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➢ **ICC 在巴西圣保罗设案件管理中心**

2017 年 5 月，国际商会仲裁院（ICC）为了扩大 ICC 在拉丁美洲地区的影响，并方便该地区案件管理，在巴西圣保罗开设一个新的案件管理团队。此前，ICC 已经在巴西首都里约热内卢成立过一个团队。

➢ **香港立法通过第三方资助仲裁**

2017 年 6 月 14 日，香港立法委员会通过立法，允许第三方机构资助仲裁地为香港或主要仲裁程序在香港进行（仲裁地为其他国家或地区）的仲裁，该立法也同样适用于调解。自 2016 年 10 月 12 日香港法律改革委员会发布《第三方资助仲裁》报告书，建议应修订法律，准许第三方资助适用于《仲裁条例》下的仲裁及相关法律程序后，这一修法程序便被正式提上日程直到近期通过。此举对于香港维持国际仲裁中心的地位具有重要意义。

➢ **双边司法协助创举——“推定互惠原则”**

2017 年 6 月 8 日，由中国最高人民法院举办的第二届中国-东盟大法官论坛在中华人民共和国广西壮族自治区南宁市举行并发布了《第二届中国-东盟

➢ **ICC Opens in Sao Paulo**

The International Court of Arbitration of the International Chamber of Commerce (ICC) has announced that it is to expand operations in Latin America through the establishment of a case management team located in Sao Paulo, Brazil.

➢ **Hong Kong Permits Third-Party Funding**

On 14 June 2017, Hong Kong passed a long-awaited legislation that makes it clear that third-party funding in arbitration is allowed under Hong Kong law. In broad terms, third party funding involves a third party covering the costs of a legal proceeding, in return for a share of the proceeds if the claim is successful. The new legislation is an important development, which opens up the available options for funding of arbitration claims in Hong Kong.

➢ **Presumptive Reciprocity Rule to be Applied in Cross-border Judicial Assistance**

On 8 June 2017, the Supreme People’s Court of China (hereinafter as the “SPC”) held the Second Chief Justice Forum of China-ASEAN (Association

大法官论坛南宁声明》（下称“《声明》”）。中华人民共和国首席大法官、最高人民法院院长周强先生，柬埔寨、印度尼西亚、老挝、马来西亚、沙巴和沙捞越（东马）、缅甸、菲律宾、新加坡、泰国、越南等国家的多位最高法院大法官，以及东南亚国家联盟秘书处副秘书长穆赫坦先生等出席论坛。

《声明》第七条表示“尚未缔结有关外国民商事判决承认和执行国际条约的国家，在承认与执行对方国家民商事判决的司法程序中，如对方国家的法院不存在以互惠为理由拒绝承认和执行本国民商事判决的先例，在本国国内法允许的范围内，即可推定与对方国家之间存在互惠关系。”将“推定互惠原则”付诸实践，中国与东盟各国以及其他周边国家之间的民商事判决的执行将获得更大的空间和可能性，这一举措有助于完善跨境纠纷解决机制，有助于推动区域国家之间的贸易和投资便利化，并最终有利于形成区域内和谐有序的经贸投资法律环境。

of Southeast Asian Nations). In this forum, chief justice Mr. Zhou Qiang from the SPC and other chief justices from ASEAN countries, such as Cambodia, Indonesia, Malaysia, Singapore, Thailand, Laos, Philippine, Vietnam participated. A major breakthrough of this Forum was the issuance of the “Declaration of the Second Chief Justice Forum of China-ASEAN” (hereinafter as the “Declaration”). According to Article 7 of the Declaration, if there is no bilateral treaty for mutual recognition and enforcement of judgments between ASEAN countries and China, and there is no precedent of refusal to recognize and enforce judgment on the ground of reciprocity, reciprocity could therefore be deemed to exist between the certain ASEAN country and China. The presumptive reciprocity clause will serve as an important role in judicial assistance between China and neighborhood countries, thus promote trade and investment.

- **ICSID 公布 16 项 ICSID 仲裁规则拟修订事项**

国际投资争端解决中心（下称“ICSID”）于 2016 年 10 月正式启动了 ICSID 仲裁规则的修订工作，这也是其自 1984 年、2003 年和 2006 年后第四次进行仲裁规则的修订。在公开征求意见的基础上，ICSID 近日发布了修订工作的阶段性文件，其中特别提出了 16 项其认为将在下一阶段重点讨论的规则修订事项。具体包括：在仲裁员选任方面，建议简化仲裁员选任的流程；第三方资助仲裁；合并仲裁；先期异议；费用分配；决定和命令的公开等十六个方面。

- **ICSID Discloses 16 Items for Rules Amendment**

On October 7, 2016, ICSID advised its 153 member States that it was initiated the updating of the ICSID rules and regulations. Amendments to the ICSID rules require approvals from two-thirds of the member states according to ICSID Convention Article 6. This is the ICSID’s fourth revision of its rules. The first two revisions were made in 1984 and 2003, however the changes to the rules by these two revisions were modest.

- **中国在又一起 ICSID 投资仲裁案中被诉**

2017 年 6 月 21 日，中国政府在又一起 ICSID（国际投资争端解决中心）案件中成为被申请人。申请人 Hela Scharwz GmbH 是一家德国食品和香料制造商，该争端依据 2003 年中德 BIT 提起。这是中国在 ICSID 第三次被诉。

- **China being Sued in Another ICSID Claim**

On 21 June 2017, China was sued for the third time at ICSID (“International Centre for Settlement of Investment Disputes”). This ICSID arbitration was commenced by a German food and spice manufacturer under the 2003 Germany-China BIT.

【安杰国际商事仲裁观察】
【AnJie Observations on International Commercial Arbitration】

➢ 北京城建 v 也门案新进展：仲裁庭关于国企是否为适格投资者主体的认定

2017 年 5 月 31 日，北京城建集团诉也门政府 ICSID 投资仲裁案取得新进展：仲裁庭发布管辖权决定，拒绝也门政府的主张，认为北京城建是中国-也门 BIT 项下适格的投资者，可以向 ICSID 提起仲裁。

2014 年 12 月 3 日，ICSID 官方网站公布了申请人为北京城建集团，被申请人是也门共和国的一个投资仲裁案件。案由是机场航站楼建筑工程争议。该案涉及的是北京城建集团于 2006 年初中标的萨那国际机场新航站楼工程。2006 年，北京城建集团正式收到也门民航气象局的中标通知函，中标也门萨那国际机场新航站楼工程，工程中标价为 1.15 亿美元。北京城建集团为正式签约和工程开工做了充分的准备工作，确保按期开工和严格履约。在该争议中，申请人北京城建集团主张被申请人也门共和国违反《中国-也门 BIT》，强制剥夺即征收了申请人在也门的资产。

被申请人也门政府对仲裁庭提出了五项管辖权异议：第一，申请人不是 ICSID 公约项下缔约另一方的国民；第二，也门在中国-也门 BIT 项下的仲裁同意仅限于投资征收的补偿数额争议；第三，MFN（最惠国待遇）条款不能规避限制型争端解决条款；第四，申请人并未作出受 BIT 保护的投资；第五，北京城建的诉求本质上是合同之诉，并非条约之诉。其中，尤为引人关注的是双方对第一项异议的争论以及仲裁庭对该问题的决定。

被申请人主张，申请人北京城建并不符合 ICSID

➢ ICSID Tribunal Accepts Jurisdiction in BUCG v. Yemen

On 31 May 2017, an ICSID (International Centre for Settlement of Investment Disputes) tribunal accepted jurisdiction over a claim brought by a Chinese company, Beijing Urban Construction Group Co. Ltd. (BUCG), against the Republic of Yemen (Yemen) under the Yemen-China Bilateral Investment Treaty ("the BIT").

BUCG entered into a construction contract with the Yemen Civil Aviation and Meteorology Authority ("CAMA") on 28 February 2006 for constructing a new International Terminal Building at Sana'a International Airport. On 3 December 2014. ICSID registered the Request brought by BUCG. BUCG alleged that the Respondent's military forces intervened and excluded BUCG workers from the construction site, and, allegedly, on 22 July 2009, CAMA gave notice of its intention to terminate the Contract. BUCG stated that Respondent's denial of access deprived it from earning a profit, constituting several breaches under the BIT.

In the arbitration, Yemen raised a number of objections to jurisdiction, including that: (1) BUCG does not qualify as a "national of another contracting state" under Article 25(1) of the ICSID Convention because it is a "State-owned entity, […] an agent of the Chinese Government and discharges governmental functions…"; (2) the arbitration clause in the BIT is limited to resolving disputes concerning the amount of compensation payable for expropriation of the claimant's investment; (3) the most-favored-nation("MFN") clause cannot circumvent the limited dispute clause; (4) BUCG does not have a qualifying investment under Article 25(1) of the ICSID Convention; and (5) BUCG's claim is a contractual claim (not a treaty claim).

After hearing parties' positions, the Tribunal made the following decisions:

公约第 25（1）条项下“缔约另一方国民”的资格要求。依据 Broches 标准，申诉方作为国有实体，既是中国政府的代理人，也在商事交易中行使政府职能。由此，也门与北京城建集团的纠纷转化为也门政府与中国政府的国家间争端，而非 ICSID 公约第 25（1）条项下的国家-投资者争端。而且，北京城建也没有依照也门国内法将其权利注册为投资，而这种注册要求是享受中国-也门 BIT 条约保护的前提。综上，也门政府认为仲裁庭缺乏管辖权。申请人则认为，在进行相关工程时，其并不以中国政府的代理人身份行事，也没有行使任何政府职能。相反，在机场合同相关事项中，北京城建以商事能力行事，没有接受中国政府的指挥或控制。

仲裁庭对于双方如上争议作了如下决定：仲裁庭明确了投资者公私身份的认定参照 Broches 标准，其核心是要求仲裁庭分析投资在特定情境中的商事功能。仲裁庭认为也门政府的举证并不足以证明，北京城建在航站楼建设中以任何意义上的中国政府代理人的身份行事。相反，既有书面记录显示北京城建以一般商业承包人的身份参与竞标。因此，并无证据证明北京城建行使了中国政府职能，以非商事功能的能力行事。其次仲裁庭认为，根据中国-也门 BIT，进行投资注册并不是适格投资者和受保护投资的明确条约要求。虽然有些条约明文规定，投资注册是享受条约保护的前提条件，但中国-也门 BIT 显然无此要求。最终，仲裁庭认定，申请人北京城建是适格的投资者，其投资是受保护的投资，仲裁庭具有管辖权。

（注：*Broches 标准：在 1972 年 ICSID 的秘书长 MR. ARON BROCHES 和其他的 ICSID 起草人已经将政府控制的企业视为政府或者政府的行为做出来明确界定，即：完全取决于该企业的具体行为，是代表政府行为，还是纯商业行为。这一原则在后来的 CESKOSLOVENSKAOBCHODINI BANKA, A.S V. THE SLOVAK REPUBLIC（“CSOB”）案件中得到采纳。*）

(1) For BUCG’s qualification as a “national of another contracting state”, the tribunal rejected almost all of the respondent’s objections by applying the Broches functional test. It determined that, “in the fact-specific context” of the case, the claimant’s “functions” were that of a “commercial contractor”. The tribunal found no evidence that the claimant was “fulfilling [a] Chinese governmental function within the sovereign territory of the Republic of Yemen”.
(2) As for confining the scope of disputes in the arbitration clause under the BIT to “Quantum of compensation”, the Tribunal applied Article 31(1) of the Vienna Convention on the Law of Treaties. It decided that, under the BIT, Yemen consented to arbitration “disputes relating to whether or not an expropriation had occurred”.
(3) For the application of the MFN clause, the Tribunal decided that the MFN clause should be tied to activities that take place “in the territory” associated geographically with the investment. It refused to enlarge the dispute resolution provision of Article 10 by the MFN clause to import a broader dispute resolution clause from the Yemen-UK BIT.
(4) For whether BUCG had a qualifying investment, the Tribunal had no difficulty in concluding that BUCG did make an investment in Yemen that qualified for protection under both the ICSID Convention and the BIT after applying “double-keyhole test”.
(5) For the nature of BUCG’s claim, the Tribunal affirmed its jurisdiction to hear the Claimant’s claims to the extent that they arise under the BIT. If the Claimant cannot establish a claim under the Treaty in the course of the merits phase of this arbitration, the proceedings will be dismissed.

The tribunal reaffirmed many international laws and customs. This is also one of the few investment arbitration cases involving one of the Chinese state-owned companies, who took a controversial position in its identification internationally. The Tribunal’s applied the attribution rules under International Law Commission’s Draft Articles on State Responsibility and focused on a context-specific analysis of the commercial function of the investment. This decision perhaps sheds light on how other arbitration tribunals will approach future cases.

【中国国际商事争议解决热点聚焦】
【China International Commercial Dispute Resolution Spotlight】

➢ 香港法院以存在生效仲裁协议为由裁定中止诉讼程序

在保利达国际有限公司（以下简称“保利达公司”）诉龙浩国际集团有限公司（以下简称“龙浩公司”）一案（[2017] HKCFI 604）中，香港高等法院原讼法庭陈美兰法官以当事人之间存在有效的仲裁条款为由，中止正在进行中的诉讼程序。与之前一系列类似案例的裁定一样，本案亦反映了香港法院拒绝对仲裁进行不当干涉的基本原则和态度。

在本案中，保利达公司作为原告，在香港法院起诉龙浩公司，被告还包括广东龙浩集团有限公司及一个自然人股东。纠纷缘自各方于 2008 年 4 月 15 日签订的一份合作框架协议。依据该份框架协议，保利达公司与龙浩公司将共同成立一家合资公司，以便在中国内地共同建设、开发、运行一些高铁项目。本框架协议载有仲裁协条款，规定，本协议项下一些争议将提交 CIETAC 在湖南仲裁解决。

依据双方合作框架协议，自然人股东于 2008 年 12 月签订了一份保证书。2009 年 5 月 30 日，

➢ Hong Kong Court Decides Stay of Proceeding by Finding an Arbitration Agreement Valid

In Polytec Overseas Limited and another v. Grand Dragon International Holdings Co Ltd and others [2017] HKCFI 604, the Hong Kong Court of First Instance recently upheld defendants' request to stay court proceedings in favor of arbitration based on Section 20 of the Arbitration Ordinance. This decision highlights the Hong Kong Court's reluctance to intervene in disputes involving arbitration clauses and its willingness to give great deference to the Arbitration Ordinance.

Before the Court was a breach of contract dispute case between plaintiffs Polytec Overseas Limited ("POL") and Polytec Holdings International Limited ("PHIL") against defendants Grand Dragon International Holdings Company Limited ("LHK"), Guandong Longhao Group Limited ("LG") and an individual shareholder of both LHK and LG ("Defendant X"). POL and LHK entered into a Cooperation Framework Agreement ("BOT") on April 15, 2008, to form a joint venture with the goal

保利达公司，龙浩公司以及广东龙浩集团有限公司补充签订了一份协议（下称“补充协议一”），对原合作框架协议中的一些内容进行补充澄清。在该补充协议一中，规定了与合同框架协议不同的争议解决条款，其规定协议项下产生的一切争议均应提交有管辖权的香港法院解决。补充协议一第四条更进一步规定，本补充协议与合作框架协议具有同等效力。

三方于 2015 年 1 月 26 日签订了第二份补充协议（下称“补充协议二”），同样与高铁项目的实施问题相关，但补充协议二中没有任何争议解决条款。

在香港法院的诉讼中，法官认为本案的焦点问题在于在补充协议与合作框架协议存在不一致的争议解决条款时，合作框架协议中的仲裁条款是否还有效。法官最终裁定支持了被告龙浩公司的中止程序申请，根据香港《仲裁条例》第 20 条的规定，法官认为，从表面证据显示，当事人之间存在有效的仲裁条款。法官作出上述决定还援引了 Private Company “Triple V” Inc v. Star (Universal) Co Ltd & Another [1995] 2 HKLRD 62 案中的相关判决理由作为依据。并引用了 Tommy CP Sze v Li & Fung (Trading) Ltd [2003] 1 HKC 418 案中确定的四要件标准进行判断，即：（1）当事人之间是否存在仲裁条款？（2）上述仲裁条款是否具有可履行性？（3）当事人之间是否存在争议？（4）当事人之间的争议是否在上述仲裁条款的范围内？

本案中，陈美兰法官主要对四要件中的第四点进行了分析。合作框架协议以及补充协议一确实规定了不一致的争议解决条款，但是，综观原告起诉的内容，均与合作框架协议密切相关，同时，补充协议一及补充协议二的实质内容亦与合作框架协议密不可分。由此，法官认为，本案中的争议应按合作框架协议中的仲裁条款，诉诸仲裁解决。法官充分考虑了原告的立场及理由后，重申了其判断当事人之间是否存在有效仲裁条款的“表面证据”标

of developing, constructing, and operating highways in Mainland China. The BOT contained an arbitration clause requiring all disputes to be submitted to CIETAC in Hunan for arbitration.

In accordance with the BOT, Defendant X signed a guarantee in December of 2008. On May 30, 2009, POL, PHIL, and LHK entered into an agreement (the “1st Supplemental”) to clarify the terms of the BOT. The 1st Supplemental called for disputes to be submitted to the courts of HKSAR for resolution. Clause 4 stated that the agreement had “equal force and effect” as the BOT. An agreement (the “2nd Supplemental”), containing no dispute resolution provision, was executed on January 26, 2015, by POL, PHIL, LHK, and LG to resolve a dispute and set the terms to continue the highway projects.

Subsequent disputes gave rise to this case before Judge Mimmie Chan. The central issue is whether the mandatory arbitration provision in the BOT is valid despite subsequent conflicting agreements between the parties. The Court grants defendants’ stay application, finding a prima facie basis for an operative arbitration clause relying on Section 20 of the Arbitration Ordinance, Article 8 of Model Law, and the holding in Private Company “Triple V” Inc v. Star (Universal) Co Ltd & Another [1995] 2 HKLRD 62.

The Court uses the four-part test from Tommy CP Sze v Li & Fung (Trading) Ltd [2003] 1 HKC 418, which examines: (1) Is there an arbitration agreement between the parties? (2) Is the clause in question capable of being performed? (3) Is there in reality a dispute or difference between the parties? (4) Is the dispute or difference between the parties within the ambit of the arbitration agreement?

The crux of the disagreement hinges on element 4. It is undisputed that an arbitration clause appears in

准，即只要有表面证据证明仲裁条款存在，相关纠纷即应提交仲裁而非诉讼解决。

值得注意的是，原告抗辩理由之一是其认为被告同时在湖南法院提起诉讼的行为可以视为对诉诸仲裁权利的放弃。关于上述抗辩，陈美兰法官认为，原告既没有提供被告在湖南法院起诉开始的具体日期，又未能提供法院向其送达的应诉通知书等文书佐证，法官亦注意到被告表现出强烈的将争议提交仲裁解决的意向。因此，尽管本案存在不一致的争议解决条款，法官仍坚持从宽解释《仲裁条例》20 条，认定当事人之间存在有效的仲裁条款，进而决定中止诉讼程序，令当事人将争议提交仲裁。

the BOT and a conflicting provision is later included in the 1st Supplemental. However, the Court points out that the plaintiffs' claims and relief sought are based on the terms of the BOT and subject to the arbitration clause. The various supplemental agreements heavily reference the BOT and do not cancel or replace its terms.

The Court acknowledges the plaintiffs' position regarding the conflicting provisions, but reiterates its standard of simply "determining on a prima facie basis whether there is a valid arbitration agreement" (at ¶ 48). Finding an operative arbitration clause in the BOT, the Court defers to the arbitral tribunal to reconcile the conflicting provisions.

In the alternative, plaintiffs argue that defendants waived its right to arbitration by filing a claim in a Hunan court. The Court finds insufficient evidence that defendants clearly waived their arbitration rights because a lack of information concerning the date such claim was filed, whether plaintiffs had been served, and seems to weigh heavily the fact that defendants had applied for a leave and are ready and willing to proceed to arbitration.

Despite multiple agreements with conflicting dispute resolution provisions, the Court broadly applies Section 20 of the Arbitration Ordinance to find an operative arbitration provision, ruling for the defendants in granting a stay in favor of arbitration. It should be noted that the standard is merely whether there is a prima facie basis for a valid arbitration clause. In analyzing dispute resolution provisions, Hong Kong Courts will likely continue to give great deference to the Arbitration Ordinance and heavily favor settlements by arbitration.

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.

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