Court may extend this time limit pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative if it is necessary to do so.

### Costs

The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative fees both of which are fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

The ICC collects the arbitration fees based on the amount in dispute. This approach differs from that adopted in an LCIA arbitration but is similar to that in a CIETAC arbitration. The administrative fees start from a minimum of US\$2,500, which applies to a case in which the disputed amount is less than US\$50,000, and rises to a maximum of US\$88,000 at maximum, where the disputed amount is more than US\$100M.

The arbitrator's fees are also based on the disputed amount. For a detailed schedule of the fees, please refer to the ICC Arbitration Rules. For illustrative purposes for a case with a disputed amount of less than US\$50,000, the total arbitrators' fees will range from US\$ 2,500 to a maximum of 17% of the total disputed amount, i.e. US\$8,500. In a case with a disputed amount of US\$100 million, the arbitrators fees will range from US\$61,750+(0.01% x US\$100 million)=US\$71,750 to a maximum of US\$285,800+(0.056% x US\$100 million)=US\$341,800. Within the above range, the amount of fees paid to arbitrators mainly depends on the length and complexity of the case, the time spent by arbitrators for the arbitration.

### Scrutiny of the Award by the Court

Unlike the approach adopted in LCIA arbitration (the subject of our first newsletter in this series), before rendering an award, the Arbitral Tribunal shall submit it in draft to the Court. The Court may lay down modifications as to the form of the Award and without affecting the Arbitral Tribunal's right of decision, may also draw its attention to points of substance. No award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.

In 2007, the Court laid down modifications as to the form of the award and/or drew the arbitral tribunal's attention to points of substance when approving 317 awards, leaving 32 awards approved without commentary by the Court. On a further 35 occasions, the Court requested that the tribunal resubmit its award for approval.

### Legal Fees

Unless otherwise agreed by the parties, the arbitral tribunal has the power to order in the final Award and fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

### Place of Arbitration

In the absence of agreement by the parties, the Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate. In 2007, Europe continued to be the most favored region for the place of arbitration (74.7%). Paris (108 cases) maintained its position as the leading city, while London (58 cases) moved into second position, ahead of Geneva (56) and Zurich (36).

China was chosen to be the place of arbitration for 7 cases in 2007, all of which were in Hong Kong. Mainland China has been

可以终止接受其他证据和主张 (Closing of Proceedings), 在此之后, 除非仲裁庭要求或指示, 任何一方均不能再提交其他的证据和主张。

### 国际商会仲裁所需的时间

仲裁庭应在Terms of Reference出具之后的6个月内对案件做出裁决。仲裁庭根据仲裁庭提出的合理的请求, 或者自己认为确有必要, 可以相应地延长上述时限。

### 费用

国际商会仲裁的费用, 由以下几个方面构成:

- (1) 仲裁员报酬
- (2) 仲裁院的行政费用
- (3) 专家费用(如有的话)
- (4) 律师代理费

国际商会仲裁院根据争议的金额收取仲裁费, 这一点与伦敦国际仲裁院不同, 而与中国国际经济贸易仲裁委员会的收费方式类似。行政费用的最低收费额为2,500美元, 适用于争议金额小于50,000美元的案件。行政费用的最高收费额为88,000美元, 适用于争议金额一亿美元以上的案件。

仲裁员报酬也是基于争议金额的基础上。具体的计算方法, 请参见国际商会仲裁院的仲裁规则。以下仅是对最小收费与最大收费的比较, 供读者对国际商会仲裁院的收费有一个直观的了解。如果一个案件的争议金额小于50,000美元, 仲裁员报酬在2,500美元到8,500美元之间。如果争议金额为一亿美元, 仲裁员报酬为61,750美元到341,800美元。仲裁员报酬在仲裁规则规定的范围之内, 主要根据仲裁员为案件所付出的时间和案件的复杂程度来决定最终的报酬。

### 国际商会仲裁院对仲裁裁决的审查

与伦敦国际仲裁院仲裁(请参见我所的系列介绍第一篇)不同, 在国际商会仲裁中, 仲裁庭在做出裁决之前, 应将裁决书初稿送交仲裁院审阅。仲裁院可以对裁决书的格式提出意见, 并在保证不影响仲裁庭的独立审案的前提下, 对一些实体问题提请仲裁庭注意。在仲裁院对裁决书的格式确认之前, 仲裁庭不能下达裁决书。

2007年, 国际商会仲裁院共对317份裁决书提出了格式或实体方面的建议, 对32份裁决书未经任何建议予以了批准。对35份裁决书, 仲裁院要求仲裁庭重新提交申请。

### 律师费

除非当事人另有约定, 仲裁庭有权在裁决书中裁定另一方承担一方当事人因仲裁而支出的全部或部分律师费或其他费用。

### 仲裁地

除非当事人另有约定, 仲裁庭商双方当事人可以在其认为的适合的地方进行庭审或其他会议。在2007年, 欧洲仍然在国际商会仲裁中当事人首选的仲裁程序的进行地, 占全部审结案件数的74.7%。就具体的城市而言, 依次为巴黎(108件), 伦敦(58件)、日内瓦(56件)、苏黎世(36件)。

2007年, 在中国开庭审理的案件有7件, 均在香港。过

chosen by the parties as the place of a few oral hearings in the past.

It should be noted, however, the place of arbitration is distinct from the place of oral hearing. The legal implications for the place of arbitration is that laws governing arbitral procedures for the place of arbitration will be applied to the arbitration, whilst the place of an oral hearing has no such legal importance.

In the past few years, it has been disputed whether China has "opened" a market for ICC arbitrations and therefore what the legal implications are of the "place of arbitration" being Mainland China and how the Chinese law governing arbitration shall govern the procedural matters of ICC arbitration. To the extent there exists uncertainties, with the opening of ICC's new Asia office in Hong Kong, it will only be a matter of time before such uncertainties are resolved.

Hammonds is a full service multidisciplinary law firm. Our dedicated dispute resolution team comprises 250 lawyers in seven countries dealing with disputes around the world. We have extensive experience of all forms of dispute resolution and alternative dispute resolution including all forms of arbitrations. Our Asia dispute resolution team is based out of our Hong Kong and Beijing offices and has worked closely with our European offices on a range of ICC arbitrations.

希文律师事务所是一家提供全方位法律服务的综合性律师事务所。其中，我们的争议解决团队由250名律师组成，遍布7个国家和地区，在全球范围内处理各种争议。我们在所有形式的争议解决和解决争议的替代方法方面有着丰富的经验和极深的造诣，包括各种各样的仲裁。我们在香港和北京的亚洲争议解决团队与欧洲的团队紧密合作，处理一系列国际商会仲裁院的仲裁案件。

去有当事人曾经约定中国大陆为开庭地点。中国国际经济贸易仲裁委员会也曾为此提供过场所。

但是，仲裁地和开庭地点存在着根本的区别。当事人选择某一国家为仲裁地，则该国的有关仲裁程序的法律适用于该仲裁程序，而开庭地仅为仲裁程序中的一个技术性环节，对适用哪一国法律无必然联系。

因此，在过去的数年中，在中国仲裁界曾经引发过国际商会仲裁能否将中国作为仲裁地的争论，并由此引申到中国“仲裁市场”的开放问题，以及中国仲裁法和仲裁制度如何完善，以适应这一情况的问题。随着ICC香港办事处的成立，这一问题有望在可以预见的将来，继续得到深入讨论，并寻求解决方案。

Keith is the Senior Partner of Hammonds Hong Kong and Chief Representative of Beijing Representative Office. He is extremely experienced in international arbitration both in Europe and China, with particular emphasis on the energy and financial services sector. His expertise also covers high court/commercial court litigation, expert determinations, mediations and other forms of ADR.



## Keith Brandt

### 布英达

布英达是希文律师事务所香港所的高级合伙人，也是希文北京代表处的首席代表。他在国际仲裁方面有着十分丰富的经验，包括在欧洲和中国，特别是在能源和金融服务的争议解决方面。他的经验也包括高等法院诉讼、专家决定、调解等解决争议的替代办法领域。

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Patrick is a lawyer and Director of Strategic Business of Hammonds based in Beijing. He has significant experience in international dispute resolution, particularly in international arbitration and other means of Alternative Dispute Resolution. He had been working at China International Economic and Trade Arbitration Commission for eight years and handled more than 200 cases either in the capacity of associate to arbitrators and as a panel arbitrator. He is native speaker of mandarin Chinese and Korean and fluent in English and Japanese.



## Patrick Rungao Zheng

### 郑润镐

郑润镐律师是希文北京办事处的业务战略负责人。他在国际争议解决特别是国际仲裁领域有着丰富的经验。他曾经在中国国际经济贸易仲裁委员会工作过八年，也是该会现任仲裁员。他作为经办人、仲裁员和律师办理过超过两百件国际仲裁案件。他的工作语言是中文、英文、韩文和日文。

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