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安杰国际商事争议解决简报

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AnJie Law Firm

19/F, Tower D1, Liangmaqiao Diplomatic Office Building,
No. 19, Dongfangdonglu, Chaoyang District, Beijing 100600, P.R.China
Tel: +86 (10) 8567 5988 Fax: +86 (10) 8567 5999
中国·北京市朝阳区东方东路19号亮马桥外交办公大楼D1座19层
电话：+ 86 (10) 8567 5988 传真：+ 86 (10) 8567 5999
www.anjielaw.com

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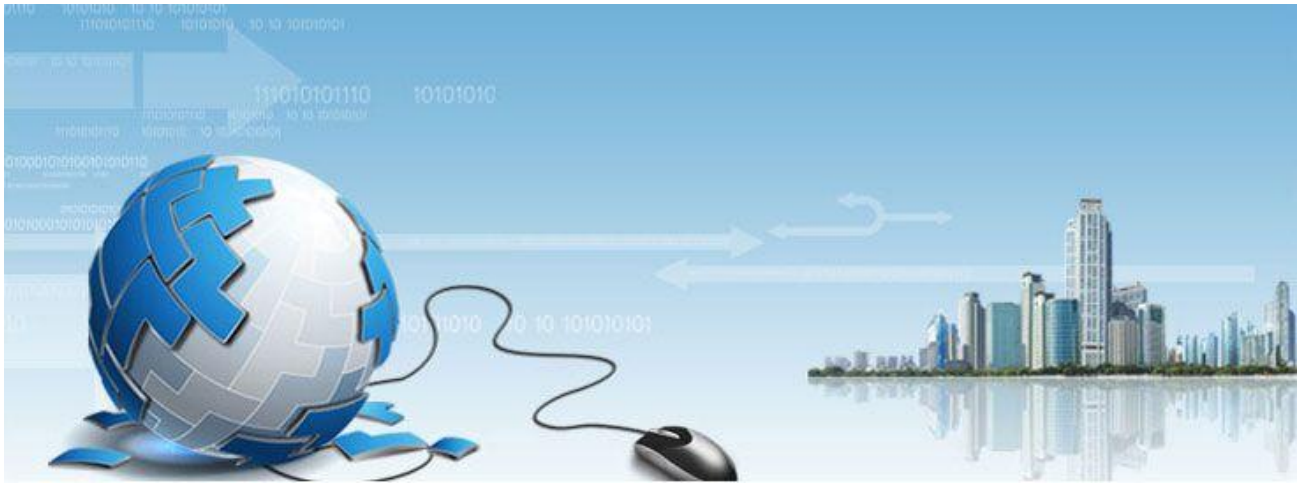

➢ 香港国际仲裁中心任命新秘书长

香港国际仲裁中心 (HKIAC) 正式宣布 Sarah Grimmer 将于 2016 年 9 月 1 日起成为 HKIAC 的新一任秘书长。

Grimmer 女士在国际仲裁领域拥有超过 14 年的经验，其中包括在国家间、投资者与国家间以及国际商事仲裁方面的丰富经历。凭借其在常设仲裁法院（PCA）和 ICC 国际仲裁院的工作经验，Grimmer 女士将把大量先进的机构管理理念带到 HKIAC。

➢ 贸仲香港《第三方资助仲裁指引》征求意见稿出台

2016 年 5 月 19 日，贸仲委香港仲裁中心《第三方资助仲裁指引》（下称“《指引》”）征求意见稿在香港发布。该文件是由贸仲委香港仲裁中心组织专家起草的有关第三方资助仲裁的指导性文件，对指导贸仲香港仲裁案件中的第三方资助具有重要意义。

《指引》起草专家组成员 Matthew Townsend 在

➢ HKIAC Appoints New Secretary General

The Hong Kong International Arbitration Center (HKIAC) is pleased to announce the appointment of Sarah Grimmer as HKIAC's Secretary General with effect from September 2016.

Sarah has more than 14 years of experience in the field of international arbitration, spanning inter-state, investor-state and international commercial arbitration. Having worked at two major arbitral institutions, i.e. Permanent Court of Arbitration (PCA) and International Court of Arbitration (ICC), Sarah brings a wealth of institutional expertise to the Center.

➢ CIETAC Advises on Third Party Funding in Hong Kong

CIETAC's Hong Kong Arbitration Center (CIETAC HKAC) has unveiled draft guidelines on third-party funding following a recent push to permit it in the special administrative region.

The guidelines set out "certain principles of practice and conduct which CIETAC HKAC encourages parties and arbitrators to observe in respect of actual or anticipated

贸仲委仲裁员研讨会上介绍了《指引》出台的背景、目的，解释了其中的重点条文。他指出，《指引》不仅可适用于香港，还可为其他司法区的仲裁实践提供参考。

arbitration proceedings in which there is or may be an element of third-party funding." In publishing them, the center may be seen as accepting the possibility that funding may soon be declared legal in Hong Kong, as recommended by Hong Kong's Law Review Commission in a consultation paper in 2015.

- **中国法院判决首次在新西兰得到完全承认**

中国公民陈某在海外投资房地产纠纷案在国内法院胜诉后，申请在新西兰法院承认和执行判决，历时七年，大获成功。这是中国法院的判决书在新西兰得到完全承认的首个案例。该案件无疑将给未来的类似案件树立一个可以参照的标杆，增加了中国投资者的维权手段，让手握中国胜诉判决的债权人在新西兰也能够得到完全的执行，增强中国投资者海外投资的信心和保障。

- **Chinese Judgment Recognized and Enforced Successfully in New Zealand**

A Chinese investor in real estate in New Zealand applied to the New Zealand court for recognition and enforcement of a judgment made by the Chinese court and achieved a comprehensive success. It is the first time that Chinese court judgment gets fully recognized and enforced in New Zealand and it is believed that the winning of the case would strengthen confidence of Chinese investors in New Zealand.

- **瑞士仲裁协会进军亚洲仲裁业**

2016 年 6 月 20 日，瑞士仲裁协会（ASA）在新加坡举办发布会，宣布其在新加坡设立东南亚分会。这是 ASA 设立的第一个区域性分支机构。

- **ASA Moves into Asia**

On 20 June 2016, the Swiss Arbitration Association (ASA) has celebrated the launch of a Southeast Asia chapter in Singapore – the body’s first regional branch.

- **孟买国际仲裁中心发布新规则**

2016 年 6 月 15 日，位于印度的孟买国际仲裁中心（MCIA）发布了《孟买国际仲裁中心仲裁规则》。该规则在发布当天开始生效，反映了国际仲裁的最佳实践，既适用于国际仲裁，也适用于国内仲裁。该规则还明确了 MCIA 将向印度的仲裁业引进最佳国际仲裁实践的机构宗旨。

- **MCIA Unveils New Rules**

On 15 June 2016, India’s home-grown Mumbai Centre for International Arbitration (MCIA) announced the launch of the MCIA Rules. The MCIA Rules will come into effect from this date. The MCIA’s commitment to bring international best practices to arbitration in India is demonstrated by the MCIA Rules. The Rules reflect best practices from around the world, suitable for both domestic and international arbitrations.

【安杰国际商事仲裁观察】

【AnJie Observations on International Commercial Arbitration】

➢ 美国法院对被撤销的仲裁裁决的承认与执行

《纽约公约》对于仲裁裁决在不同成员国之间的承认和执行起到了极大的促进作用。然而，对于已经被撤销的仲裁裁决，在《纽约公约》的视角下是可以拒绝承认与执行的，之所以说“可以”是依据公约第 5 条第 1 款第 5 项的字面表述（“may”），这相当于在执行地国法院可以拒绝执行外国仲裁裁决的理由中，给当地法院的法官留下了一定的自由裁量权。通过以下三个案例，可以大致总结出美国法院如何对待被撤销的外国仲裁裁决的承认和执行申请。

Chromalloy v Egypt (DDC 1996)

在 Chromalloy 案中，美国公司 Chromalloy 与埃及国防部签订了向埃及空军提供直升机零部件的购买、维修与服务合同。合同中订有“若产生争议则在开罗适用埃及法进行仲裁”的条款，并含有“no recourse”条款，即仲裁庭的裁决为终局裁决，对双方当事人均有拘束力，任何一方当事人不得提出上诉或采取其他法律措施。在 1991 年 12 月埃及政府单方

➢ US Enforcement of Foreign Arbitral Awards

Chromalloy v Egypt (DDC 1996)

Chromalloy Aeroservices, Inc. (‘CAS’) is a US corporation who entered into a military procurement contract with Egypt. The contract provided that Egyptian law governed the contract and the seat of arbitration was in Cairo. A contract dispute arose. CAS prevailed in an arbitration seated in Cairo. Shortly afterwards, CAS sought to enforce the award in the US. Shortly after CAS initiated the US enforcement proceeding, Egypt successfully petitioned the Egyptian judiciary to annul the award. Thereafter, Egypt asked the DC District Court to grant *res judicata* effect to the order of the Egyptian Court of Appeal nullifying the award, thereby dismissing CAS’s enforcement application.

The Chromalloy court declined to do so, relying on US public policy in favor of final and binding arbitration of commercial disputes. Additionally, the Chromalloy court was motivated by the fact that Egypt filed the annulment preceding only after CAS

终止合同后，Chromalloy 提起仲裁，并获得仲裁庭于 1994 年 8 月作出的有利于己方的裁决，遂向美国哥伦比亚特区地方法院申请强制执行该裁决。1995 年开罗上诉法院认为该仲裁裁决排除了合同应当适用的《埃及行政法》并且不适当地适用了《埃及民法典》，因而根据埃方请求撤销了该裁决。但美国哥伦比亚特区地方法院以美国支持对商事争议作出的终局的具有法律拘束力的裁决这一“公共政策”为由，作出了执行该被埃及法院撤销的裁决的裁定，法院在作出承认和执行该被撤销的仲裁裁决的理由之一还包括被申请人是在申请人提出承认与执行仲裁裁决的申请后才向埃及法院提出撤销仲裁裁决的。

TermoRio SA v Electranta SP (DC Cir 2007)

在 TermoRio 案中，哥伦比亚地区法院以仲裁协议中选择适用国际商会（ICC）规则违反哥伦比亚法律而无效为由，撤销了该仲裁裁决。美国华盛顿特区上诉巡回法院考察了哥伦比亚地区法院的裁定及其依据的法律，并考量了哥伦比亚地区法院裁定是否违反了“基本的正义理念”，从而有可能导致仲裁裁决被拒绝承认和执行。然而该法院采取了狭义的角度来看待裁定中作为例外的公共秩序保留，并且认为哥伦比亚的裁定没有违反公共秩序，进而承认了哥伦比亚对相关仲裁裁决的撤销裁定是正确的。美国华盛顿特区上诉巡回法院在裁定文书中指出，“没有证据表明哥伦比亚法院的撤销裁定违反了‘基本的正义理念’，裁定的作出并无瑕疵，裁定结果无明显不公。”并且，对于仲裁裁决适用 ICC 规则违反哥伦比亚法律这一问题的裁量“是哥伦比亚自己的事”。但是，华盛顿特区上诉巡回法院的裁定也受到仲裁界的质疑，有学者认为，美国法院对哥伦比亚法院裁定持肯定的态度其实对国际仲裁发展起到阻碍作用，会影响仲裁裁决在各国的承认和执行，从而一定程度上违反了国际仲裁原则。

initiated the US enforcement proceeding, suggesting that potential enforcement in the US motivated Egypt to seek annulment in Cairo. Furthermore, the US court is also concerned about US corporation might be biased before the Egyptian Court since the subject of the dispute was a military procurement contract entered into with the state.

TermoRio SA v Electranta SP (DC Cir 2007)

In this case, TermoRio, a Colombian corporation, entered into a power purchase agreement with Electrificadoradel Atlantico SA (‘Electranta’), a Colombian state-owned public utility. The parties agreed that Colombian law governed the arbitration, and disputes were subject to ICC arbitration with seat in Colombia. Later a contract dispute arose. TermoRio got a favorable award in the arbitration.

Electranta initiated set-aside proceedings of the award in Colombia and finally the award was annulled by Colombia’s highest administrative court, on the ground that the arbitration clause was invalid since at the time the parties entered into the contract, Colombian law did not expressly permit use of ICC procedural rules in arbitration. TermoRio subsequently sought to enforce the award in the US.

The DC Circuit Court affirmed the district court’s decision to deny enforcement of the award. Having reviewed the proceedings before the Colombian court, the DC Circuit Court noted “Because there is nothing in the record here indicating that the proceedings before the Consejo del Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it.” Furthermore, the TermoRio court observed that the matter was “a peculiarly Colombian affair”, since the contract was entered into between Colombian parties for services rendered in Colombia, and the contract was governed by Colombian law with arbitration seated in Colombia.

Corporación Mexicana de Mantenimiento Integral

Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración Producción (SDNY 2013)

在本案中，一个私人公司 COMMISA 与墨西哥一个国有机构 PEP 签订了一份合同，合同约定适用墨西哥法，并同时约定了合同引发的纠纷可以提交仲裁或申请向 PEP 申请“行政撤销”。双方发生合同纠纷后，PEP 对案涉合同启动了“行政撤销”程序，并同时对本案提起了仲裁，墨西哥仲裁机构的仲裁庭最终裁定 COMMISA 获胜。之后，COMMISA 将胜诉裁定提交美国法院申请承认和执行，美国法院裁定承认和执行该裁决，但 PEP 却在墨西哥当地法院申请撤销该裁决并获得支持。最后，美国法院决定不撤回之前作出的承认和执行仲裁裁决的裁定，在其裁定书中，Hellerstein 法官重申了 TermoRio 案中美国法院对被撤销的外国仲裁裁决的承认和执行之立场，即“当外国法院的撤销裁定违反了‘基本的正义理念’时，美国法院无义务尊重其撤销裁定”。Hellerstein 法官认为，墨西哥法院的对仲裁机构裁决予以撤销的裁定违背了“基本的正义理念”，其原因在于 COMMISSA 根本无法在“行政撤销”程序中就纠纷的实质问题与 PEP 进行抗辩，并且，由于诉讼时效的经过等一系列原因，COMMISA 在纠纷中很可能丧失一切有可能对自身合法权利进行救济的途径。因此，尽管墨西哥法院撤销了案涉裁决，美国法院仍对其予以承认和执行。

从上述三个案例可以看出，对于已经在仲裁地国法院被撤销的仲裁裁决在美国的承认和执行，美国法院行使了一定的自由裁量权，当撤销裁决的申请并非是当事人善意提起，或撤销的裁定违反了“基本的正文理念”时，美国法院很有可能仍会对被撤销的仲裁裁决予以承认和执行，这一方面也体现了美国法院对仲裁裁决既判力的尊重。

v Pemex-Exploración Producción (SDNY 2013)

A private company, COMMISA, entered into contracts with Petroleós Mexicanos (“PEP”), a state agency that controlled Mexican hydrocarbons. The contracts were governed by Mexican law, and provided for arbitration as well as administrative rescission by PEP. A contract dispute arose later. PEP initiated administrative rescission of the contracts, and the parties initiated arbitration to resolve the contractual disputes. COMMISA prevailed in an arbitration seated in Mexico City. COMMISA sought enforcement of the award before the District Court for the Southern District of New York (SDNY) After that, PEP initiated annulment proceedings before the Mexican courts. The US court granted COMMISA’s application. Subsequently, the Mexican courts annulled the award. The question then became whether the District Court should vacate its previous order confirming the award.

The District Court decided not to vacate the prior order. Judge Hellerstein adopted the standard of the TermoRio court that a US court need not respect the foreign court’s order if it violated “basic notions of justice”. Judge Hellerstein found that the decisions rendered by the Mexican judiciary violated “basic notions of justice” because the Mexican courts retroactively applied Mexican statutory law that was not in effect at the time the parties entered into the contracts. In addition, the application left COMMISA without recourse in Mexico since apparently it could not arbitrate the merits of the dispute with PEP, but the statute of limitations had also expired for it to be able to initiate court litigation in Mexico. Judge Hellerstein concluded that the decisions violated “basic notions of justice” since the retroactive application of a law was improper, and the net result was that COMMISA would have no forum to pursue a remedy. （*Cases are with reference to IBA, “Arbitration News”, Vol.20, No.2, March 2015*）

【中国国际商事争议解决热点聚焦】

【China International Commercial Dispute Resolution Spotlight】

➢ **最高院对《涉外民事关系法律适用法》生效前的涉外仲裁条款效力作出批复**

在最高人民法院近日发布的一则案例中，最高人民法院在 2015 年 3 月对一起涉港合同中的仲裁条款效力问题作出了批复，值得注意的是，该份包含仲裁条款的涉港合同是在我国《涉外民事关系法律适用法》颁布前签署的。

2014 年原告塘厦镇房地产公司（“塘厦”）起诉称：1993 年 10 月 8 日，塘厦镇房地产公司与通利文公司（“通利文”）签订《合作兴建塘厦部分别墅区合同书》，约定三方（另一方为“京裕投资有限公司”，实际未参与开发）合作开发位于东莞市塘厦镇环城南路的住宅用地。其中，被告通利文公司负责提供建设资金、项目建设和销售，并承担全部支出费用，包括各项税费。土地开发住宅面积达到总量的三分之二后，原告发现被告未按合同书约定依法申报、缴纳税费高达 4000 余万元。由于该项目是以原告名义开发的，税务机关要求原告办理纳税申报。被告销售房屋时已按照销售价格 3%收取业主交易契税，部分业主要求原告办理房产证并承担违约责任。原告请求法

➢ **SPC Decides on the Validity of Arbitration Clause in Hong Kong Related Contract Dispute**

In a recent published case by the Supreme People’s Court, Dongguan Tangxia Real Estate Development Company (“Tangxia Real Estate”) and Tongliwen Co. Ltd. (“Tongliwen”) concluded a cooperation contract to develop a piece of land to build houses for sale. A dispute resolution clause stating that any dispute arising from this contract shall be resolved by arbitration. Later, Tangxia Real Estate filed an action in front of the Dongguan No. 3 People's Court (“the Court”) for breach of contract. The Court found the arbitration clause in the contract not valid because it did not fulfill the requirements of a valid arbitration clause under Chinese Arbitration Law.

Tangxia Real Estate entered into a contract with Tongliwen as early as 1993, the main content of which was that the parties cooperatively developed a piece of hand to build houses for sale. Tongliwen was responsible to pay all taxes related to the development and the sale of real estate. Later Tangxia Real Estate discovered that Tongliwen failed to pay over forty million RMB (Approximately 7

院判决解除其与被告之间的合作开发关系。

原告提交的《合作兴建塘厦部分别墅区合同书》第十四条显示，双方当事人约定了仲裁条款，即“凡因执行本合同所发生的或与本合同有关的一切争议，三方应首先通过友好协商解决。如协商不能解决，应提请法律部门仲裁，仲裁的裁决是终局的，对三方都有约束力。”

一审法院东莞第三人民法院与东莞中院以及广东省高级人民法院的处理意见一致，认为本案合同中当事人约定的仲裁条款无效。本案当事人通利文公司为香港注册成立的公司，故塘厦公司与通利文公司之间仲裁条款效力的认定应参照适用涉外仲裁协议效力的有关规定。最高人民法院《关于适用<中华人民共和国涉外民事关系法律适用法>若干问题的解释（一）》第二条的规定，涉外民事关系法律适用法实施以前发生的涉外民事关系，人民法院应当根据该涉外民事关系参照涉外民事关系法律适用法的规定确定。本案合同签订于 1993 年，当时法律没有规定确认涉港仲裁条款效力应当适用的法律，故根据上述法律规定，本案仲裁条款可参照《中华人民共和国涉外民事关系法律适用法若干问题的解释（一）》的规定确定适用的准据法。本案双方当事人没有选择适用仲裁条款的法律，也没有仲裁地或仲裁机构，根据《中华人民共和国涉外民事关系法律适用法》第十八条及最高人民法院《中华人民共和国涉外民事关系法律适用法若干问题的解释（一）》第十四条的相关规定，确定本案仲裁条款的效力适用中国内地的法律。

而根据《中华人民共和国仲裁法》第十六条第二款的规定，仲裁协议应当具有下列内容：（一）请求仲裁的意思表示；（二）仲裁事项；（三）选定的仲裁委员会。本案中合同仲裁条款没有明确约定具体的仲裁机构，属于内容不明确的仲裁条款。依据《中华人民共和国仲裁法》第十八条的规定，仲裁协议对仲裁事项或者仲裁委员会没有约定或约定不明的，当事人可以补充协议；达不成补充协议的，仲裁协议无效。本案合同当事人未就仲裁条款达成补充协议，因此该仲裁条款无效。另根据 《最高人民法院关于适用<

million USD) taxes to tax authority. Since the real estate development was all under the name of Tangxia Real Estate, the tax authority required Tangxia Real Estate to pay the outstanding taxes plus fines for late payment. Tangxia soon commenced litigation at the Court for resolving the above disputes. The arbitration clause contained in the contract between Tangxia Real Estate and Tongliwen stipulated that: “Any disputes arising from the performing, execution of this contract shall be resolved by amicable negotiation between the parties, if the parties still could not reach an agreement, the dispute shall be subject to arbitration in the relevant legal agency. The decision in the arbitration is binding to parties involved.”

As required by the Reporting System, the case was reported to the Dongguan Intermediate People's Court and then to the Guangdong Higher People's Court. Guangdong Higher People's Court reasoned in its decision that since Tongliwen Company had its registered place of business in Hong Kong, deciding the validity of the arbitration clause should refer to applicable law on validity of the arbitration clause in a foreign related contract. The contract concerned in this case was concluded in 1993, at that time, there was no applicable law on the validity of arbitration clause in a foreign-related contract. However, according to Article 2 of the “Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the ‘Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations’ (I)” (“the Interpretation”), the validity of the arbitration clause contained in the contract could apply the Interpretation as well as the “Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations”. Additionally, Article 18 of the “Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations” provided, “Parties concerned may agree upon the laws applicable to an arbitration agreement. Where the parties have made no such choice, laws of the domicile of the arbitration commission or laws of the place of arbitration shall

中华人民共和国仲裁法>若干问题的解释》第七条规定，当事人约定争议可以向仲裁机构申请仲裁也可以向人民法院起诉的，仲裁协议无效，东莞第三人民法院可以立案受理。同时，本案属于不动产纠纷提起的诉讼，不 动产所在地在东莞市塘厦镇 ，根据《中华人民共和国民事诉讼法》第三十三条第（一）项的规定，东莞三院对本案具有管辖权。

根据我国涉外仲裁司法审查的特有“层报”机制，最高人民法院对本案仲裁条款的效力作出了批复。最高院认为东莞三院、东莞中院以及广东省高级人民法院对本案的裁决是正确的，本案仲裁协议为涉港仲裁协议，确认本案仲裁协议效力应适用我国内地法律，当事人没有选择仲裁协议适用的法律，也没有约定明确的仲裁地和仲裁机构，依据我国相关仲裁法律，案涉仲裁协议应认定为无效。

在本案中，最高院的批复确定了在《涉外民事关系法律适用法》颁布实施之前签订的合同中仲裁协议效力认定的法律依据，并重申了我国《仲裁法》中规定的有效仲裁协议需要满足的“三个要件”。

apply.”Also, Article 14 of the Interpretation provided that “Where the parties concerned do not select the law applicable to a foreign-related arbitration agreement and do not stipulate the arbitration institution or the place of arbitration or the stipulation is unclear, the people's court may apply the laws of the People's Republic of China to recognize the effect of the arbitration agreement.”

The arbitration clause in the contract did not specify a particular arbitration institution, nor did it specify the place of arbitration, and the parties could not reach any agreement regarding the applicable law afterwards. Therefore, the laws of the People's Republic of China should be applied in determining the validity of the arbitration clause. Article 16 of the Chinese Arbitration Law stipulated that an arbitration agreement shall contain the following elements to become valid: an expression of intention to apply for arbitration; matters for arbitration; and a designated arbitration commission.

In this case, the arbitration clause did not specify a designated arbitration commission or institution to resolve the dispute; instead, it only vaguely stated that disputes should be subject to arbitration in the “relevant legal agency”. Based on the above ground, the arbitration clause was not valid. And the Court should have jurisdiction over the disputes. Tangxia Real Estate claimed that even if there was an arbitration clause in the contract, it was not a valid one and thus not binding to the parties, therefore Tangxia Real Estate had the right to file an action before the people's court regardless of an invalid arbitration clause.

Following the requirements of the Reporting System, the case was reported to the Supreme People's Court (“the SPC”) for a final reply. The SPC had upheld all decisions and findings of the Guangdong Higher People's Court that the applicable law to decide validity of the arbitration clause should be Chinese law and the arbitration clause at question was not valid according to relevant provision in Chinese Arbitration Law.

如需了解更多信息，敬请联系安杰争议解决团队合伙人。
Please contact partners of the dispute resolution team at AnJie Law Firm for further information.

董箫 | 合伙人
DONG Xiao | Partner
Tel: +86 10 8567 5998 | dongxiao@anjielaw.com
专业方向：国际贸易与投资、IP Expertise Area: Int'l Trade& Investment, IP

程冰 | 合伙人
CHENG Bing | Partner
Tel: +86 10 8567 5955 | chengbing@anjielaw.com
专业方向：IP、国际投资 Expertise Area: IP, Int'l Investment

高苹 | 合伙人
GAO Ping | Partner
Tel: +86 10 8567 5906 | gaoping@anjielaw.com
专业方向：公司治理、投融资 Expertise Area: Corporate, Investment & Financing

詹昊 | 合伙人
ZHAN Hao | Partner
Tel: +86 10 8567 5966 | zhanhao@anjielaw.com
专业方向：保险、反垄断 Expertise Area: Insurance, Antitrust

郑曦林 | 合伙人
ZHENG Xilin | Partner
Tel: +86 10 8567 5916 | zhengxilin@anjielaw.com
专业方向：能源矿产、国际投资 Expertise Area: Energy & Mining, Int'l Investment

主编：董箫
Chief Editor: Arthur Dong

编委：王秀娟、谢晓勇、王延妍、叶朗、李慧君、Darren Mayberry，常琳
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