Fourth Group of Model Cases Involving the "Belt and Road" Initiative Published by the Supreme People's Court

Area of Law:	Crimes and Criminal Responsibility Optimization of Doing Business
Level of Authority:	Documents of Judicial Interpretation Nature
Date Issued:	09-27-2023
Effective Date:	09-27-2023
Issuing Authority:	Supreme People's Court
Status:	Effective
Topic:	Road & Belt Initiative Release of Judicial Cases

最高人民法院发布第四批涉“一带一路”建设典型案例

Fourth Group of Model Cases Involving the "Belt and Road" Initiative Published by the Supreme People's Court

（2023年9月27日）

(September 27, 2023)

今年是落实党的二十大精神的开局之年，也是习近平总书记提出共建“一带一路”倡议十周年。深入贯彻党的二十大精神，以习近平新时代中国特色社会主义思想为指导，健全“一带一路”国际商事争端解决机制，依法妥善化解涉“一带一路”建设争议，是高质量共建“一带一路”的重要保障，是统筹推进国内法治和涉外法治的重要内容，是巩固我国在“一带一路”建设和全球治理中的大国地位、彰显我国负责任大国形象、推动构建人类命运共同体的重要路径。

This year is the first year to implement the guidelines of the 20th CPC National Congress and the tenth anniversary of the "Belt and Road" Initiative ("BRI") proposed by General Secretary Xi Jinping. Thoroughly implementing the guidelines of the 20th CPC National Congress, following the guidance of Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, improving the international commercial dispute settlement mechanism for the BRI, and properly resolving disputes involving the BRI in accordance with the law are an important guarantee for the BRI with high quality, an important content of promoting rule of law domestically and for foreign-related issues under overall planning, and an important path to consolidate China's status as a great power in the BRI and global governance, highlight China's image as a responsible great power, and advance the construction of a community with a shared future for mankind.

自“一带一路”倡议发布以来，人民法院坚持共商共建共享原则，坚持公正高效便利，坚持尊重当事人意思自治，坚持纠纷解决多元化，化解涉“一带一路”建设争议成效显著。

Since the release of the BRI, remarkable results have been achieved by the people's courts by following the principle of co-building through consultation and sharing, adhering to fairness, efficiency, and convenience, respecting the party autonomy, and adhering to diversified dispute resolution methods in resolving disputes involving the BRI.

这次发布的12个典型案例，涉及国际货物买卖、独立保函、信用证、审计侵权赔偿、保险人代位求偿、金融衍生品交易、法律服务合同、股权转让等涉外商事纠纷的多个类型，还有认可和执行香港仲裁裁决、承认和执行外国民事判决案件，都是“一带一路”建设中常见的案件，所涉法律争议具有很强的代表性。人民法院在这些案件的审理中，对疑难复杂问题作出清晰回应，对于统一裁判标准、完善审理规则起到了很好的指导作用。这些典型案例具有以下几方面特点：

The twelve model cases published involve various types of foreign-related commercial disputes, including international sale of goods, independent guarantee, L/C, compensation for audit-related tort, insurer's subrogation, financial derivative transactions, legal service contracts, and equity transfer. There are also cases of recognition and enforcement of an arbitral award made in Hong Kong, and recognition and enforcement of a foreign civil judgment, which are common cases in the BRI and the legal disputes involved are highly representative. In the trial of these cases, the people's courts have given clear responses to the difficult and complex issues, which has played a good instructive role in unifying adjudication standards and improving trial rules. These model cases have the following characteristics:

一是营造优质法治营商环境，平等保护中外投资者合法权益。重申独立保函“见索即付”的制度价值，明确担保函的付款义务不受基础交易项下抗辩权的影响，厘清反担保函项下“善意付款”的认定标准；阐明会计师事务所在审计中的注意义务及侵权赔偿责任的理论基础，强调人民法院无权在法律和司法解释规定之外扩大认定利害关系人的范围；准确界定法律服务合同的范围与商业风险的界限，指出律师事务所就股权交易提供法律服务，对目标公司在股权交易前对外签订的工程合同是否公平合理，不负有审查义务，提示中国企业在“走出去”过程中进一步增强法律意识，提升风险管控能力。

二是维护公平竞争的市场秩序，统一裁判尺度。澄清涉外独立保函纠纷中相符索赔与欺诈的认定等争议问题，阐释反担保函受益人在尚未获得付款请求权的情况下，隐瞒事实、虚假提交表面相符索赔请求可能因滥用付款请求权而构成欺诈；强调信用证交易项下议付行的独立审单责任，确立议付行的议付行为是否善意的裁判尺度；明晰股权转让中的回购性商业安排和股权让与担保的区别，对合同目的、让与担保的从属性特征、受让方的股东权利是否受到限制等进行全面分析。本次入选的典型案例充分体现了法治固根本、稳预期、利长远的保障作用，对于切实保护中外投资者市场预期、营造市场化法治化国际化营商环境具有重要意义。

First, creating a high-quality law-based business environment and equally protecting the legitimate rights and interests of Chinese and foreign investors. The system value of the independent guarantee (demand guarantee)is reaffirmed, it is specified that the payment obligations under a guarantee are not affected by the right to defense under the underlying transaction, and the standards for determining " bona fide payment " under the counter guarantee are clarified; the duty of care of an accounting firm in an audit and the theoretical basis for tortious liability for compensation are clarified and it is emphasized that the people's court has no right to expand the scope in which interested parties are determined beyond the provisions of laws and judicial interpretations; the scope of legal service contracts and the boundaries of commercial risks are accurately defined. It is specified that a law firm providing legal services for equity transactions has no responsibility to examine whether an engineering contract signed by the target company with a party not involved before the equity transaction is fair and reasonable. The Chinese enterprises are reminded of further enhancing their legal awareness and improving their risk management and control capability in the course of "going global."

三是完善涉外商事法律适用规则体系，准确适用准据法。准确理解和适用《联合国国际货物销售合同公约》中的宣告合同无效条款，界定根本违约和解除权行使期限；根据《维也纳条约法公约》规定准确解释《蒙特利尔公约》，确认《蒙特利尔公约》第三十五条中规定的两年诉讼时效适用法院地法有关诉讼时效中止、中断的规定；充分遵循金融衍生品交易的自身特性和国际惯例，在石油掉期合约纠纷中确认提前终止净额结算条款的性质和效力。本次入选的典型案例反映出人民法院一如既往坚持尊重当事人意思自治，准确适用准据法，恪守国际条约，尊重国际惯例的司法立场。

四是加强国际、区际司法协助与合作，促进民商事判决和仲裁裁决的跨境跨区承认、认可和执行。根据被执行人通过转让被查封财产、提起另案诉讼对被查封财产进行确权、意图规避执行的实际案情，依法驳回受让方执行异议之诉的诉讼请求，保障外国仲裁裁决的执行；根据两地安排认可和执行香港仲裁裁决，在保障当事人正当程序权利的同时有力支持香港建设亚太区国际法律及争议解决服务中心；适用互惠原则承认新加坡法院民商事判决效力，践行中新承认和执行金钱判决指导备忘录的精神。

Second, maintaining the market order of fair competition and unifying the criteria for judgment The controversial issues including determination of matching claims and fraud in disputes over foreign-related independent guarantee are clarified. It is elaborated that where the beneficiary of a counter guarantee has not obtained the right to claim payment, its acts of concealing facts and falsely submitting apparently complying claims may constitute fraud due to abuse of the right to claim for payment; the independent document examination responsibility of the negotiating bank under L/C transaction is emphasized and the criteria for judgment as to whether the payment is negotiated by the negotiating bank in good faith is established; the differences between repurchase commercial arrangements and equity transferring guarantee in an equity transfer are clarified and the contract purpose, the dependent features of transferring guarantee, and whether the shareholders' rights of the transferee are restricted are fully analyzed. These selected model cases have fully embodied the supporting roles of rule of law in consolidating foundations, ensuring stable expectations, and delivering long-term benefits. They are of great significance for effectively protecting the market expectations of Chinese and foreign investors and creating an international market-oriented and law-based business environment.

发布第四批涉“一带一路”建设典型案例，既是人民法院服务保障高质量共建“一带一路”成果的集中展示，也是深入实施涉外审判精品战略的重要举措。我们期望，这次典型案例的发布不仅有利于从裁判中准确提炼法律规则，对同类案件的办理起到指导示范效应，而且促使各级法院持续深化精品战略，提升涉外民商事审判质效，不断提高国际公信力和影响力。

案例1.准确适用《联合国国际货物销售合同公约》宣告合同无效制度维护国际货物买卖秩序

Third, improving the system of rules on the application of foreign-related commercial laws and ensuring accurate application of governing laws. The provisions on the avoidance of contract under the United Nations Convention on Contracts for the International Sale of Goods is accurately comprehended and applied and the fundamental breach of contract and the time limit for exercise of right of rescission are defined; the Montreal Convention is accurately interpreted in accordance with the provisions of the Vienna Convention on the Law of Treaties and it is confirmed that the two-year limitation of actions provided for in Article 35 of the Montreal Convention is governed by the provisions of the law of the forum on the suspension and discontinuance of the limitation of actions; by fully abiding by the characteristics of financial derivatives transactions and international practice, the nature and validity of the clause on early termination of netting settlement in oil swap contract disputes are confirmed. The model cases selected have reflected the judicial position of the people's courts in respecting the party autonomy , accurately applying the governing laws, abiding by international treaties, and respecting international practices as always.

——西班牙EC公司（Exportextil Countertrade SA）与南通麦奈特医疗用品有限公司国际货物买卖合同纠纷案

【基本案情】

Fourth, strengthening international and regional judicial assistance and cooperation and promoting the cross-border and cross-regional recognition and enforcement of civil and commercial judgments and arbitral awards. On the basis of the actual facts that the party against whom enforcement is sought carries out confirmation of ownership of the sealed-up property by transferring such property and filing another lawsuit with the intent to avoid enforcement, the people's court dismisses the claims of the transferee for raising an objection to enforcement in accordance with the law and safeguards the enforcement of a foreign arbitral award; under the arrangements between the Chinese mainland and Hong Kong, the people's court in China recognizes and enforces an arbitral award made in Hong Kong. In this way, legitimate procedural rights of the parties are safeguarded and in the meantime, efforts are made to support the building of an international legal and dispute resolution services center in the Asia-Pacific Region in Kong Kong; the people's court in China recognizes the validity of a civil and commercial judgment rendered by a court of Singapore by applying the principle of reciprocity and practices the spirit of the Guiding Memorandum of the Supreme People's Court of the People's Republic of China and the Supreme Court of the Republic of Singapore on the Recognition and Enforcement of Monetary Judgments in Commercial Cases.

2017年2月9日，西班牙EC公司与麦奈特公司签署买卖合同，约定EC公司向麦奈特公司购买漂白纱布。后EC公司主张麦奈特公司交付的货物不符合合同约定，致使合同目的不能实现，诉讼请求解除买卖合同、返还货款并赔偿预期利润损失。EC公司在案件审理中选择适用《联合国国际货物销售合同公约》。

The publication of the fourth group of model cases related to the BRI is not only a concentrated display of the achievements of the people's courts in serving and safeguarding the high-quality development of the BRI, but also an important measure for implementing the strategy of fine works in foreign-related trials in an in-depth manner. We expect that the publication of these model cases will not only facilitate the accurate extraction of legal rules from judgments and play a guiding and exemplary effect in the handling of similar cases, but also urge the people's courts at all levels to continuously deepen the strategy of fine works, improve the quality and efficiency of foreign-related civil and commercial trials, and constantly increase international credibility and influence.

【裁判结果】

Case No. 1: Accurately Applying the System of Declaring a Contract Avoided under the United Nations Convention on Contracts for the International Sale of Goods and Maintaining the Order in the International Sale of Goods

江苏省南通市中级人民法院审理认为，本案当事人营业地分别位于中国和西班牙，两国均是公约缔约国，双方在合同中并未明确排除适用《联合国国际货物销售合同公约》（以下简称《销售合同公约》），故本案应适用《销售合同公约》解决争议。案涉纱布的质量问题不属于重大质量瑕疵，该纱布依然具有使用价值，能够使用或转售，麦奈特公司并未达到根本违约的程度，EC公司无权宣告整个合同无效。此外，EC公司在2017年10月18日即知晓货物不符合同，但并未向麦奈特公司发出宣告合同无效的声明，直至2019年6月18日起诉时才提出该请求，已超出了合理期间，丧失了宣告整个合同无效的权利。因麦奈特公司仅交付85%的货物，双方即因质量争议提起诉讼，合同的剩余15%部分已无法履行，故在EC公司的诉讼请求范围内依法确认合同尚未履行的15%部分无效。EC公司提出的索赔额应是对自身直接损失及可得利益充分评估的结果，但其在合同履行中也存在一定过错，间接造成了损失的扩大，故参考索赔金额，结合双方过错程度、案涉货物的可利用价值等因素，确定麦奈特公司向EC赔偿3万美元。据此，判令麦奈特公司赔偿EC公司经济损失3万美元，对EC公司其他诉请不予支持。一审判决后，双方均未上诉，并已履行完毕。

— Case of dispute over a contract for the international sale of goods (Exportextil Countertrade SA v. Nantong Mcknight Medical Products Co., Ltd.

【典型意义】

《联合国国际货物销售合同公约》规定的宣告合同无效制度实质等同于我国法律的合同解除制度。本案在审理中国企业与“一带一路”共建国家的企业之间发生的国际货物买卖合同纠纷案中，准确理解和适用公约宣告合同无效制度，一方面对于根本违约情形以及合同解除权行使的合理期间予以准确认定，不允许宣告合同全部无效，体现了公约基于诚信原则于第四十九条第二款规定的解约权限制性规定；另一方面根据合同货物分批交付的特点，允许宣告合同部分无效，即予以部分解除，并由违约方赔偿守约方相应的经济损失，较好展现了人民法院依法维护国际货物买卖秩序、平等保护中外当事人合法权益的职能作用。

[Basic Facts]

On February 9, 2017, Exportextil Countertrade SA (Spain) (hereinafter referred to as "EC SA") and Nantong Mcknight Medical Products Co., Ltd. (hereinafter referred to as "Mcknight Company") entered into a sales contract, pursuant to which EC SA purchased bleached gauze from Mcknight Company. EC SA afterwards alleged that the goods delivered by Mcknight Company failed to comply with the contractual stipulations, resulting in failure to realize the contract purpose. It claimed that the sales contract should be rescinded, the payment for goods should be refunded, and the loss to anticipated profit should be compensated. EC SA chose to apply the United Nations Convention on Contracts for the International Sale of Goods in the trial of this case.

【一审案号】江苏省南通市中级人民法院（2019）苏06民初429号

[Judgment]

案例2.根据条约解释原则认定《蒙特利尔公约》规定的诉讼时效条款适用法院地法认定诉讼时效中断

In the trial, the Intermediate People's Court of Nantong

City, Jiangsu Province held that the places of business of the parties involved were China and Spain and both countries were contracting states of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the "CISG"). The parties did not expressly exclude the application of the CISG in the contract. Therefore, the CISG should apply in this case to settle the dispute. The quality problem of the gauze involved was not a major quality defect and this batch of gauze still had use value and could be used or resold. The acts of Mcknight Company did not constitute a fundamental breach of contract, for which EC SA was not entitled to declare the entire contract avoided. In addition, EC SA knew that the goods did not comply with the contractual stipulations on October 18, 2017, but it failed to issue a declaration of avoidance of the contract to Mcknight Company. EC SA did not raise such claim until the filing of a lawsuit on June 18, 2019, which exceeded the reasonable time limit, and it has lost the right to declare the entire contract avoided. As Mcknight Company only delivered 85% of the goods and the parties filed a lawsuit due to dispute over quality of the goods, the remaining 15% of the contract failed to be performed. Therefore, the unperformed 15% of the contract should be declared avoided within the scope of EC SA's claims. The amount of compensation claimed by EC SA should be a result of adequate evaluation of its direct losses and prospect interest. However, as EC SA was at fault to some extent in the performance of the contract, which indirectly caused expansion of losses, it was decided that Mcknight Company should compensate EC SA USD 30,000 by referring to the amount of compensation claimed, the faults of both parties, the utilizable value of the goods involved, and other factors. On those grounds, the

——日本财产保险（中国）有限公司上海分公司等与罗宾逊全球物流（大连）有限公司深圳分公司等保险人代位求偿权纠纷案

Intermediate People's Court of Nantong City determined that Mcknight Company should compensate EC SA USD 30,000 for economic losses and other claims of EC SA should not be supported. After the judgment of first instance was pronounced, neither party appealed and the judgment has been satisfied.

[Significance]

The system of declaration of contract avoidance under the CISG is essentially equivalent to the system of contract rescission under laws of China. In the trial of this case of dispute over a contract for the international sale of goods between a Chinese enterprise and an enterprise from a partner of the BRI, the people's court accurately comprehended and applied the system of declaration of contract avoidance under the CISG. On the one hand, it accurately determined the circumstances of fundamental breach of contract and the reasonable time limit for exercising the right to rescind the contract and did not allow declaration of avoidance of the entire contract, which reflected the restrictive provisions on the right of rescission provided in Article 49 (2) of the CISG based on good faith. On the other hand, according to the characteristic of the contract that goods were delivered in batches, it allowed declaration of avoidance of partial contract, that is, rescission of partial contract and the breaching party's compensation for economic losses of the observant party, which reflected the functions and roles of the people's court in maintaining the order of international sale of goods and equally protecting the legitimate rights and interests of both Chinese and foreign parties.

[Reference No. of the Judgment of First Instance] No. 429 [2019], First, Civil Division, IPC, Nantong, Jiangsu

【基本案情】

罗宾逊深圳分公司与中芯公司签订《物流服务承揽协议》，罗宾逊公司针对案涉两台机器设备的运输签发两份不可转让的空运单，承运人均为中华航空公司。案涉设备空运至深圳机场后，在机场货站存放期间遭受雨淋。2016年11月28日，中芯公司至深圳机场提货，发现设备外包装受潮破损，于次日向罗宾逊公司发送索赔通知书。日本财保上海分公司、太平洋财保上海分公司、中银保险上海分公司三保险公司根据其与中芯公司签订的保险合同，向中芯公司支付了赔偿款117万美元，并分别于2018年7月24日、2018年9月30日、2019年11月27日向罗宾逊公司发送索赔函，于2020年5月28日提起本案代位求偿权诉讼，要求罗宾逊深圳分公司、罗宾逊公司支付赔偿款。罗宾逊深圳分公司、罗宾逊公司答辩称《蒙特利尔公约》规定的两年诉讼时效为不变期间即除斥期间，三保险公司本案起诉已超过两年诉讼时效，应驳回其诉讼请求。

【裁判结果】

广东省深圳市中级人民法院审理认为，《蒙特利尔公约》的解释应当遵循《维也纳条约法公约》规定的条约解释规则，依其用语按上下文并参照条约目的及宗旨所具有的通常意义，作出善意解释。《蒙特利尔公约》第三十五条系有关诉讼时效的规定，该条未对诉讼时效的中止、中断作出规定，第二款指出两年诉讼时效期间的计算方法依照案件受理法院的法律确定，故本案中公约第三十五条规定的两年诉讼时效应适用我国法律有关诉讼时效中止、中断的规定。同时，《蒙特利尔公约》将保护国际航空消费者的利益作为立约重要目的，适用法院地法有关诉讼时效中止、中断的规则，更有利于此立约目的，也不违背该公约第三十五条的制定意图。本案诉讼时效因中芯公司、三保险公司向罗宾逊深圳分公司、罗宾逊公司提出索赔构成中断，三保险公司提起本案诉讼未超过两年诉讼时效，遂改判罗宾逊深圳分公司在《蒙特利尔公约》规定的限额内向三保险公司支付赔偿款，罗宾逊公司对此承担补充清偿责任。

Case No. 2: Determining the Provisions on the Limitation of Actions as Provided in the Montreal Convention under the Principles of Treaty Interpretation and the Discontinuance of Limitation of Actions by Applying the Law of the Forum

— Case of dispute over insurer's subrogation (Shanghai Branch of Sompo Japan Insurance (China) Co., Ltd. et al. v. Shenzhen Branch of C.H. Robinson Worldwide (Dalian) Limited et al.)

【典型意义】

本案争议焦点在于《蒙特利尔公约》第三十五条规定的两年期间是不变期间还是诉讼时效期间的规定，对此各国司法实践的认定不尽一致。二审判决根据《维也纳条约法公约》的规定解释《蒙特利尔公约》条文，根据《蒙特利尔公约》第三十五条上下文并参照该公约之目的及宗旨，认定该条规定的两年期间为诉讼时效，应当适用法院地法有关诉讼时效中断的规定，从而认定原告起诉未超过诉讼时效，体现出我国法院恪守条约义务，致力于实现公约目的及宗旨的司法立场，对于类案处理具有重要的指导意义。

[Basic Facts]

Shenzhen Branch of C.H. Robinson Worldwide (Dalian) Limited (hereinafter referred to as "Shenzhen Branch") and SMIC entered into a Contracting Agreement on Logistics Services. C.H. Robinson Worldwide (Dalian) Limited (hereinafter referred to as "C.H. Robinson Company") issued two non-transferable air waybills with respect to the transportation of two pieces of machinery equipment involved, with China Airlines as the carrier. After being transported to the Shenzhen Airport by air, the machinery equipment involved was drenched by rain while being stored in the cargo terminal of the Airport. On November 28, 2016, SMIC picked up the goods at the Shenzhen Airport and found that the outer packing of the equipment was damaged due to moisture. It sent a notice of claim to C.H. Robinson Company on the next day. Shanghai Branch of Sompo Japan Insurance (China) Co., Ltd., Shanghai Branch of CPIC, and Shanghai Branch of BOC Insurance paid SMIC an indemnity of USD 1.17 million in accordance with the insurance contracts entered into between them and SMIC. They separately issued letters of claim to C.H. Robinson Company on July 24, 2018, September 30, 2018, and November 27, 2019. They filed this lawsuit of subrogation on May 28, 2020 and claimed that Shenzhen Branch and C.H. Robinson Company should pay the indemnity. Shenzhen Branch and C.H. Robinson Company replied that the limitation of actions of two years as provided in the Montreal Convention was an invariable period, that is, the repose period, the lawsuit filed by the three insurance companies had exceeded the limitation of actions of two years and their claims should be dismissed.

【一审案号】广东省深圳前海合作区人民法院（2020）粤0391民初4178号

[Judgment]

【二审案号】广东省深圳市中级人民法院（2021）粤03民终30373号

In the trial, the Intermediate People's Court of Shenzhen City, Guangdong Province held that the Montreal Convention should be interpreted in accordance with the treaty interpretation rules set out in the Vienna Convention on the Law of Treaties. The terms of the Montreal Convention should be interpreted in good faith according to the ordinary meaning given by the context and in the light of the purpose and tenet of the Convention. Article 35 of the Montreal Convention is a provision on the limitation of actions, which does not provide on suspension and discontinuance of the limitation of actions. The second paragraph thereof points out that the method of calculating the two-year limitation of actions should be determined by the law of the forum. Therefore, the two-year limitation of actions as provided in Article 35 of the Montreal Convention should be subject to the provisions on suspension and discontinuance of the limitation of actions as provided in the laws of China. Meanwhile, the protection of interests of international aviation consumers is an important purpose of the Montreal Convention. Therefore, the application of the rules on suspension and discontinuance of the limitation of actions of the forum is more conducive to this purpose and does not violate the intention of Article 35 of the Montreal Convention. The limitation of actions in this case was discontinued as SMIC and the three insurance companies filed claims against Shenzhen Branch of C.H. Robinson Company and the three insurance companies' filing of this lawsuit did not exceed the two-year limitation of actions. The Intermediate People's Court of Shenzhen City thus modified the original judgment so that Shenzhen Branch should pay the three insurance companies the indemnity within the limit provided in the Montreal Convention and C.H. Robinson Company should assume

案例3. 准确判定议付行为是否善意 促进信用证制度健康发展

the supplementary liquidation liability therefor.

[Significance]

The issue of this case is whether the two-year period provided in Article 35 of the Montreal Convention is an invariable period or a period of limitation of actions. The determination of the aforesaid issue in judicial practice of various countries is inconsistent. In the judgment of second instance, the provisions of the Montreal Convention were interpreted in accordance with the provisions of the Vienna Convention on the Law of Treaties. In accordance with the context of Article 35 of the Montreal Convention and by referring to the purpose and tenet thereof, the court of second instance determined that the two-year period as provided in the Article was a period of limitation of actions, the provisions on discontinuance of limitation of actions in the law of the forum should apply, and decided that the lawsuit filed by plaintiffs did not exceed the limitation of actions. This case has reflected the judicial position of the people's courts in China in strictly abiding by the obligations provided in the Montreal Convention and their efforts to realize the purpose and tenet of the Montreal Convention, and is of great guiding significance for handling similar cases.

——江苏普华有限公司与东亚银行（中国）有限公司上海分行等信用证欺诈纠纷案

【基本案情】

[Reference No. of the Judgment of First Instance] No. 4178 [2020], First, Civil Division, Primary People's Court of Qianhai Cooperation Zone, Shenzhen, Guangdong

[Reference No. of the Judgment of Second Instance] No. 30373 [2021], Final, Civil Division, IPC, Shenzhen, Guangdong

传旗公司委托普华公司代理进口棉花。同日，普华公司与诚峰公司签订《买卖合同》，约定诚峰公司向普华公司出售原棉，付款方式为见票付款信用证，通知行为东亚银行。经普华公司申请，光大银行开立了信用证。2013年5月30日，东亚银行向诚峰公司发出《付款通知书》。同日，诚峰公司向东亚银行递交《交单委托指示》，在“其他指示栏”注明“担保一切不符点”。诚峰公司提交的信用证项下提单没有其载明的托运人的背书，仅有诚峰公司的签章背书。普华公司收到光大银行转交的单据后承付，并委托第三方办理提货手续，但被告知提单项下货物已被提走。2015年2月12日，传奇公司法定代表人、诚峰公司代表人陈某被判处信用证诈骗罪。普华公司提起本案诉讼，请求判令终止支付光大银行开立信用证项下款项。一、二审判决认为东亚银行的议付不属于善意议付，依据普华公司诉请判令终止支付案涉信用证项下款项。东亚银行申请再审。

【裁判结果】

Case No. 3: Accurately Determining Whether Payment Was Negotiated in Good faith and Promoting the Sound Development of the L/C System

— Case of dispute over L/C fraud (Jiangsu Puhua Co., Ltd. v. Shanghai Branch of Bank of East Asia (China) Co., Ltd.

[Basic Facts]

最高人民法院再审审查认为，根据《最高人民法院关于审理信用证纠纷案件若干问题的规定》第十条第一款第四项的规定，议付行善意地进行了议付是信用证欺诈止付的例外情形。关于议付行为是否善意，应综合考虑议付行在议付之前是否参与或知晓欺诈，其是否尽到审单义务。根据国际商会制定的《跟单信用证统一惯例》（UCP600）第14条规定，议付行应在相符交单的情况下办理议付，其具有独立的审单义务。因此，东亚银行关于开证行接受了案涉提单背书的瑕疵，其议付系善意的主张不能成立。对于如何审核指示提单，国际商会制定的《关于审核跟单信用证项下单据的国际标准银行实务》（ISBP）第E13a要求，对于指示提单，必须经托运人背书。这是一项长期存在的银行业惯例。诚峰公司向东亚银行提交的指示提单均仅有诚峰公司的背书，而没有托运人或托运人代理人的背书，不符合案涉信用证关于相应提单应为“指示提单、空白背书并注明运费预付”的要求，属于单证不相符。东亚银行对于单据的审查未尽到一般注意义务，其要求受益人在《交单委托指示》中填写“担保一切不符点”即予以议付，其议付行为不属于善意议付行为，故裁定驳回东亚银行的再审申请。

【典型意义】

信用证制度通过降低交易风险，促进了“一带一路”共建国家之间的贸易发展。本案通过明晰议付行的议付行为是否善意，进一步明确了《最高人民法院关于审理信用证纠纷案件若干问题的规定》第十条第一款规定的信用证欺诈止付的例外情形之具体适用。一是明确了议付行负有独立审单责任。根据UCP600之规定，信用证交易项下的开证行、保兑行、议付行均有独立审核单据的责任。《最高人民法院关于审理信用证纠纷案件若干问题的规定》明确开证行有独立审查单据的义务，但并不因此免除议付行独立审核单据的责任。二是明确了应当如何审核提单的不符点，即要严格依据案涉信用证要求及其所适用《跟单信用证统一惯例》和已经成为行业惯例的银行标准实务规定的审单标准要求审核提单。三是确立了银行议付行为是否善意的裁判尺度。议付行审单应当尽到专业银行应尽的审慎义务。本案对于促进信用证制度健康发展从而助力“一带一路”建设具有典型意义。

Chuanqi Company entrusted Jiangsu Puhua Co., Ltd. (hereinafter referred to as “Puhua Company”) to act as an agent for the import of cotton. On the same day, Puhua Company and Chengfeng Company entered into a Sales Contract, under which Chengfeng Company sold raw cotton to Puhua Company, payment was made by letter of credit (L/C) payable on demand, and Shanghai Branch of Bank of East Asia (China) Co., Ltd. (hereinafter referred to as “Shanghai Branch of BEA”) was the notifying bank. Upon Puhua Company's application, China Everbright Bank (hereinafter referred to as “CEB”) issued the L/C. On May 30, 2013, Shanghai Branch of BEA issued to Chengfeng Company a Notice of Payment to Chengfeng Company. On the same day, Chengfeng Company submitted to Shanghai Branch of BEA the Instructions for Representation of Documents and specified “guarantee for all discrepancies” in the “Column of Other Instructions.” The bill of lading under the L/C submitted by Chengfeng Company did not set forth the endorsement of the consignor and it only bore the signature endorsement of Chengfeng Company. Upon receipt of the documents forwarded by CEB, Puhua Company promised to make payment and entrusted a third party with handling the delivery formalities, but was informed that the goods under the bill of lading had been taken away. On February 12, 2015, Chen [REDACTED], legal representative of both Chuanqi Company and Chengfeng Company, was convicted of L/C fraud. Puhua Company filed this lawsuit and requested that the court should order termination of payment under the L/C issued by CEB. According to the judgments of first instance and second instance, the act of Shanghai Branch of BEA was a negotiation of payment in good faith and requested by Puhua Company, the courts of first instance and second instance ordered termination of payment under the L/C

【一审案号】武汉海事法院（2013）武海法商字第01201号

involved. Shanghai Branch of BEA filed an application for retrial.

[Judgment]

【二审案号】湖北省高级人民法院（2019）鄂民终828号

Upon retrial, the Supreme People's Court held that, pursuant to the provisions of item (4), paragraph 1 of Article 10 of the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases of L/C Disputes, the negotiating bank's negotiation of payment in good faith was an exceptional circumstance for termination of payment in a L/C fraud. With respect to whether the payment was negotiated in good faith, it should be taken into full account whether the negotiating bank engaged in or knew the fraud before negotiating the payment and whether the negotiating bank fulfilled the obligation of examining documents. In accordance with the provisions of Article 14 of the Uniform Customs and Practice for Documentary Credits (UCP600) developed by the International Chamber of Commerce, the negotiating bank shall negotiate the payment under the circumstance of complying representation of documents and it shall have an independent obligation of examining documents. Therefore, the claims of Shanghai Branch of BEA that the issuing bank accepted the defect of endorsement on the bill of lading involved and the payment was negotiated in good faith were untenable. With regard to how to examine an order bill of lading, according to the requirements as provided in E13a of the International Standard Banking Practice (ISBP) for the Examination of Documents under Documentary Credits (hereinafter referred to as “ISBP”) developed by the International Chamber of Commerce, an order bill of lading must be endorsed by the carrier. This is a long-standing banking practice. In the order bill of lading

【再审审查案号】最高人民法院（2020）最高法民申2937号

presented by Chengfeng Company to Shanghai Branch of BEA, there was only endorsement of Chengfeng Company and there was no endorsement of the carrier or carrier's agent. The order bill of lading did not satisfy the requirements of the L/C involved that the corresponding bill of lading should be “an order bill of lading or a blank endorsement and freight prepaid should be marked.” Therefore, it constituted noncomplying documents. Shanghai Branch of BEA failed to perform the general duty of care for examination of documents. As it required that the beneficiary should enter “guarantee for all discrepancies” in the Instructions for Entrusted Presentation of Documents and then negotiate the payment, such act was not an act of negotiating the payment in good faith. Therefore, the Supreme People's Court ruled to deny the application of Shanghai Branch of BEA for retrial.

[Significance]

案例4.明确保函欺诈以及银行付款行为是否善意的认定标准 维护独立保函见索即付制度价值

The L/C system facilitates trade development among the BRI partner countries by reducing transaction risks. In this case, by clarifying whether the negotiating bank negotiated the payment in good faith, the specific application of an exceptional circumstance for termination of payment in L/C fraud as set forth in paragraph 1 of Article 10 of the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases of L/C Disputes was further specified. First, it was specified that the negotiating bank is responsible for independently examining documents. In accordance with the provisions of UCP600, the issuing bank, the confirming bank, and the negotiating bank under L/C transaction are all responsible for independently examining documents. Under the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases of L/C Disputes, the issuing bank is obliged to independently examine documents; however, this does not exempt the negotiating bank from its responsibility of independently examining documents. Second, how discrepancies on the bill of lading should be examined was specified, that is, a bill of lading should be examined in strict accordance with the requirements of the L/C involved and the document examination requirements of the applicable Uniform Customs and Practice for Documentary Credits and the standards for examining documents provided for in the banking standards and practices that have become the industrial practice. Third, the criteria for judgment for determining whether a bank negotiates the payment in good faith was established. When examining a document, the negotiating bank should fulfill the duty of care of a professional bank. This case is of typical significance for promoting the sound development of the L/C system and facilitating the development of the BRI.

——中国电建集团山东电力建设有限公司与印度卡玛朗加能源公司（GMR KAMALANGA Energy Ltd.）等涉外保函欺诈纠纷案

[Reference No. of the Judgment of First Instance] No. 01201 [2013], Commercial Division, Wuhan Maritime Court

[Reference No. of the Judgment of Second Instance] No. 828 [2019], Final, Civil Division, HPC, Hubei

[Reference No. of the Judgment Rendered upon Retrial Examination] No. 2937 [2020], Petition, Civil Division, SPC

Case No. 4: Clarifying the Standards for Determining a Guarantee Fraud and Whether a Bank's Payment Was Made in Good faith and Safeguarding the Value of the Independent Demand Guarantee System

【基本案情】

山东电建与能源公司签订合同，约定山东电建作为承包商，在印度承建一座燃煤火电厂。根据山东电建的申请，银行开立了9份金额共计202322359美元的保函，并开立了相应的反担保函。合同履行过程中，能源公司以山东电建违约为由要求印度国家银行班加罗尔分行支付保函项下的全部款项。印度国家银行班加罗尔分行向能源公司支付了4份保函项下的款项。印度国家银行上海分行按照印度国家银行班加罗尔分行向其提出的索赔，支付了反担保函项下的相应款项。山东电建提起本案诉讼，请求终止支付案涉保函、反担保函项下的款项。

【裁判结果】

最高人民法院二审认为，山东电建以独立保函欺诈为由提起本案诉讼，其应当举证证明印度银行班加罗尔分行、印度银行上海分行明知能源公司存在独立保函欺诈情形，仍然违反诚信原则予以付款，并进而以受益人身份在见索即付独立反担保函项下提出索款请求。由于能源公司的索赔符合保函条款，印度银行班加罗尔分行应承担见索即付的付款责任；至于付款当日是否有罢工情形、款项的支付方式是否符合能源公司索兑函的要求与判断该行付款行为是否善意没有关联。山东电建未能提交充分的证据证明印度银行班加罗尔分行付款是非善意的，一审判决认定其为非善意付款缺乏事实和法律依据，应予纠正。反担保函为转开独立保函情形下用以保障追偿权的独立保函，在相符交单的条件成就时，就产生开立人的付款义务。因此，印度银行上海分行在收到印度银行班加罗尔分行的相符索赔时，即应承担付款义务，其也有权向浦发银行济南分行和工行山东省分行索赔。一审判决认定印度银行上海分行非善意付款缺乏事实和法律依据，应予纠正。印度银行班加罗尔分行和印度银行上海分行上诉主张其构成善意付款，不应止付反担保函下款项的上诉理由成立，予以支持。改判驳回山东电建的诉讼请求。

— Case of dispute over foreign-related guarantee fraud (Shandong Electric Power Construction Co., Ltd. under Power Construction Corporation of China, Ltd. v. GMR KAMALANGA Energy Ltd. et al.)

【典型意义】

本案重申了独立保函“见索即付”的制度价值，人民法院对基础交易的审查坚持有限原则和必要原则。出具独立保函的银行只负责审查受益人提交的单据是否符合保函条款的规定并有权自行决定是否付款，担保函的付款义务不受基础交易项下抗辩权的影响。本案同时明确了反担保函项下“善意付款”的认定标准。本案裁判体现了对中外当事人的平等保护原则和我国良好的法治环境，对推动中国企业在“走出去”过程中加强法律意识，提升风险管控能力亦具有积极意义。

[Basic Facts]

Shandong Electric Power Construction Co., Ltd. under Power Construction Corporation of China, Ltd. (hereinafter referred to as "Shandong Electric Power Construction Company") and GMR KAMALANGA Energy Ltd. (hereinafter referred to as "Energy Company") entered into a contract, stipulating that Shandong Electric Power Construction Company would build a coal-fired power plant in India as a contractor. Upon application of Shandong Electric Power Construction Company, a bank issued nine letters of guarantee with a total amount of USD 202,322,359 and the relevant letters of counter guarantee were issued. In the performance of the contract, on the ground that Shandong Electric Power Construction Company breached the contract, Energy Company demanded that Bangalore Branch of State Bank of India (hereinafter referred to as "Bangalore Branch") should make full payment under the letters of guarantee. Bangalore Branch made payment under four letters of guarantee to Energy Company. Shanghai Branch of State Bank of India (hereinafter referred to as "Shanghai Branch") made corresponding payment under the letters of counter guarantee according to the claim raised to it by Bangalore Branch. Shandong Electric Power Construction Company filed this lawsuit and requested that the payments under the letters of guarantee and letters of counter guarantee should be terminated.

【一审案号】山东省高级人民法院（2014）鲁民四初字第6号

[Judgment]

【二审案号】最高人民法院（2019）最高法民终513号

In the trial of second instance, the Supreme People's Court held that as Shandong Electric Power Construction Company filed this lawsuit on the ground of independent guarantee fraud, it should provide evidence to prove that Bangalore Branch and Shanghai Branch knew that Energy

Company fell under circumstances of independent guarantee fraud, but Bangalore Branch still made payments in violation of the principle of good faith and then raised a claim as a beneficiary under the independent demand counter guarantees. Since Energy Company's claim complied with the terms of the guarantee, Bangalore Branch should undertake the liability for payment on demand; with regard to whether there was a strike on the date of payment or whether the payment method complied with the requirements in the demand letter issued by Energy Company were irrelevant to determining whether Bangalore Branch made payments in good faith. Shandong Electric Power Construction Company failed to submit sufficient evidence to prove that Bangalore Branch made payment not in good faith. Therefore, the judgment of first instance that the payments were made by Bangalore Branch not in good faith lacked factual basis and legal basis and should be corrected. A counter guarantee is an independent guarantee for securing the right of recourse under the circumstances of re-issuance of an independent guarantee. Where the conditions for complying presentation are met, the payment obligation of the issuer arises. Therefore, when Shanghai Branch received a complying claim from Bangalore Branch, Shanghai Branch should undertake the payment obligation and Shanghai Branch also had the right to raise a claim to Jinan Branch of Shanghai Pudong Development Bank and Shandong Branch of ICBC. The conclusion in the judgment of first instance that Shanghai Branch made payments not in good faith lacked factual and legal basis and should be corrected. The appellate grounds of Bangalore Branch and Shanghai Branch that they made payments in good faith and payments under the letters of counter guarantee should not be terminated were tenable and should be upheld. The Supreme People's Court modified the original

案例5. 准确界定转开保函情形下反担保函受益人的“滥用付款请求权”厘清不同欺诈情形的认定标准

judgment and dismissed the claims of Shandong Electric Power Construction Company.

[Significance]

This case has restated the value of "payment on demand" of independent guarantees and that the examination of an underlying transaction by the people's court should follow the principles of limitation and necessity. The bank issuing an independent guarantee is only responsible for examining whether the documents presented by the beneficiary comply with the terms of the guarantee and it has the discretion to decide whether or not to make payment. The payment obligation under the guarantee is not affected by the right to defense under the underlying transaction. This case has also clarified the standards for determining "payment in good faith" under a counter guarantee. The judgment of this case has reflected the principle of equal protection of Chinese and foreign parties and demonstrated a favorable legal environment in China. It is of positive significance for promoting Chinese enterprises to strengthen their legal awareness and improve their risk control ability in the process of "going global."

——阿拉伯及法兰西联合银行（香港）有限公司【UBAF（Hong Kong） Ltd.】与中国银行股份有限公司河南省分行独立保函付款纠纷案

【基本案情】

[Reference No. of the Judgment of First Instance] No. 6 [2014], First, Civil Division IV, HPC, Shandong

[Reference No. of the Judgment of Second Instance] No. 513 [2019], Final, Civil Division, SPC

Case No. 5: Accurately Defining "Abuse of the Right of Claim" by the Counter Guarantee Beneficiary under the Circumstance of Reissuing a Letter of Guarantee and Clarifying the Standards for Determining Various Circumstances of Fraud

— Case of dispute over payment by independent guarantee (UBAF (Hong Kong) Ltd. v. Henan Branch of Bank of China Limited)

中国银行河南省分行以阿拉伯及法兰西联合银行（香港）有限公司（以下简称UBAF）为受益人开具了《反担保履约保函》《反担保预付款保函》。UBAF根据中国银行河南省分行的指示向韩国现代出具了《履约保函》和《预付款保函》。2011年12月15日，UBAF向中国银行河南省分行提出索赔请求，称已经收到韩国现代与《预付款保函》相符的索赔请求。事实上，直到12月19日，UBAF才收到韩国现代依据《预付款保函》提出的相符索赔。经韩国现代起诉，香港高等法院判令UBAF向韩国现代付款。UBAF遂依据《反担保预付款保函》提起本案诉讼，请求中国银行河南省分行支付该保函项下款项。

【裁判结果】

最高人民法院二审认为，如果反担保函受益人在尚未获得付款请求权的情况下，通过隐瞒事实、虚假提交表面相符索赔请求等方式，向该保函的开立人提出付款请求，构成《最高人民法院关于审理独立保函纠纷案件若干问题的规定》第十二条第五款规定的“受益人明知其没有付款请求权仍滥用该权利”的欺诈情形。其最终实际向其所开立的保函受益人支付了款项，并不构成《最高人民法院关于审理独立保函纠纷案件若干问题的规定》第十四条第三款规定的“善意付款”情形。据此，改判驳回UBAF的全部诉讼请求。

【典型意义】

[Basic Facts]

在“一带一路”建设中，独立保函是当事人经常选择的一种工程履约担保方式，近年来人民法院受理的涉外独立保函纠纷案件呈上升趋势。本案详细阐释与澄清了涉外独立保函纠纷中，相符索赔、欺诈、善意付款的认定等存在争议的问题。在转开保函的情形下，反担保函的受益人经常同时具有独立保函开立人的身份。《最高人民法院关于审理独立保函纠纷案件若干问题的规定》第十四条第三款“善意付款”构成欺诈止付的例外情形的适用前提是独立保函受益人欺诈索赔并获得开立人付款，此时重点应判断是否存在“双重欺诈”；如开立人对受益人欺诈不知情而善意付款的，不构成“双重欺诈”，则应保护开立人利益，不予止付。对于不存在独立保函受益人欺诈索赔情形的，例如本案反担保函受益人以“受益人”身份独立向反担保函的开立人请求付款的“单重欺诈”，则应适用第十二条的一般规则判断其是否构成欺诈索赔，没有第十四条第三款的适用空间。本案正确认定第十二条和第十四条第三款之间的关系，对人民法院审理独立保函纠纷案件具有较强的指导意义和示范作用。

Henan Branch of Bank of China Limited (hereinafter referred to as "Henan Branch of BOC") issued a Counter-Guarantee Performance Bond and a Counter-Guarantee Advance Payment Bond with UBAF (Hong Kong) Ltd. (hereinafter referred to as "UBAF") as the beneficiary. Under the instructions of Henan Branch of BOC, UBAF issued a Performance Security and an Advance Payment Bond to South Korea's Hyundai Motor Group (hereinafter referred to as "Hyundai"). On December 15, 2011, UBAF filed a claim to Henan Branch of BOC, stating that it had received a claim from Hyundai, which was consistent with the Advance Payment Bond. As a matter of fact, it was not until December 19 that UBAF received the corresponding consistent claim raised by Hyundai in accordance with the Advance Payment Bond. Hyundai filed a lawsuit and the High Court of Hong Kong ordered UBAF to make payment to Hyundai. UBAF thus filed this lawsuit in accordance with the Counter-Guarantee Advance Payment Bond and claimed that Henan Branch of BOC should make payment under the Counter-Guarantee Advance Payment Bond.

【一审案号】河南省高级人民法院（2014）豫法民三初字第3号

[Judgment]

【二审案号】最高人民法院（2018）最高法民终880号

In the trial of second instance, the Supreme People's Court held that if the beneficiary of a counter guarantee has not yet obtained the right of claim, but it raised a claim for payment to the issuer of the counter guarantee by means of concealing facts or falsely submitting a superficially consistent claim for compensation, the above acts of the beneficiary constituted a fraud under which "the beneficiary still abuses the right of claim knowing that it has no such right" as prescribed in paragraph 5 of Article 12 of the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Independent Guarantee Dispute Cases. Such beneficiary's final actual payment to the beneficiary of the guarantee it issued did not fall under the circumstance of "making payment in good faith" as prescribed in paragraph 3 of Article 14 of the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Independent Guarantee Dispute Cases. In view of the above, the Supreme People's Court modified the original judgment and dismissed all claims of UBAF.

[Significance]

In the development of the BRI, independent guarantee is a method frequently selected by the parties for engineering performance guarantee. In recent years, cases of foreign-related disputes over independent guarantee accepted by the people's courts are on the rise. This case has elaborated and clarified the controversial issues including determination of complying claim for compensation, fraud, and payment in good faith. Under the circumstance of guarantee reissuance, the beneficiary of a counter guarantee is often also the issuer of an independent

案例6.严格限定审计侵权赔偿责任诉讼“利害关系人”的范围 阐明会计师事务所注意义务的法理基础

——富昇（天津）融资租赁有限公司与德国致同会计师事务所股份有限公司（Warth & Klein Grant Thornton AG）侵权责任纠纷案

guarantee. The exception where the "payment in good faith" as prescribed in paragraph 3 of Article 14 of the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Independent Guarantee Dispute Cases constitutes a fraudulent suspension of payment should apply on the premise that the beneficiary of an independent guarantee fraudulently claims for compensation and obtains payment from the issuer. Under this circumstance, emphasis should be put on whether there is a "double fraud"; if the issuer makes the payment in good faith without knowing the fraud of the beneficiary, it does not constitute a "double fraud" and the interests of the issuer should be protected and the payment should not be suspended. Where there is no fraudulent claim for compensation by the beneficiary of an independent guarantee, for example, there is only a "single fraud" where the beneficiary of the counter guarantee in this case independently claimed for payment to the issuer of the counter guarantee, the general rules set out in Article 12 thereof should apply in determining whether such claim for payment constitutes a fraudulent claim and there is no applicable space of paragraph 3 of Article 14 thereof. The correct determination of the relationship between Article 12 and paragraph 3 of Article 14 of the Provisions in this case has provided strong guidance and demonstration for the people's courts in trying independent guarantee dispute cases.

【基本案情】

[Reference No. of the Judgment of First Instance] No. 3 [2014], First, Civil Division III, HPC, Henan	富昇公司与中宇建材于2012年签订两份《融资租赁合同》，中宇卫浴、中宇陶瓷作为担保人提供连带责任担保。富昇公司向中宇建材发放了1.88亿元人民币的融资款。但中宇建材仅偿还部分款项，后该企业破产。德国中宇是在德国上市的公司，其全资持股香港中宇，香港中宇全资持股中宇卫浴和中宇陶瓷，中宇卫浴则全资持股中宇建材。富昇公司主张，中宇建材申请贷款时的项目报告记载，中宇建材及担保人均是德国中宇下属核心企业，富昇公司据此从德国证券市场网站下载了致同公司为德国中宇出具的审计报告，并信赖、使用该审计报告包含的不实信息而作出贷款交易决策并进而遭受损失，诉请判令致同公司赔偿富昇公司损失。
[Reference No. of the Judgment of Second Instance] No. 880 [2018], Final, Civil Division, SPC	【裁判结果】

Case No. 6: Strictly Limiting the Scope of "Interested Parties" in Litigation over Compensation Liability for Audit-related Tort and Clarifying the Legal Basis for the Duty of Care of the Accounting Firm

— Case of dispute over tortious liability (Fusheng (Tianjin) Financial Leasing Co., Ltd. v. Warth & Klein Grant Thornton AG)

【典型意义】

最高人民法院二审审理认为，涉外审计侵权赔偿责任纠纷适用侵权行为地法，因侵权行为地包括侵权行为实施地和侵权结果发生地，一审判决适用侵权结果发生地法律即我国法律正确。会计师事务所不实审计报告侵权赔偿责任的实质是侵权法律逻辑与公共政策之间的平衡与协调，既要彰显侵权责任法的遏制和救济功能，又要避免发生正常市场风险分配机制扭曲的现象，其关键点在于确定合理信赖或使用不实审计报告致损的“利害关系人”之范围。根据《最高人民法院关于审理涉及会计师事务所在审计业务活动中民事侵权赔偿案件的若干规定》（以下简称《审计侵权赔偿规定》）第二条的规定，因合理信赖或者使用会计师事务所不实报告而遭受损失的利害关系人只限于两类：一类是与被审计单位进行交易活动而遭受损失的主体，另一类是从事与被审计单位股票期权等有关的交易而遭受损失的主体。上述两类人员以外的第三人不属于法律保护的利害关系人，在我国侵权责任法等法律无其他规定的情况下，应当认定会计师事务所对其他第三人不负有法定注意义务。本案中，虽然致同公司审计报告中《合并财务报表附注》列明合并财务报表的公司包括中宇建材，但中宇建材并不是致同公司的审计对象，富昇公司也未从事与致同公司审计对象德国中宇股票期权等有关的交易，故富昇公司不是致同公司审计报告侵权损害赔偿之诉的利害关系人。致同公司对富昇公司不负有法定注意义务，其相应不具有违反法定注意义务之过错，不应承担侵权责任。据此，判决驳回富昇公司诉讼请求。

[Basic Facts]

随着共建“一带一路”高质量发展，会计师事务所跨境业务量呈现增长态势，会计师事务所审计侵权责任问题也愈加受到关注。本案一方面阐明了涉外审计侵权赔偿责任纠纷的法律适用，明确可适用侵权结果发生地法，为中国法的域外适用明晰了法理基础；另一方面，通过阐明会计师事务所审计侵权赔偿责任以及注意义务的理论基础，对《审计侵权赔偿规定》第二条予以严格解释，明确人民法院无权在法律和司法解释规定之外扩大认定利害关系人的范围，较好平衡了专业侵权责任的救济功能与公共政策之间的关系，有助于形成稳定的市场预期，为同类案件的法律适用起到了很好的示范效果，对我国企业“走出去”参与“一带一路”建设亦具有积极意义。

Fusheng (Tianjin) Financial Leasing Co., Ltd. (hereinafter referred to as "Fusheng Company) and Joyou Building Materials Co., Ltd. (hereinafter referred to as "Joyou Building Materials Company") entered into two financial leasing contracts in 2012, under which Joyou Sanitaryware Co., Ltd. (hereinafter referred to as "Joyou Sanitaryware Company") and Joyou Ceramics Co., Ltd. (hereinafter referred to as "Joyou Ceramics Company") acted as guarantors to provide joint and several liability guarantee. Fusheng Company granted financing funds of 188 million yuan to Joyou Building Materials Company. However, Joyou Building Materials Company only paid partial funds and it went bankrupt later. Joyou AG is a company listed in Germany and it wholly holds shares of Joyou (Hong Kong) Company, which in turn wholly holds shares of Joyou Sanitaryware Company and Joyou Ceramics Company. Joyou Sanitaryware Company wholly holds shares of Joyou Building Materials Company. Fusheng Company alleged that according to the project report prepared by Joyou Building Materials Company at the time of application for loans, Joyou Building Materials Company and the guarantors were core enterprises affiliated to Joyou AG. Fusheng Company thereby downloaded the audit report issued by Warth & Klein Grant Thornton AG (hereinafter referred to as "Grant Thornton") from the website of German securities market, trusted and used false information in the audit report to make loan transaction decisions, and subsequently suffered losses. Fusheng Company thus requested that the court should order Grant Thornton to compensate for its losses.

【一审案号】天津市高级人民法院（2018）津民初27号

[Judgment]

In the trial of second instance, the Supreme People's Court

【二审案号】最高人民法院（2021）最高法民终575号

held that the laws at the place of tort should apply to the foreign-related audit dispute over compensation liability for audit--related tort. As the places of tort included both the place where the tort was committed and the place where the tort produced results, it was correct to apply the law at the place where the tort produced results, namely, the law of the People's Republic of China. The essence of the tortious liability for compensation caused by the false audit report issued by the accounting firm was balance and coordination between the legal logic of torts and public policies. The containment and relief functions of the tort law should be demonstrated and the distortion of the normal market risk allocation mechanism should be avoided. The key point was to determine the scope of "interested parties" who may sustain losses due to reasonable reliance or use of a false audit report. In accordance with the provisions of Article 2 of the Several Provisions of the Supreme People's Court on the Trial of Compensation Cases for Civil Tort Involving Accounting Firms Engaging in the Audit Business (hereinafter referred to as the "Provisions on Compensation for Audit-related Tort"), the interested parties suffering losses due to reasonable reliance on or use of a false report issued by an accounting firm are limited to two categories: entities suffering losses in doing a deal with the audited entity and entities suffering losses in doing a deal relating to the stocks or bonds of the audited entity. Any third party other than the above two types of persons are not the interested parties under legal protection. Where there are no other provisions in the Tort Law of the People's Republic of China and other laws, it should be determined that the accounting firm did not bear the statutory duty of care to any other third party. In this case, although the companies listed in the Notes to the Consolidated Financial Statements in the audit report issued by Grant Thornton

案例7.依法审查复杂国际商事合同 区分股权转让与股权让与担保

included Joyou Building Materials Company, Joyou Building Materials Company was not the audited subject of Grant Thornton and Fusheng Company had never engaged in any transactions related to stock options of Joyou AG, the audited object of Grant Thornton. Therefore, Fusheng Company was not an interested party to the lawsuit involving compensation for tort caused by the audit report issued by Grant Thornton. As Grant Thornton did not bear the statutory duty of care to Fusheng Company, it was not at fault in violation of the statutory duty of care accordingly. Therefore, it should not bear any tortious liability. The Supreme People's Court thus ruled to dismiss the claims of Fusheng Company.

[Significance]

——伯利兹籍居民张某某与谢某某、深圳澳鑫隆投资有限公司等合同纠纷案

With the high-quality development of the BRI, the cross-border business volume of accounting firms is growing and more attention has been paid to the issue of accounting firms' liabilities for audit-related tort. In this case, on the one hand, the law applicable to dispute over tortious liability for compensation involving foreign-related audit was clarified and it was specified that the law in the place where the tort produced results may apply, which clearly indicated the legal basis for the extra-territorial application of the Chinese laws; on the other hand, Article 2 of the Provisions on Compensation for Audit-related Tort was strictly interpreted by expounding the theoretical basis for the tortious liability for compensation caused by audit conducted by the accounting firm and the duty of care of the accounting firm. It was specified that the people's court had no right to determine the scope of interested parties beyond the provisions of laws and judicial interpretations, which better balanced the relationship between the relief functions of professional tortious liability and public policies. This case is conducive to forming a stable market expectation, sets a good example for the application of law for similar cases, and is of positive significance for Chinese enterprises to "go global" and participate in the BRI.

【基本案情】

美达菲公司最初由达菲公司和澳鑫隆公司分别持股56.14%和43.86%。根据2013年至2014年达菲公司、澳鑫隆公司、美达菲公司等签署的一系列协议，张某某系达菲公司、澳鑫隆公司、美达菲公司的实际控制人，达菲公司及其关联公司将美达菲公司100%股权变更登记至创东方企业名下作为向创东方企业融资的风险保障措施。后张某某、达菲公司与澳鑫隆公司、谢某某等签订协议，约定澳鑫隆公司股权正式由谢某某等持有，并由澳鑫隆公司筹资用于回购登记在创东方企业名下的美达菲公司99%股权，还约定张某某和达菲公司有权在澳鑫隆公司完成回购后12个月内向澳鑫隆公司购买美达菲公司99%的股权以及购买的价款等。该协议签订后，澳鑫隆公司筹资回购了美达菲公司99%股权并完成了工商变更登记。张某某认为案涉协议约定的有关美达菲公司股权的交易安排系股权让与担保，其作为美达菲公司的实际控制人，请求确认登记在澳鑫隆公司名下的美达菲公司99%股权系向谢某某提供的让与担保措施并确认美达菲公司43.86%的股权归其所有。达菲公司另案起诉请求确认相关交易安排系让与担保并确认美达菲公司55.14%的股权归其所有。

[Reference No. of the Judgment of First Instance] No. 27 [2018], First, Civil Division, HPC, Tianjin

【裁判结果】

[Reference No. of the Judgment of Second Instance] No. 575 [2021], Final, Civil Division, SPC

最高人民法院经审理认为， 区分股权让与担保和股权转让，主要应从合同目的以及合同是否具有主从性特征来判断。案涉协议没有张某某、达菲公司向澳鑫隆公司借款的约定，也没有就以美达菲公司99%股权向澳鑫隆公司进行让与担保进行约定，未体现让与担保的从属性特征。案涉协议有关张某某、达菲公司可以在约定的期限内向澳鑫隆公司购买美达菲公司99%股权的约定系相关各方达成的一种商业安排，不同于让与担保中采用的转让方应当在一定期限届满后回购所转让财产的约定。且根据案涉协议，澳鑫隆公司对美达菲公司的经营权仅在回购期内受到一定限制，并未约定对回购期满后澳鑫隆公司的股东权利进行任何限制，亦不同于股权让与担保常见的对受让方股东权利进行限制的约定。即便张某某原为美达菲公司的实际控制人，但未曾直接持有美达菲公司股权，张某某主张美达菲公司股权归其所有欠缺请求权基础。综上，判决驳回张某某的全部诉讼请求。

Case No. 7: Legally Reviewing a Complicated International Commercial Contract and Differentiating Equity Transfer from Equity Transfer Guarantee

— Case of dispute over contracts (Zhang [REDACTED] (a Belizean citizen) v. Xie [REDACTED], Shenzhen Aoxinlong Investment Co., Ltd. et al.)

【典型意义】

本案是最高人民法院国际商事法庭审理的国际商事案件，涉及多份商事合同，相关交易安排参与主体众多，交易背景和交易设计复杂，争议所涉公司股权价值巨大，本案的裁判说理就如何识别股权让与担保和有回购条款的股权转让这一疑难法律问题提供了清晰的指引。

[Basic Facts]

Dafei Company and Shenzhen Aoxinlong Investment Co., Ltd. (hereinafter referred to as "Aoxinlong Company") initially held 56.14% and 43.86% of equity of Meidafei Company. According to a series of agreements signed by and among Dafei Company, Aoxinlong Company, Meidafei Company, and others from 2013 to 2014, Zhang [REDACTED] was the actual controller of Dafei Company, Aoxinlong Company, and Meidafei Company, and Dafei Company and its affiliated company registered 100% of equity of Meidafei Company under the name of CDF Company as the risk safeguard for financing to CDF Company. Zhang [REDACTED] and Dafei Company then signed an agreement with Aoxinlong Company, Xie [REDACTED], and others, stipulating that the equity of Aoxinlong Company would be officially held by Xie [REDACTED] and others and Aoxinlong Company would raise funds to repurchase 99% of equity of Meidafei Company registered under the name of CDF Company. It was also stipulated the right of Zhang [REDACTED] and Dafei Company to purchase 99% of the equity of Meidafei Company and the purchase price from Aoxinlong Company within 12 months after completion of the repurchase by Aoxinlong Company. After signing of the agreement, Aoxinlong Company raised funds and repurchased 99% of equity of Meidafei Company and

【一审案号】最高人民法院（2020）最高法商初5号

completed the industrial and commercial registration modification. Zhang [REDACTED] believed that the transaction arrangements regarding Meidafei Company's equity in the agreements involved were equity transfer guarantee. As the actual controller of Meidafei Company, he requested the court to confirm that 99% of equity of Meidafei Company registered under the name of Aoxinlong Company was a transfer guarantee measure provided to Xie [REDACTED] and 43.86% of equity of Meidafei Company was owned by him. Dafei Company filed a separate lawsuit, requesting the court to confirm that the relevant transaction arrangements were transfer guarantee and 55.14% of equity of Meidafei Company was owned by it.

[Judgment]

案例8.尊重法律服务合同约定 维护跨境股权交易法律服务市场秩序

In the trial, the Supreme People's Court held that equity transfer guarantee and equity transfer should mainly be determined on the basis of purposes of a contract and whether the contract has master-slave characteristics. There were no stipulations that Zhang [REDACTED] and Dafei Company borrowed loans from Aoxinlong Company and 99% of equity of Meidafei Company was used as transfer guarantee to Aoxinlong Company in the contracts involved. Such contracts did not reflect the dependent characteristics of the transfer guarantee. The stipulation in the contracts involved that Zhang [REDACTED] and Dafei Company may purchase 99% of the equity of Meidafei Company from Aoxinlong Company within the agreed time limit was a commercial arrangement among the relevant parties, which was different from the provision of transfer guarantee that the transferor should repurchase the transferred property after expiration of a certain time limit. Moreover, in accordance with the contracts involved, Aoxinlong Company's right to operate Meidafei Company was only somewhat restricted within the repurchase period and no restrictions were imposed on the shareholders' rights of Aoxinlong Company after expiration of the repurchase period. Such restrictions were different from those generally imposed on the shareholders' rights of the transferee in equity transfer guarantee. Even if Zhang [REDACTED] was originally the actual controller of Meidafei Company, he has never directly held the equity of Meidafei Company and his claim for ownership of the equity of Meidafei Company lacked a basis. In conclusion, the Supreme People's Court ruled to dismiss all claims of Zhang [REDACTED].

[Significance]

——天威新能源控股有限公司与达维律师事务所（Davis Polk & Wardwell LLP）法律服务合同纠纷案

【基本案情】

This is an international commercial case tried by the China International Commercial Court ("CICC") of the Supreme People's Court. It involves several commercial contracts, there are many participants in the relevant transaction arrangements, the transaction background and transaction design are complex, and the equity of the companies involved has great value. The reasoning in the judgment of this case provides clear guidelines for the difficult legal issue on how to distinguish equity transfer guarantee from equity transfer with repurchase terms.

[Reference No. of the Judgment of First Instance] No. 5 [2020], First, Commercial Division, SPC

Case No. 8: Respecting Stipulations of a Legal Service Contract and Maintaining the Market Order of Legal Services for Cross-border Equity Transaction

— Case of dispute over a legal service contract (Tianwei New Energy Holdings Limited v. Davis Polk & Wardwell LLP)

达维律师事务所与天威新能源公司形成法律服务合同关系，由前者对后者的跨境股权交易提供法律服务。在该股权交易完成后，天威新能源公司认为目标公司在收购之前与他人签订的工程合同对目标公司有重大不利影响，达维律师事务所出具错误或误导性的法律意见使其作出错误投资决策，遂提起本案诉讼，请求达维律师事务所赔偿损失人民币5亿元并退还已支付的律师费。

【裁判结果】

最高人民法院二审审理认为，达维律师事务所就案涉股权交易提供法律服务，与该交易密切相关的工程合同虽应列入其审查的范围，但对工程合同的审查仅限于合同是否存在阻碍股权交易完成或者对股权交易有重大不利影响的约定，不应将其审查义务扩展到工程合同自身是否公平合理，否则即是要求达维律师事务所以法律风险提示的方式替代天威新能源公司独立作出商事风险判断。案涉股权交易的目标公司与案外人签订没有封顶价格的“成本加成合同”，本身并不具有非法性，仅系基于签约时的商业判断作出的选择。该类合同本身并不应认定为构成影响股权交易的法律风险。达维律师事务所针对股权交易目标公司对外交易合同作出“未载有‘控制权变更'条款，亦不存在其他对拟议交易的重大不利约定”的意见符合审慎合理的标准，并无不当。遂判决驳回天威新能源公司的诉讼请求。

【典型意义】

近年来，越来越多的中国企业走出国门，积极参与共建“一带一路”，拓展海外业务。由于法律制度的差异，一些中国企业在采取股权并购的方式实施境外投资时，会通过与当地律师事务所签订合同的方式寻求法律服务。本案的审理秉持平等保护中外当事人合法权益的原则，准确界定了法律服务合同的范围与商业风险的界限，彰显了我国良好的法治环境，同时对推动中国企业在“走出去”过程中加强法律意识，提升风险管控能力有积极意义。

[Basic Facts]

Davis Polk & Wardwell LLP (hereinafter referred to as "DPW") and Tianwei New Energy Holdings Limited (hereinafter referred to as "Tianwei New Energy Company") had entered into a legal service contract, whereby DPW shall provide Tianwei New Energy Company with legal service for cross-border equity transaction. After completion of the equity transaction, Tianwei New Energy Company deemed that the engineering contract signed by the target company with others prior to the acquisition had material adverse effect on the target company and the incorrect or misleading legal opinion issued by DPW resulted in its incorrect investment decision. Therefore, Tianwei New Energy Company filed this lawsuit and claimed that DPW should compensate for its loss of 500 million yuan and refund the attorneys' fee that had already paid.

【一审案号】北京市高级人民法院（2014）高民（商）初字第04917号

[Judgment]

【二审案号】最高人民法院（2019）最高法民终318号

Upon trial of second instance, the Supreme People's Court held that when DPW provided legal service for the equity transaction involved, it should include the engineering contract closely related to the transaction in the scope of review. However, the review of the engineering contract should only be limited to whether the contract contained any stipulation that would hinder the completion of equity transaction or had any material adverse effect on the equity transaction. The review obligations should not be extended to whether the engineering contract itself was fair and reasonable. Otherwise, DPW would be required to replace Tianwei New Energy Company's independent judgment of commercial risks with DPW's legal risk warning. The target company in the equity transaction involved entered into a "cost plus contract" without a capped price with a party not involved. The contract itself was not illegal and it was only a choice made on the basis of a commercial judgment at the time of concluding the contract. Such contract itself should not be deemed as constituting a legal risk that may affect the equity transaction. DPW's opinion that "there is no 'change in control' clause or any other materially adverse terms to the proposed transaction" regarding the external transaction contract signed by the target company of the equity transaction involved conformed to the standard of prudence and reasonableness and was not improper. Therefore, the Supreme People's Court decided to dismiss the claims of Tianwei New Energy Company.

[Significance]

案例9.正确处理金融衍生品种交易纠纷，确认提前终止净额结算条款的性质和效力

——渣打银行（中国）有限公司与张家口联合石油化工有限公司金融衍生品种交易纠纷案

In recent years, more and more Chinese enterprises have gone abroad to proactively participate in the development of the BRI and expand business overseas. Due to differences in legal systems, some Chinese enterprises may seek legal services by entering into contracts with local law firms when making overseas investment in the form of equity mergers and acquisitions. The trial of this case upholds the principle of equal protection of the legitimate rights and interests of Chinese and foreign parties, accurately defines the scope of legal service contracts and the boundaries of commercial risks, and demonstrates a sound legal environment in China. At the same time, it is of positive significance for advancing Chinese enterprises to strengthen their legal awareness and improve their risk control capabilities in the process of "going global."

【基本案情】

2011年9月15日，渣打银行与张家口石化公司签订《国际掉期及衍生品协会主协议》（International Swaps and Derivatives Association Master Agreement 2002，简称ISDA主协议）。2014年2月和3月，双方签订交易条款，约定就布伦特原油开展互换交易，张家口石化公司向渣打银行确认及承认：张家口石化公司已经基于自身的判断对是否订立交易以及交易是否合适或适当做了最终决定，且对于其认为需要取得其他咨询以协助其作出本决定的，其已经取得自身顾问的所有额外意见。此后，双方依约履行了4期互换交易。2014年5月和9月，渣打银行与张家口石化公司的授权交易员齐某通话，就系争交易向张家口石化公司提示油价下跌风险。张家口石化公司均表示了解且希望按原约定3月份交易条款执行。2014年11月11日，张家口石化公司发函要求提前终止2月18日签署的“布伦特原油-买入绩效互换”协议，否认2014年11月10日后互换交易的效力，并表示不再承担11月10日后的损失。2014年11月27日，渣打银行向张家口石化公司发出《提前终止通知》，指定2014年12月2日为主协议项下所有未完成交易的提前终止日。

[Reference No. of the Judgment of First Instance] No. 04917 [2014], First, Civil (Commercial) Division, HPC, Beijing

[Reference No. of the Judgment of Second Instance] No. 318 [2019], Final, Civil Division, SPC

Case No. 9: Correctly Resolving Disputes in Financial Derivatives Trading and Confirming the Nature and Validity of the Terms on Early Termination of the Netting Settlement

— Case of dispute over financial derivatives trading (Standard Chartered Bank (China) Co., Ltd. v. Zhangjiakou United Petrochemical Co., Ltd.)

[Basic Facts]

On September 15, 2011, Standard Chartered Bank (hereinafter referred to as "SCB") and Zhangjiakou United Petrochemical Co., Ltd. (hereinafter referred to as "Zhangjiakou Petrochemical Company") entered into an

2014年12月2日，渣打银行向5家市场交易商发送电子邮件，就系争交易提前终止所需的平仓成本发送询价函。次日，渣打银行向张家口石化公司发出《提前终止金额计算报告》，要求张家口石化公司支付提前终止款项，提前终止金额在本报告生效日起的第二个本地工作日到期，要求张家口石化公司在支付到期日支付以上提前终止款项加上到期应付的利息。

渣打银行因索赔未果提起本案诉讼，要求张家口石化公司向渣打银行支付互换交易项下欠付的提前终止款项1328560.97美元及利息等。

【裁判结果】

上海金融法院二审审理认为，衍生品交易是合同当事人对未来的不确定性进行博弈，在金融机构对产品交易结构、蕴含风险进行充分揭示的情况下，当事人应对交易过程中可能产生的收益或亏损有一定的预期，并在此基础上自主作出商业判断，由此订立的交易协议应系双方当事人真实意思表示。当事人要求终止交易符合协议约定构成该方之违约事件的，金融机构有权依据协议享有违约事件发生后提前终止的权利。ISDA主协议为场外衍生品交易提供了适用于国际市场的标准化合约，作为国际惯例和国内行业规则被广泛采用并为交易参与方所熟知。法院在对违约责任进行认定时，应以我国合同法为基本依据，同时充分考量ISDA主协议相关规定及金融衍生品交易的自身特性，并以诚实信用原则和商业合理性原则为基础，计算提前终止款项的相应市场公允价值。因此，判决张家口石化公司应支付渣打银行1305777.97美元。

International Swaps and Derivatives Association Master Agreement 2002 (hereinafter referred to as the "ISDA Master Agreement"). In February and March 2014, the parties entered into the transaction terms providing for a swap transaction in respect of Brent Crude Oil. Zhangjiakou Petrochemical Company confirmed and acknowledged to SCB that Zhangjiakou Petrochemical Company has made a final decision on whether to enter into a transaction and whether the transaction was suitable or appropriate based on its own judgment. Moreover, it has obtained all additional advice from its own advisers where it deemed necessary to obtain other advice for assistance in making this decision. The parties made four swap transactions as agreed. In May and September 2014, SCB called Qi [REDACTED], authorized trader of Zhangjiakou Petrochemical Company, and prompted Zhangjiakou Petrochemical Company of the risk of oil price decline with respect to the transaction in dispute. Zhangjiakou Petrochemical Company stated that it has known the prompt and hoped to execute the transaction terms in March as originally agreed. On November 11, 2014, Zhangjiakou Petrochemical Company sent a letter and required early termination of the Agreement on "Brent Crude Oil - Buy Performance Swap" signed on February 18, 2014, denied the effectiveness of swap transactions after November 10, 2014, and stated that it would no longer bear any loss incurred after November 10, 2014. On November 27, 2014, SCB issued a Notice of Early Termination to Zhangjiakou Petrochemical Company and specified that December 2, 2014 was the date of early termination of all outstanding transactions under the Master Agreement.

【典型意义】

On December 2, 2014, SCB sent an email to five market dealers, asking for inquiry letters regarding liquidation costs for early termination of the transactions at issue. On the subsequent day, SCB issued a Report on Calculation of the Early Termination Amount to Zhangjiakou Petrochemical Company and claimed that Zhangjiakou Petrochemical Company should make payment for early termination, the early termination amount fell due on the second local working day as of the date when this Report came into effect, and Zhangjiakou Petrochemical Company should pay the above early termination amount and interest due on the due date.

该案系因2014年国际石油价格暴跌，客户为止损提前解除合约而引发的违约纠纷。在案件审理中，法院充分遵循金融衍生品交易的自身特性和国际惯例，确认了提前终止净额结算条款的性质和效力，对类案裁判具有一定指引作用。该案的司法裁判也有助于促进金融衍生品交易市场特别是掉期交易市场的发展，推动国际金融机构在境内开展金融衍生品交易，在高质量共建“一带一路”中进一步推进上海国际金融中心建设和我国金融业对外开放。

SCB filed this lawsuit due to unsuccessful compensation. It claimed that Zhangjiakou Petrochemical Company should pay it USD 1,328,560.97 as the early termination amount owed to SCB under the swap transactions and the interest thereof.

【一审案号】上海市浦东新区人民法院（2019）沪0115民初25676号

[Judgment]

【二审案号】上海金融法院（2020）沪74民终533号

In the trial of second instance, the Shanghai Financial Court held that derivatives transaction was a game between the contracting parties for the uncertainty of the future; under the circumstance that a financial institution has fully disclosed the product transaction structure and the implied risks, the parties should have certain expectations regarding the possible gains or losses that may arise in the process of transactions and make a business judgment independently on the basis of such expectations. The transaction agreement thus concluded should be the true intention of both parties. Where a party's request to terminate a transaction complied with the agreement and constituted an event of default of such party, the financial institution was entitled to the right of early termination after occurrence of the event of default pursuant to the agreement. The ISDA Master Agreement provides an internationally applicable standardized contract for OTC derivatives transactions, is widely adopted as international practice and domestic industry rules, and is well known to participants to the transactions. When determining the liability for breach of contract, the court should apply the Contract Law of the People's Republic of China as the basic basis, take into account the relevant stipulations of the ISDA Master Agreement and the characteristics of financial derivatives transactions, and calculate the corresponding fair market value of the early termination amount under the principles of good faith and commercial reasonableness. Therefore, the Shanghai Financial Court decided that Zhangjiakou Petrochemical Company should pay SCB USD 1,305,777.97.

案例10.依法驳回案外人执行异议诉请，及时有效执行外国仲裁裁决

[Significance]

This case is about dispute over breach of contract caused by a client's early termination of an agreement due to the sharp decline of international oil prices in 2014. In the trial of this case, the court fully observed the characteristics of financial derivatives transactions and international practice and confirmed the nature and validity of the netting settlement terms for early termination, which provides guidance for the adjudication of similar cases. The judicial adjudication of this case will also promote the development of the market of financial derivatives transactions, especially the market of swaps transactions and drive international financial institutions to conduct financial derivatives transactions within the territory of China. In the high-quality development of the BRI, efforts should be made to further advance the construction of Shanghai as an international financial center and the opening-up of China's financial industry.

——中国中小企业投资有限公司与俄罗斯萨哈林海产品无限股份公司、东方国际经济技术合作公司案外人执行异议之诉

【基本案情】

2000年10月，俄罗斯联邦萨哈林地区仲裁法庭裁决：东方合作公司应给付萨哈林公司货款总计3007319.2美元以及俄罗斯联邦财政税83490卢布。经萨哈林公司申请，一审法院黑龙江省高级人民法院于2004年1月裁定对该裁决予以承认并执行，裁定冻结东方合作公司持有的东方财务公司6300万元股权及红利。2011年9月，东方实业公司与中小企业公司签订《股权转让协议》，约定东方实业公司将东方合作公司代其持有的东方财务公司6300万股股权，以6300万元的价格转让给中小企业公司。当日，东方合作公司出具书面证明，对该股权转让协议无异议。后中小企业公司诉至河北省河间市人民法院，请求确认案涉6300万元股权为其所有。2012年3月29日，河间市人民法院判决确认中小企业公司对案涉股权享有所有权。2017年6月5日，中小企业公司向一审法院提出执行异议申请，一审法院裁定驳回。中小企业公司遂提起执行异议之诉。一审法院判决驳回中小企业的诉讼请求。中小企业不服一审判决，向最高人民法院提起上诉。

[Reference No. of the Judgment of First Instance] No. 25676 [2019], First, Civil Division, 0115, People's Court, Pudong New Area, Shanghai

[Reference No. of the Judgment of Second Instance] No. 533 [2020], Final, Civil Division, 74, Shanghai Financial Court

【裁判结果】

最高人民法院二审审理认为，是否对执行标的予以执行，取决于案外人是否就执行标的享有足以排除强制执行的民事权益。案外人执行异议之诉中，案外人主张的权利应当是所有权等在性质上能够排除人民法院对执行标的强制执行的实体权利。中小企业公司与东方实业公司签订《股权转让协议》时，案涉股权已经被法院裁定冻结。根据《关于人民法院民事执行中查封、扣押、冻结财产的规定》第二十六条和最高人民法院《关于执行权合理配置和科学运行的若干意见》第26条的规定，已被查封、冻结的财产不能诉请确权。况中小企业公司的股权转让款并未实际支付过，股权交易一直没有完成，中小企业公司不能享有案涉股权的所有权，且并无生效判决对案涉股权的权属作出认定。中小企业公司不能证明其对本案所涉执行标的享有足以排除强制执行的民事权益，遂维持一审关于驳回中小企业公司诉讼请求的判决，驳回中小企业公司的上诉。

Case No. 10: Legally Dismissing a Claim of a Party not Involved for Objection to Enforcement and Enforcing a Foreign Arbitral Award in a Timely and Effective Manner

— Action of objection to enforcement raised by a party not involved (China Small and Medium Enterprise Investment Management Limited v. Russia Sakhalin Marine Products Unlimited and Oriental International Economic and Technical Cooperation Company)

【典型意义】

本案外国仲裁裁决经人民法院裁定承认，并在裁定执行过程中查封了案涉财产，而被执行人通过转让被查封财产、提起另案诉讼对查封财产进行确权等方式意图规避执行。人民法院依法执行外国仲裁裁决，不仅驳回执行异议申请，并在其后的执行异议之诉中，根据司法解释规定，认定受让行为并非善意，同时及时对生效的另案确权判决予以再审，体现了我国法院为保障仲裁裁决跨境执行而采取的各项有效举措，有力维护了“一带一路”共建国家民事主体的合法权益。

[Basic Facts]

In October 2000, the arbitral tribunal in the Sakhalin region of the Russian Federation made an arbitral award that Oriental International Economic and Technical Cooperation Company (hereinafter referred to as “Oriental Cooperation Company”) should make payment to Russia Sakhalin Marine Products Unlimited (hereinafter referred to as "Sakhalin Unlimited") for goods of USD 3,007,319.2 and the Russian Federation fiscal tax of 83,490 rubles. At the application of Sakhalin Unlimited, the court of first instance, High People's Court of Heilongjiang Province, ruled in January 2004 to recognize and enforce the arbitral award and freeze the equity of 63 million yuan of Oriental Finance Company held by Oriental Cooperation Company and the dividends. In September 2011, Oriental Industrial Company signed an Equity Transfer Agreement with China Small and Medium Enterprise Investment Management Limited (hereinafter referred to as "SME Company"), under which Oriental Industrial Company would transfer the equity of 63 million yuan of Oriental Finance Company it held on behalf of Oriental Cooperation Company to SME

【一审案号】黑龙江省高级人民法院（2017）黑民初209号

Company at a price of 63 million yuan. On that day, Oriental Cooperation Company issued a written certificate, indicating that it raised no objection to the Agreement. SME Company then filed a lawsuit with the Primary People's Court of Hejian City, Hebei Province and requested that the Court should confirm its ownership of the equity involved of 63 million yuan. On March 29, 2012, the Primary People's Court of Hejian City rendered a judgment, where SME Company's ownership of the equity involved was confirmed. On June 5, 2017, SME Company filed an application for objection to enforcement with the court of first instance, and the court ruled to deny the application. SME Company then filed a lawsuit for objection to enforcement. The court of first instance decided to dismiss the claims of SME Company. SME Company was dissatisfied with the judgment of first instance and appealed to the Supreme People's Court.

[Judgment] 【二审案号】最高人民法院（2019）最高法民终1429号

In the trial of second instance, the Supreme People's Court held that whether the subject matter of enforcement may be enforced depended on whether the party not involved enjoyed civil rights and interests sufficient to exempt such party from enforcement. In a case involving an objection to enforcement raised by a party not involved, the rights claimed by the party not involved should be substantive rights including ownership, which in nature may exclude enforcement of the subject matter of enforcement by the people's court. When SME Company and Oriental Industrial Company signed the Equity Transfer Agreement, the equity involved had been frozen under the ruling rendered by the people's court. In accordance with the provisions of Article 26 of the Provisions of the Supreme People's Court for the People's Courts to Seal up, Seize, and Freeze Properties in Civil Enforcement and Article 26 of the Several Opinions of the Supreme People's Court on Reasonable Allocation and Scientific Operation of Enforcement Power, the ownership of property that had been sealed up or frozen should not be claimed for confirmation of ownership. Moreover, SME Company did not actually pay the equity transfer price, the equity transfer had never been completed, SME Company did not enjoy the ownership of the equity involved, and there was no effective judgment determining the ownership of the equity involved. SME Company failed to prove that it enjoyed civil rights and interests sufficient to exempt enforcement of the subject matter involved. Therefore, the judgment of first instance that the claims of SME Company should be dismissed was affirmed and the appeal of SME Company was dismissed.

案例11.认可和执行香港仲裁裁决 依法保护“一带一路”共建国家的企业合法权益

[Significance]

In this case, a foreign arbitral award was recognized in the ruling rendered by the people's court and the property involved was sealed up in the course of enforcement of the ruling. However, the party against whom enforcement was sought intended to avoid the enforcement by transferring the property that has been sealed up, filing another lawsuit for confirming the ownership of such property, and other means. The people's court enforced the foreign arbitral award in accordance with the law. It not only denied an application for objection to enforcement, but also determined that the transfer was not in good faith in accordance with the provisions of judicial interpretations in the subsequent action for objection to enforcement. At the same time, the people's court held a retrial of another case involving an effective judgment for confirming the ownership of property in a timely manner. Those efforts have reflected various effective measures adopted by the people's courts in China to guarantee the cross-border enforcement of arbitral awards and vigorously protected the legitimate rights and interests of civil subjects in the BRI partner countries.

——来宝资源国际私人有限公司（Noble Resources International Pte. Ltd.）申请认可和执行香港国际仲裁中心仲裁裁决案

【基本案情】

[Reference No. of the Judgment of First Instance] No. 209 [2017], First, Civil Division, HPC, Heilongjiang

[Reference No. of the Judgment of Second Instance] No. 1429 [2019], Final, Civil Division, SPC

Case No. 11 Recognizing and Enforcing a Hong Kong Arbitral Award and Legally Protecting the Legitimate Rights and Interests of an Enterprise from a BRI Partner Country

2015年9月至2016年9月，来宝公司分别与枫泽公司、新鑫公司、渤钢贸易公司、繁盛公司四家公司签订买卖合同，购买冶金焦炭等。四份合同均约定争议适用英国法管辖，由香港特别行政区香港国际仲裁中心仲裁解决。后来宝公司与四家公司对合同履行均发生争议，来宝公司对四批次货物的履行提出四个仲裁申请，香港国际仲裁中心依据来宝公司的申请，将上述四个仲裁程序合并为一个仲裁，裁决四家公司向来宝公司连带支付款项。来宝公司向法院申请认可和执行上述仲裁裁决。枫泽公司、渤钢贸易公司、繁盛公司认为来宝公司与各公司分别签订的合同中存在仲裁条款，同一份合同不能同时约束多名被申请人，仲裁庭将来宝公司与各公司的仲裁合并为一个仲裁，违反仲裁规则。

【裁判结果】

天津市第三中级人民法院审查认为，来宝公司与各公司分别签订的多份合同中均存在仲裁条款，但其中的任何一份合同均不能同时约束多个被申请人，对该四个案件适用“多份合同，单个仲裁”程序，不符合香港国际仲裁中心《2013机构仲裁规则》第29 条关于适用该程序应当满足“导致仲裁的各仲裁协议分别约束仲裁所有当事人”这一条件的规定。但在仲裁庭组成后明确赋予当事人异议权的时间段内，四家公司均未正式提出异议，而是参加了仲裁程序。根据《2013机构仲裁规则》第29.2条关于“只要可以有效放弃，当事各方放弃基于依第29条开始单个仲裁而对仲裁庭作出的任何裁决的效力和/或执行提出任何的异议”的规定和第31条关于“当事人知道或理应知道未按本规则（包括一个或多个仲裁协议）的规定或其引发的要求行事，但仍继续参与仲裁而未立即提出异议的，应视为已放弃提出异议的权利”的规定，应视为该四家公司已经放弃了对适用该程序提出异议的权利。该案经向最高人民法院报核，裁定对案涉仲裁裁决予以认可和执行。

— Case of an application of Noble Resources International Pte. Ltd for recognition and enforcement of an arbitral award rendered by the Hong Kong International Arbitration Centre

【典型意义】

[Basic Facts]

本案是中国企业与“一带一路”共建国家的企业之间发生国际货物买卖合同纠纷，经香港国际仲裁中心仲裁后，外国企业向我国法院申请认可和执行仲裁裁决的案件。本案中涉及“多份合同、单个仲裁”，人民法院依据香港国际仲裁中心仲裁规则审查认定仲裁程序的合法性，有效维护了仲裁当事人的正当程序权利。随着“一带一路”倡议的深入推进，香港的国际仲裁机构成为“一带一路”项目纠纷当事人经常选择的争议解决平台之一。本案根据内地与香港相互执行仲裁裁决的安排，依法认可和执行案涉裁决，为当事人在港解决“一带一路”纠纷提供了强有力的司法保障。

From September 2015 to September 2016, Noble Resources International Pte. Ltd. (hereinafter referred to as "Noble Pte. Ltd.") concluded sales contracts with Fengze Company, Xinxin Company, Bohai Steel Trading Company, and Fansheng Company, in which Noble Pte. Ltd. purchased metallurgical coke and other products from the four companies. All of four contracts provided that any dispute arising therefrom shall be governed by the British laws and resolved by the Hong Kong International Arbitration Centre (HKIAC) through arbitration. Disputes arose between Noble Pte. Ltd. and the four companies concerning the performance of the contracts. Noble Pte. Ltd. filed four arbitration applications concerning the performance of four batches of goods. Based on the applications filed by Noble Pte. Ltd., the HKIAC consolidated the above four arbitration proceedings into one and decided in an arbitral award that the four companies should jointly and severally make payments to Noble Pte Ltd. Noble Pte. Ltd. filed an application with the Third Intermediate People's Court of Tianjin Municipality for recognition and enforcement of the above arbitral award. Fengze Company, Bohai Steel Trading Company, and Fansheng Company believed that there was an arbitration clause in each contract concluded by Noble Pte. Ltd. with the aforesaid companies, a contract could not bind several respondents at the same time, and the HKIAC consolidated the arbitration proceedings between Noble Pte. Ltd. and the aforesaid companies into one, which was against the arbitration rules.

【一审案号】天津市第三中级人民法院（2019）津03认港1号

[Judgment]

案例12.厘清互惠原则适用标准 依法承认“一带一路”合作共建国家法院的民商事判决

Upon examination, the Third Intermediate People's Court of Tianjin Municipality held that there was an arbitration clause in the contracts concluded by and between Noble Pte. Ltd. and the four companies, but any of the contracts may not bind more than one respondent. The application of "single arbitration under multiple contracts" to those four cases did not comply with the requirement under Article 29 of the Administered Arbitration Rules 2013 of the HKIAC that "all parties to the arbitration are bound by each arbitration agreement giving rise to the arbitration." However, within the time limit when the parties were explicitly granted the right to raise an objection after the formation of the arbitral tribunal, none of the four companies raised any formal objection and they all participated in the arbitral proceedings. Pursuant to the provisions of Article 29.2 of the Administered Arbitration Rules 2013 that "the parties waive any objection, on the basis of the commencement of a single arbitration under Article 29, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration, in so far as such waiver can validly be made" and Article 31 thereof that "a party who knows or ought reasonably to know that any provision of, or requirement arising under, these Rules (including the arbitration agreement(s)) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object," it should be deemed that the four companies have waived their right to raise an objection to the application of the proceedings. This case was reported to the Supreme People's Court for review and it was ruled that the arbitral award involved should be recognized and enforced.

[Significance]

——双林建筑有限公司（Shuang Lin Construction Pte. Ltd.）申请承认与执行新加坡国家法院民事判决案

【基本案情】

This is a case where disputes over international goods sales and purchase contracts arose among Chinese enterprises and an enterprise from a BRI partner country and after arbitral award was made by the HKIAC, the foreign enterprise filed an application with a Chinese court for recognition and enforcement of the arbitral award made by the HKIAC. This case involves "single arbitration under multiple contracts." The people's court of China determined the legality of the arbitration proceedings upon examination of the arbitration rules of the HKIAC, which has effectively protected the due process rights of the parties to the arbitration. As the in-depth advancement of the BRI, Hong Kong-based international arbitration institutions have become platforms frequently chosen by parties to resolve disputes over the BRI projects. In this case, according to the arrangements for mutual enforcement of arbitral awards between the Mainland and Hong Kong, the arbitral award involved was recognized and enforced in accordance with the law, which has provided strong judicial guarantee for the parties to resolve disputes involving the BRI in Hong Kong.

2020年5月15日，在新加坡注册成立的双林公司向新加坡国家法院（Singapore State Courts）起诉中国公民潘某臣民间借贷纠纷。在新加坡国家法院发出盖有法院印章的传票令状和索偿书后，由双林公司的律师向潘某臣送达。在两次送达失效后，该律师根据法院作出的命令，将文件张贴在潘某臣住所的门上。新加坡国家法院的命令内容为：送达附有索偿书的传票令状连同法院此间签发的一份庭令副本可以有效地通过张贴在新加坡某地址前门上（该地址为潘某臣最后可知的地址），以及通过AR挂号邮寄该地址。上述方式送达的传票令状、索偿书及法庭向潘某臣发出的庭令可视为适当和充分的送达。因潘某臣未出庭，新加坡国家法院于2020年8月23日作出判决，内容为：潘某臣支付双林公司118225.8新元及利息。双林公司遂向潘某臣住所地法院即浙江省温州市中级人民法院提出申请承认和执行上述民事判决。

[Reference No. of the Judgment of First Instance] No. 1 [2019], Recognition of the Arbitral Award Made by the HKIAC, 03, Third IPC, Tianjin)

浙江省温州市中级人民法院审查期间，潘某臣确认新加坡国家法院作出的命令中所列地址为其在新加坡的住址，并对新加坡国家法院作出的上述判决不持异议。双林公司确认潘某臣已履行部分判决内容。

Case No. 12: Clarifying the Standards for Application of the Principle of Reciprocity and Legally Recognizing a Civil and Commercial Judgment Rendered by a BRI Partner Country

【裁判结果】

— Case of an application of Shuang Lin Construction Pte. Ltd. for recognition and enforcement of a civil judgment rendered by the Singapore State Courts

[Basic Facts]

浙江省温州市中级人民法院经审查认为，我国与新加坡之间虽未缔结或者共同参加关于互相承认和执行生效裁判文书的国际条约，但由于新加坡高等法院曾对我国法院的民事判决予以执行，根据互惠原则，我国法院可以依据《中华人民共和国民事诉讼法》第二百八十八条的规定，对符合条件的新加坡法院的民事判决予以承认和执行。该案虽系缺席判决，但潘某臣已经得到合法传唤；该判决已经生效且不存在违反中华人民共和国法律的基本原则或者国家主权、安全、社会公共利益的情形，遂裁定对案涉判决的法律效力予以承认。

【典型意义】

On May 15, 2020, Shuang Lin Construction Pte. Ltd. (incorporated in Singapore) filed a lawsuit with the Singapore State Courts against a Chinese citizen Pan [REDACTED]chen for private lending dispute. After the Singapore State Courts issued the writ of summons and the claim letter affixed with its official seal, the lawyer of Shuang Lin Pte. Ltd. served such documents upon Pan [REDACTED]chen. After service failed for two times, the lawyer posted the documents on the door of Pan [REDACTED]chen's residence in accordance with the writ of the Singapore State Courts. The writ of the Singapore State Courts was that the writ of summons affixed with a claim letter jointly with a writ copy may be effectively served by posting them on the front door of a residence in Singapore (which address was the last known address of Pan [REDACTED]chen) or mailing such documents to the address by AR post. The service of the writ of summons, the claim letter, and the writ by the Singapore State Courts to Pan [REDACTED]chen by the means may be deemed as appropriate and adequate service. As Pan [REDACTED]chen did not appear in court, the Singapore State Courts rendered a judgment on August 23, 2020 that Pan [REDACTED]chen should pay Shuang Lin Pte. Ltd. 118,225.8 Singapore dollars and the interest thereof. Shuang Lin Pte. Ltd. thus filed an application for recognition and enforcement of the aforesaid civil judgment with the Intermediate People's Court of Wenzhou City, Zhejiang Province, namely, the court at the place of Pan [REDACTED]chen's domicile.

本案是人民法院依法适用互惠原则，承认“一带一路”合作共建国家法院民商事判决的案例。在我国与新加坡并未缔结关于相互承认和执行生效民商事裁判文书的双边司法协助协定，亦未共同参加相关国际条约的情况下，本案通过厘清互惠原则的适用标准，积极促进我国和新加坡之间相互承认和执行民商事判决，较好践行了《中华人民共和国最高人民法院和新加坡共和国最高法院关于承认与执行商事案件金钱判决的指导备忘录》的精神，对于保障高质量共建“一带一路”、着力营造开放包容的法治化国际化营商环境等方面均具有积极意义。

During the period of examination by the Intermediate People's Court of Wenzhou City, Zhejiang Province, Pan [REDACTED]chen confirmed that the address listed in the writ issued by the Singapore State Courts was his domicile in Singapore and he had no objection to the aforesaid judgment rendered by the Singapore State Courts. Shuang Lin Pte. Ltd. confirmed that Pan [REDACTED]chen had satisfied part of the judgment.

【一审案号】浙江省温州市中级人民法院（2022）浙03协外认4号

[Judgment]

Upon examination, the Intermediate People's Court of Wenzhou City, Zhejiang Province held that although China and Singapore have not concluded or acceded to an international treaty for mutual recognition and enforcement of effective judgments, since the High Court of Singapore once eenforced civil judgments rendered by courts of China, under the principle of reciprocity, any court of China may recognize and enforce the civil judgments rendered by courts of Singapore meeting the prescribed conditions in accordance with the provisions of Article 288 of the Civil Procedure Law of the People's Republic of China. Although the judgment in this case involved a defaultjudgment, Pan [REDACTED]chen had been legally summoned; the judgment had taken effect and did not violate the basic principles of laws of the People's Republic of China or violate the national sovereignty, security, and social and public interests. Therefore, the Intermediate People's Court of Wenzhou City ruled that the legal effect of the judgment involved should be recognized.

[Significance]

This is a case where the people's court applies the principle of reciprocity in accordance with the law and recognizes the civil and commercial judgment rendered by a BRI partner country. Under the circumstances where China and Singapore have not concluded a bilateral judicial assistance agreement on mutual recognition and enforcement of effective civil and commercial judgment instruments, nor have they acceded to a relevant international treaty, this case proactively promoted mutual recognition and enforcement of civil and commercial judgments rendered by courts of China and Singapore by clarifying the standards for the application of the principle of reciprocity. It has better practiced the spirit of the Guiding Memorandum of the Supreme People's Court of the People's Republic of China and the Supreme Court of the Republic of Singapore on the Recognition and Enforcement of Monetary Judgments in Commercial Cases. It is of positive significance for guaranteeing the high-quality development of the BRI and creating an open and tolerant international law-based business environment.

[Reference No. of the Judgment of First Instance] No. 4 [2022], Assistance in Recognition of Foreign Judgments, 03, IPC, Wenzhou, Zhejiang)