

# ■ SBLC & Demand Guarantee in the Supreme People's Court of China

Saibo JIN  
Senior Partner  
Beijing Jinchengtongda and Neal Law Offices, China  
30 April 2024, Dubai & Singapore



□ Saibo JIN

- Senior partner of Jingcheng Tongda Law Offices in Beijing China. The Vice director of financial and Securities Special Committee of All-China Lawyers Association.

An Invited experts by the PRC Supreme People's Court regarding to the drafting of the judicial interpretation of Provisions of the Supreme People's Court on Some Issues Concerning the Trial of Cases of Disputes over Letter of Credit. He was first drafter of the PRC Supreme People's drafting project of the judicial interpretation of Demand Guarantee.

One of the main promoters of the factoring contract chapter in PRC Civil Code. Help the drafting of Civil Code judicial interpretation on Guarantee issues by Supreme People's Court.

The Vice director and arbitrator of the Financial Dispute Arbitration Special Committee of China International Economic and Trade Arbitration Commission, assisting the commission in drafting and revising the Financial Dispute Arbitration Rules.

Member of the Chinese delegation to participate in the sixth working group (WORKING GROUP VI) and fifth working group (WORKING) GROUP V) of United Nations Commission on International Trade Law (UNCITRAL) on the two projects of Model Law on Secured Transactions and Model Law on Insolvency Law. A member of the Legal Committee (LC) of the Factors Chain International (FCI), participated in the drafting project of the Model Law of Factoring held by International Institute for the Unification of Private Law (UNIDROIT). Technical Adviser (TA) ICC Banking Commission, member of Task Force on demand guarantee and DOCDEX expert. member of Board of Edition of DCW and Revision team of ISP98 by IIBLP.

Recent New Decided LC  
and Standby LC and  
Independent Demand  
Guarantee Cases in the  
Court of PR China

Saibo JIN

30 April 2024

Dubai, UAE

■ **Cases summary and comments  
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# ■ 1, New Decided Standby Letters of Credit Cases in the Supreme People's Court of PR China



**JT&N 金诚同达** | **30**  
1992-2022

跨境复杂商业和金融纠纷解决法律实务：  
案例报道和分析  
Law & Practice of Cross-border Complex  
Commercial and Financial Dispute  
Resolution: Case Report and Analysis  
第 18 期 Volume No. 18  
2024 年 3 月 1 日 March 1 2024

中文文本 (第 1 页-第 37 页):

最高人民法院第二国际商事法庭一审终审之“澳大利亚和新西兰银行集团有限公司马尼拉分行与中国电力工程有限公司、江苏银行股份有限公司等备用信用证纠纷案” (判决日期: 2023 年 8 月 24 日)

简述和点评

案号 1: (2020) 最高法商初 2 号

案号 2: (2020) 最高法商初 3 号

English Version (from Page 38):

Cases Summary and Comments on the Standby Letter of Credit Dispute:  
“Australia and New Zealand Banking Group Ltd. Manila Branch v. China National Electric Engineering Co., Ltd./ Bank of Jiangsu” (Civil Judgment of First Instance and Final Instance on August 24, 2023, by the Second International Commercial Court of the Supreme People's Court of the PRC)

金赛波

Saibo JIN

2024 年 3 月 1 日

March 1, 2024

**Case Brief and Comment on the Standby Letter of Credit Dispute:  
“Australia and New Zealand Banking Group Ltd. Manila Branch v.  
China National Electric Engineering Co., Ltd./ Bank of Jiangsu”**

(Civil Judgment of First Instance and Final Instance on August 24, 2023, by the  
Second International Commercial Court of the Supreme People’s Court of the PRC.)<sup>1</sup>

Case Number: (2020) Zui Gao Fa Shang Chu No. 2, Fraud and Injunction Case of  
Standby Letter of Credit and Counter Guarantee Standby Letter of Credit.

Case Number: (2020) Zui Gao Fa Shang Chu No. 3, Improper Dishonor Case of  
Standby Letter of Credit and Counter Guarantee Standby Letter of Credit.

Interest and Costs for Improper Dishonor

**Cause of Action:**

Disputes over Independent Letter of Guarantee Fraud, Independent Letter of Guarantee Payment, and Improper Dishonor

**Parties:**

(Standby Letter of Credit) Issuing Bank: Australia and New Zealand Banking Group Ltd. Manila Branch

(Counter Guarantee Standby Letter of Credit) Issuing Bank: Bank of Jiangsu

(Standby Letter of Credit) Applicant: China National Electric Engineering Co., Ltd.

(Standby Letter of Credit) Beneficiary: D.M. CONSUNJI. INC.

**Underling Transaction:**

Subcontracting Contract for Philippine Engineering Project

**Standby Letter of Credit:**

Irrevocable Standby Letter of Credit in the amount of \$22,979,687.50 USD

**Rules:**

In this case, the Standby Letter of Credit is subject to ISP98, and the Standby Letters of Credit with guarantee functions should be recognized as Independent Letters of Guarantee, applying relevant rules of the *Provisions of Supreme People's Court on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantee*.

**Judges: Chief Judge: Shen Hongyu, Judges: Xi Xiangyang, Sun Xiangzhuang, Yu Xiaohan, Guo Zaiyu.**

**Holding:**

(1) Case No. 2: The court found that the demands of Australia and New Zealand Banking Group Ltd. Manila Branch under the "Counter Guarantee Standby Letter of Credit" did not constitute fraud, and ruled in favor of Australia and New Zealand Banking Group Ltd. Manila Branch.

(2) Case No. 3: The court found that the payment obligation of Bank of Jiangsu had not been terminated, and Bank of Jiangsu should pay Australia and New Zealand Banking Group Ltd. Manila Branch the amount of \$6 million USD and interest under the "Counter Guarantee Standby Letter of Credit".

**Reasoning:**

(1) Case No. 2: Since the evidence of fraud by Australia and New Zealand Banking Group Ltd. Manila Branch under the Counter Guarantee Standby Letter of Credit in this case did not meet the standard of proof to exclude reasonable doubt as stipulated in Article 20 of the *Provisions of Supreme People's Court on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantee*, the demands of Australia and New Zealand Banking Group Ltd. Manila Branch under the Counter Guarantee Standby Letter of Credit in this case did not constitute fraud.

(2) Case No. 3: The demands of Australia and New Zealand Banking Group Ltd. Manila Branch under the Counter Guarantee Standby Letter of Credit did not constitute fraud, so the payment obligation of Bank of Jiangsu had not been terminated. Jiangsu Bank should pay Australia and New Zealand Banking Group Ltd. Manila Branch the amount of 6 million USD under the Counter Guarantee Standby

Letter of Credit, and interest should be paid from May 11, 2017, to the actual date of payment at the same USD deposit rate as that of the Bank of China for the same period (not exceeding an annual interest rate of 3%).

## **2. Legal Analysis of the Judgment of the Second International Commercial Court of the Supreme People's Court (Final Instance)<sup>3</sup>**

### **2.1 Analysis of Judgment No. 2**

#### **2.1.1 Determination of the Nature of Legal Relations of Standby Letters of Credit and Applicable Laws (In this Part the Analysis of the Case No. 2 and Case No. 3 are the Same)**

##### **(1) Determination of the Nature of Legal Relations**

According to Article 8 of the *Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations* (hereinafter referred to as "*Application of Laws*")<sup>4</sup>, the transaction involved in this case relates to the issuance and demandes of Standby LC and Counter Guarantee Standby LC. However, there are

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<sup>3</sup> *Provisions of the Supreme People's Court on Several Issues Relating to the Establishment of International Commercial Court in China*

Article 15: The judgments and rulings made by the China International Commercial Court (CICC) are judgments and rulings that take legal effect.

Article 16: The parties may, in accordance with the provisions of Civil Procedure Law, apply to the headquarters of the Supreme People's Court (SPC) for a retrial of judgements, rulings and mediation documents rendered by the CICC that have become legally effective.

The headquarter of the SPC which accepts an application for retrial and a retrial case stipulated in the preceding paragraph shall form a new collegiate bench.

<sup>4</sup> *Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations* Article 8:

For determination of civil relations involving foreigners, the laws in which the country are located shall be applicable.

no specific legal provisions regulating standby lc within the current legal framework of China, and the *Provisions of Supreme People's Court's on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantees* (hereinafter referred to as "*L/G Provisions*") also do not make provisions for standby lc. Therefore, it is necessary to clarify the legal nature of Standby LC involved in this case based on the facts of the case, in order to determine the applicable laws.

The Standby LC and Counter Guarantee Standby LC involved in this case are stipulate "on demand" and agree to comply with ISP98. According to the rules of ISP98<sup>5</sup>, standby lc are used to guarantee the performance of obligations related to loans or advances at maturity, default, or the occurrence or non-occurrence of certain incidental events. It has the characteristics such as independence and documentary. The current laws in China mainly regulate unilateral commitments or agreements with characteristics such as independence and documentary nature through two legal systems: the commercial documentary letter of credit and the independent letter guarantee. The former applies the *Provisions of Supreme People's Court's on Several Issues Concerning the Trial of Cases of Disputes over Letter of Credit* (hereinafter referred to as "*LC Provisions*"), while the latter applies the *L/G Provisions*.

According to Article 1 of the *L/G Provisions*<sup>6</sup>, the main function of an independent

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<sup>5</sup> ISP98 Article 1.06(a): A standby is an irrevocable, independent, documentary, and binding undertaking when issued and need not so sate.

<sup>6</sup> *Provisions of Supreme People's Court's on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantees* Article 1: An independent letter of guarantee referred to in these Provisions shall mean an undertaking in writing issued by a bank or a non-bank financial institution to a beneficiary, agreeing that the issuer

letter of guarantee (hereinafter referred to as "L/G") is to guarantee that the beneficiary can receive payment under the L/G by submitting complying demand when a breach of the underlying contract occurs. If the underlying contract is performed normally, the L/G is only standby and not be used. This "standby" feature of the L/G is identical to that of standby letter of credit and differs from the nature of commercial documentary letter of credits as payment instruments when the underlying contract is performed. Therefore, the Court ruled that the standby letters of credit with guarantee functions should considered as L/G.

## **(2) Applicable Law**

In this case, it is necessary to determine whether Bank of Jiangsu still has the obligation to make payment under the Counter Standby LC it issued, considering whether ANZ Bank Manila Branch engaged in fraud and whether Bank of Jiangsu's payment obligation has been discharged according to the contract as well. Therefore, it is necessary to separately apply the rule of conflict of tort and contract to determine the applicable law. According to Article 22(2) of the *L/G Provisions*<sup>7</sup> and Article 41

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will pay a specific amount or an amount within the maximum amount of the letter of guarantee when the beneficiary demands payment and submits the documentation which satisfies the requirements of the letter of guarantee.

<sup>7</sup> *Provisions of Supreme People's Court's on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantees* Article 22(2): Where the parties concerned are unable to reach a consensus on the applicable laws for a foreign-related independent letter of guarantee fraud or dispute, the laws at the place of habitual residence of the issuer of the independent letter of guarantee for which suspension of payment is requested shall apply; where the independent letter of guarantee is issued by a financial institution's branch which is registered and



of the *Application of Laws*<sup>8</sup>, parties may agree to choose the applicable law of the contract. In this case, all parties unanimously chose to apply Chinese law during the trial, so the relevant provisions of the *L/G Provisions* should apply to the dispute involved in the case.

### **(3) Conclusion**

Standby LC with guarantee functions should be regarded as L/G. All parties unanimously chose to apply Chinese law during the trial, so the relevant rules of the *L/G Provisions* should apply to the dispute involved in the case.

#### **2.1.2 Whether there is Fraud by ANZ Bank Manila Branch under the Counter Guarantee Standby Letter of Credit**

##### **(1) Whether ANZ Bank Manila Branch Constitutes fraud under “the beneficiary has confirmed that the debt of the underlying transaction has been fully performed, or that the triggering event for payment as provided in the independent letter of guarantee has not occurred”**

According to Article 12 of the *L/G Provisions*<sup>9</sup>, it constitutes fraud if the beneficiary

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established pursuant to the law, the laws at the place of registration of the branch shall apply; where the parties concerned have a common place of habitual residence, the laws of the common place of habitual residence shall apply.

<sup>8</sup> *Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations* Article 41: The parties concerned shall negotiate and choose the applicable laws for the contracts. If the parties concerned have not made a choice, for the party whose fulfilment of obligations can best realize the contract features, the laws of his regular residence or other laws which have the closest relationship to the contract shall apply.

<sup>9</sup> *Provisions of Supreme People's Court's on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantees* Article 12: Under any of the following circumstances, the People's Court shall deem that the



## LITIGATION DIGEST

**Ping An Bank Co., Ltd. v. Huishang Bank Co., Ltd.  
Hefei Intermediate People's Court of Anhui  
Province, First Instance (10 January 2020)  
[2019] Wan 01 Min Chu No. 2479 [PR China]**

**Abstracted by Saibo JIN, Wanda LU,  
Chenhao ZHANG**

<b>Topics:</b>	Standby LC; ISP98; Pay on Demand; PRC Judicial Interpretation of Independent Guarantee; Documentary Requirements; Complying Demand; Discrepancy; Presentation
<b>Type of Lawsuit:</b>	Beneficiary sued Issuing Bank to recover funds under standby LC and interest damages and other relief.
<b>Parties:</b>	Beneficiary/Lender – Ping An Bank Co., Ltd.  Issuing Bank – Huishang Bank Co., Ltd.  Applicant/Borrower – Geological and Mineral Group
<b>Underlying Transaction:</b>	Offshore Loan
<b>LC:</b>	Standby LC issued subject to ISP98 for USD 14.28 million.
<b>Decision:</b>	The Anhui Hefei Intermediate People's Court ruled in favor of Beneficiary and ordered Issuing Bank to make payment of standby LC to Beneficiary.
<b>Rationale:</b>	The standby LC issued by Issuing Bank is legal and effective. Beneficiary demanded payment via MT799 free format SWIFT Message which met all the requirements of the standby LC and ISP98 rules. Issuing Bank should make payment under the standby LC.

### **Factual Summary:**

On 2 November 2018, Ping An Bank (Beneficiary/Lender) signed an offshore loan agreement (Loan Agreement) with the Geological and Mineral Group.

**4. Termination Claim:** Article 11 of the PRC Independent Guarantee Provisions states in part that “the rights and obligations under an Independent Guarantee have terminated ... [w]here the amount available under the Independent Guarantee has been reduced to zero”. In this case, Issuing Bank had not yet fulfilled its payment obligations under the standby LC. As a result, its claim of termination of the rights and obligations under standby LC shall not prevail.

### **Conclusion:**

The court held that the content and form of the standby LC did not violate applicable PRC laws and administrative regulations. All parties shall perform their obligations in accordance with the terms and conditions of the standby LC and ISP98 rules.

During the effective period of the standby LC, Beneficiary demanded payment from Issuing Bank through its sending of a MT799 free format demand message. The requirements of the demand complied with the standby's text and ISP98 rules. As a result, the court held that Issuing Bank shall make payment to Beneficiary according to its demand.

### **Comments by Saibo JIN:**

1. The court misunderstood the standby LC as a “non-typical guarantee”. The legal sources of letters of credit and independent guarantees are not based on guarantee law. Therefore, the standby LC is not a guarantee. Regarding the source of the independent guarantee, the Supreme Court's standing is that it is based on the letter of credit.<sup>1</sup> Therefore, the judgment of the Hefei Court is wrong. Since then, because the National People's Congress passed the “Civil Code” (effective 1 January 2021), the Supreme Court changed the legislative basis for Provisions of the Supreme People's Court on Several Issues Relating to the Hearing of Disputes over Independent Guarantees, which indicated that “Provisions are enacted pursuant to the Civil Code of the People's Republic of China”.<sup>2</sup>

2. This case clearly states the independence of the standby LC, the principle of the documentary transaction, and the principle of strict compliance; these legal analyses are correct.

3. The judgment applies both Article 2 of the Judicial Interpretation of Letters of Credit and Article 5 of the Judicial Interpretation of Independent Guarantees, holding that the Standby LC is “a letter of credit in form” but “an independent letter of guarantee in nature”. This is an erroneous judgment on both ends. Moreover, the first-instance judgment held that the application of the law should be based on the “spirit” of the two judicial interpretations which is a wrong application.

1. See *The Understanding and Application of the Provisions of Supreme People's Court on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantee* by Zhang Yongjian and Shen Hongyu, People's Justice (Application), No. 1, 2017, Page 23.

2. See Provisions of Supreme People's Court on Several Issues Relating to the Hearing of Disputes over Independent Letter of Guarantee. These Provisions are enacted pursuant to the Civil Code of the People's Republic of China, the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations, the Civil Procedural Law of the People's Republic of China and other laws, after taking into account actual trial practice; Article 3: Where the party concerned claims that the provisions of the Civil Code on general guarantees or joint and several guarantees shall apply to the independent letter of guarantee, the People's Court shall not uphold the claim.

The judge in this case does not appear to have noticed that ISP98 itself has a conflict of law rule.<sup>3</sup>

4. When a standby LC expressly stipulates the application of ISP98, the court will hear the case in accordance with the provisions of ISP98. The standing on this point is very clear. The question is whether “ISP98” belongs to the category of “international model rules” in Article 5 of the Judicial Interpretation of Independent Guarantees. Therefore, if the provisions of the standby LC do not mention the application of ISP98, is ISP98 automatically applicable? Is ISP98 only applicable when there is an agreement? It seems the judge hearing this case did not understand Interpretation No. 1.01.01 issued by IIBLP after the Judicial Interpretation of Independent Guarantees was implemented. ISP98 Interpretation No. 1.01.01 indicates that ISP98 can be interpreted and used as model rules for independent guarantee transactions.<sup>4</sup>

The court did not analyze the applicable law under the ISP98 rules and still applied letter of credit law stipulated in US Uniform Commercial Code Article 5. Under the US law, the standby LC is still treated as a letter of credit, so in this case, when applying the standby LC issued by ISP98 in a foreign-related transaction, it is appropriate to apply the judicial interpretation of the letter of credit under Chinese law.

5. When the Supreme Court formulated the Judicial Interpretation of Independent Guarantees, it clearly removed the issue of the standby LC from this interpretation. The Supreme Court’s prior opinion was to leave the standby LC issue to be decided in future cases.<sup>5</sup> In fact, the International Commercial Court of the Supreme Court has accepted a standby LC case in the first instance of the Supreme Court.<sup>6</sup> The final judgment of this case will finally clarify the legal nature and applicable law of the standby LC.

6. In terms of the precedents of Chinese courts, when the terms and conditions of a standby LC do not clearly stipulate that ISP98 is applicable, if the standby LC clearly states it is applicable to UCP600, the UCP and the judicial interpretation of letters of credit will be applied.<sup>7</sup> When the standby LC states it is applicable to the URDG, the judicial interpretation of the URDG and the

3. See ISP98 1.08: “An issuer is not responsible for: ... d. observance of law or practice other than that chosen in the standby or applicable at the place of issuance.” See THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICES, James E. Byrne, Article 1.08 4: Other Law. The expectation of the issuer is that its obligation will either be governed by the law chosen in the standby to which it has agreed or by the law applicable at the place of issuance. The issuer does not assume the risk of observance of any other law or practice, should it apply, and bears no responsibility for it, as indicated in Sub rule (d). This risk is the applicant’s.

4. See: <https://iiblp.org/interpretations/>

5. See *The Second International Commercial Court of the Supreme People’s Court Hears Two Disputes on Standby Letter of Credit*, People’s Court Daily, December 19, 2020.

6. See *China Electric Power Engineering Company Limited v. Australia and New Zealand Bank Group Limited, Manila Branch, Australia and New Zealand Bank (China) Limited, Shanghai Branch, Bank of Jiangsu, Dispute over Standby Letter of Credit* (pending), Supreme People’s Court.

7. See *ICBC Quanzhou Branch v. Chen Jinzhao Letter of Credit Dispute* (May 22, 2020), Fujian Higher People’s Court Case Number: (2020) Min Min Zhong No.5.

independent guarantee will be applied.<sup>8</sup> Courts also apply UCP when a standby LC is issued under a SWIFT message and no applicable rules are stated.<sup>9</sup> There is only one exception case that the court applies the judicial interpretation of independent guarantees for standby LC.<sup>10</sup> In addition, there is only one special case where the judicial interpretation of letters of credit is applied to issue a temporary injunction order against a standby LC.<sup>11</sup>

7. Is it common for a Chinese bank to apply the ISP98 rules for issuing standby LC? In recent years, when Chinese companies and banks have issued debt overseas, especially bonds issued in the United States, it is very common for standby LCs to be used as the main method of credit enhancement. Under another transaction mode, such as Overseas Loan (for use abroad) against Domestic Support, the standby LC is very commonly used as a domestic guarantee for an overseas loan which is a counter-guarantee or a repayment measure for the loan of overseas lender.

In these standby LC transactions, according to the Chinese court cases we collected, most apply UCP600. If the creditor’s rights are issued in the United States, as a standby LC for credit enhancement measure, ISP98 is usually applicable. The standby LC in this case was used as a counter-guarantee measure for the loan bank to provide loans to overseas entities under the aforementioned Overseas Loan transaction. The lending bank and the guarantee bank agreed in the standby LC to apply ISP98. The recent massive defaults by Chinese companies in the United States, especially those involved in the real estate industry, further remind the industry that standby LCs address significant risks, including legal risk.

8. Is it common for Chinese courts to hear standby LC cases? In recent years, a number of standby LC disputes have been heard in China; most are cases of recovery from domestic applicants after the bank has advanced payment under Overseas Loan (for use abroad) against Domestic Support.

9. In domestic standby LC transactions, is it possible to apply the ISP98 rules by agreement? Does “I (International)” in ISP hinder its application in domestic standby LC transactions in China? Does the People’s Bank of China need to draft a separate set of *Measures for Settlement by Domestic Standby LC* for domestic standby letters of credit such as the People’s Bank of China promulgated *Measures for Settlement by Domestic Letter of Credit*?<sup>12</sup> These questions shall be discussed in the future. ■

8. See *Guangdong Hongyi Investment Co., Ltd. v. Ping An Bank Co., Ltd. Shenzhen Huaifu Sub-branch*, Financial Loan Contract Dispute (Oct. 8, 2018), Shenzhen Intermediate People’s Court, Guangdong Province (2017) Yue 03 Min Zhong No.8667.

9. See *China Everbright Investment Management Co., Ltd. and Xiamen International Bank Co., Ltd. Fuzhou Branch*, Letter of Credit Dispute, Fuzhou Intermediate People’s Court, Fujian Province (Jun. 25, 2019), (2019) Min 01 Min Final 4583.

10. See *China Electric Power Engineering Company Ltd v. Australia and New Zealand Banking Group Ltd, Manila Branch, ANZ Bank (China) Ltd, Shanghai Branch, and third party Bank of Jiangsu*, Dispute over Tort Liability (Independent LC Fraud)” (Dec. 26, 2019), Beijing Fourth Intermediate People’s Court, (2019) Jing 04 Min Chu No. 535.

11. See *Ningxia Tianyuan Manganese Industry Co. v. Manganese Trading Ltd, third party China Construction Bank Corporation Ningxia Hui Autonomous Region Branch*, Application for Suspension of Payment under Letter of Credit (Sep. 3, 2014), Ningxia Yinchuan Intermediate People’s Court.

12. See *Measures on the Settlement of Domestic Letters of Credit*, People’s Bank of China, [Yin Fa [1997] No.265], Aug. 1, 1997; *Measures on the Settlement of Domestic Letters of Credit* (Amended 2016), People’s Bank of China, Oct. 8, 2016.

■ **2, New Decided  
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Guarantee Cases in the  
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Court of PR China

Saibo JIN

30 April 2024

Dubai, UAE



**CAMA (Luoyang) Aviation Protective Equipment Co.  
v. UBAF (Hong Kong) Limited  
[2018] (Supreme Court Civil Retrial No. 1216)  
[P.R. China]**

**Abstracted by Jun XU<sup>1</sup>**

**Topics:** Independent Bank Guarantee; Injunction; Effectiveness; URDG758; Fraud; Advance Payment Guarantee; Performance Guarantee; Good Faith; Abusive Demand; Discrepancy; Extend or Pay Request; Payment Suspension; Non-Documentary Condition; Jurisdiction; Separate Demand

**Type of Lawsuit:** Instructing Party and Transferee of Subcontract Agreement sued Beneficiary, Guarantor, Supplier and Sub-Supplier and requested court to prohibit Counter Guarantor from honoring Guarantor’s claim due to independent guarantee fraud. The trial court, the Henan High People’s Court, dismissed the action. Plaintiffs appealed to the Supreme People’s Court of P.R. China.

**Parties:** Appellant/Plaintiff/Instructing Party – CAMA (Luoyang) Aviation Protective Equipment Co., P.R. China

Appellant/Plaintiff/Transferee of Subcontract Agreement – Luoyang Aviation Engineering Construction Co., P.R. China

Appellee/Defendant/Beneficiary/Contractor – Korea Hyundai Engineering and Construction Co., Korea

Appellee/Defendant/Applicant/Supplier – Qatar Hyojong Industrial Co., Qatar

1. Jun Xu is Deputy General Manager at Bank of China, Jiangsu Branch, China. She is a member of ICC Banking Commission’s Executive Committee, ICC Market Intelligent Team, ICC Global Survey of Trade Finance Editorial Team, Global Supply Chain Finance Forum(GSCFF), ICC China Banking Committee Forfeiting and Factoring Expert Team. She is also co-leader of ICC SCF Rules Drafting Team, ICC DOCDEX expert, team leader of ICC China Banking Committee Translation Expert Team, and a DCW Editorial Advisory Board member.

Appellee/Defendant/Applicant/Sub-Supplier – Luoyang Aviation Construction (Qatar) Co., P.R. China

Appellee/Defendant/Guarantor – UBAF (Hong Kong) Limited, Hong Kong

Counter Guarantor – Bank of China, Henan Branch, P.R. China

Sub-Supplier’s Bank – Commercial Bank of Qatar

Presenting Bank – Korea Exchange Bank, Korea



**XU**

**Underlying Transaction:** Supply and assembly services of steel pipe piles.

**Bank Guarantees:** Counter performance guarantee and counter advance payment guarantee for USD5,980,833.40 each. Performance guarantee and advance payment guarantee. Counter guarantees and guarantees were issued subject to URDG758.

**Decision:** The Supreme People’s Court of P.R. China reversed the decision of trial court and ordered Counter Guarantor to terminate payment to Guarantor under the counter advance payment guarantee, but make payment under the counter performance guarantee, and dismissed other claims by Appellants.

**Rationale:** Guarantor committed guarantee fraud and did not act in “good faith” when it demanded payment from Counter Guarantor based on Beneficiary’s presentation under the local guarantee inasmuch as the presentation was discrepant. When there is no evidence of Guarantor fraud in its demand and Counter Guarantor does not honor Guarantor’s demand as a result of the injunction order, Counter Guarantor is not necessarily exempted from its payment obligations and shall honor a complying presentation once the injunction order expires or is lifted.

**Factual Summary:**

On 2 November 2010, Beneficiary signed a contract with Supplier for the supply of steel pipe piles for USD59,808,334, with 10% of the total contract price required as advance payment. The contract required Supplier to provide an unconditional and irrevocable performance bank guarantee and an advance payment bank guarantee each for 10% of the contract price.

After Supplier signed a Subcontract Agreement with Sub-Supplier, on 8 December 2010 Sub-Supplier signed an Agreement of Transfer with Transferee, who was responsible for the performance of the Subcontract Agreement and the advance payment and project payment under the Subcontract Agreement were to be transferred directly to Transferee. Issuance of bank guarantees was to be sought by Transferee or its affiliates.



## YAPI KREDI v. SHENYANG YUANDA ALUMINUM INDUSTRY ENGINEERING CO.

[2020][Supreme Court Civil Retrial No. 265] (P.R. China)

by Jun XU\*

<b>Topics:</b>	Bank Guarantee; Independence; Injunction; Counter Guarantee; Abusive Demand; Fraud; Advance Payment Guarantee; Performance Guarantee; Jurisdiction; Good Faith; Validity; PRC Independent Guarantee Provisions
<b>Type of Lawsuit:</b>	Applicant sued Local Guarantor and requested suspension of payment orders from the trial court prohibiting Counter Guarantor from honoring Local Guarantor's claim due to independent guarantee fraud. Both trial court and appellate court ruled in favor of Applicant. Local Guarantor petitioned for retrial in the Supreme People's Court of P.R. China.
<b>Parties:</b>	Retrial Petitioner/Appellant/Defendant/Local Guarantor/Beneficiary of Counter Guarantees– Yapi ve Kredi Bankasi A.S., Esentepe Corporate Banking Center Branch, Turkey  Retrial Respondent/Appellee/Plaintiff/Applicant– Shenyang Yuanda Aluminum Industry Engineering Co. Ltd., Shenyang, P.R. China  Counter Guarantor– China Construction Bank, Liao Ning Branch, Shenyang, P.R. China  Defendant/Beneficiary of Local Guarantees/ Contractor– “LLC Rasen Story”  Subcontractor– Russia Yuanda Curtain Wall Co. Ltd.  Advising Bank– Yapi ve Kredi Bankasi A.S. Moscow Branch
<b>Underlying Transaction:</b>	Design, manufacture, supply, and instalment of building's external curtain wall.
<b>Instruments:</b>	A counter performance guarantee and performance guarantee were issued for USD 6,636,169.86 on 20 March 2008 and a counter advance payment guarantee and advance payment guarantee were issued for USD 6,636,169.86 on 23 August 2010.

\* Jun Xu is Deputy General Manager at Bank of China, Jiangsu Branch, China. She is a member of ICC Banking Commission's Executive Committee, ICC Market Intelligence Team, ICC Global Survey of Trade Finance Editorial Team, Global Supply Chain Finance Forum (GSCFF), ICC China Banking Committee Forfeiting and Factoring Expert Team. She is also co-leader of ICC SCF Rules Drafting Team, ICC DOCDEX Expert, team leader of ICC China Banking Committee Translation Expert Team, and a DCW Editorial Advisory Board member.

The guarantees were issued subject to the law of Russia and any disputes related to the guarantees would be resolved by the Arbitration Court of Moscow. The counter guarantees were issued subject to the law of Turkey and the jurisdiction of Turkish courts.

**Decision:** The Supreme People's Court of P.R. China overturned the appellate court decision and rejected Applicant's claims.

**Rationale:** Beneficiary's demands under independent guarantees cannot be considered fraudulent if Applicant is unable to provide sufficient evidence. Local Guarantor's payments in good faith shall be protected and payments under the counter guarantees shall not be suspended provided there is no evidence of Local Guarantor's fraudulent action in its demands under the counter guarantee, nor making payment to Beneficiary despite having known of such fraud.



XU

### Factual Summary:

Subcontractor signed *Design and Construction Contract* with the Contractor for a building project on 30 January 2008.

The contract stipulated that an advance payment guarantee be issued and remain valid until the actual date of work completion and then should be returned by Contractor upon receipt of actual completion of work record. The contract also called for issuance of a performance guarantee that should remain valid until 90 days following the actual date of work completion of work and then should be returned by Contractor within 14 days of the validity of the guarantee.

On 20 March 2008, Local Guarantor issued a performance guarantee for USD 6,636,169.86 in favor of Beneficiary and on 23 August 2010 an advance payment guarantee for USD 6,636,169.86 against counter guarantees issued by Counter Guarantor at Applicant's requests. Both the counter performance guarantee and counter advance payment guarantee expired on 30 April 2016 (after extensions). The advance payment guarantee stated that it was to be effective upon receipt of advance payment of USD 6,636,169.86 (later reduced to USD 1,000,000) in Subcontractor's account at Local Guarantor's Moscow Branch.

Both guarantees (hereafter “local guarantees” when referenced together) indicated that Local Guarantor shall irrevocably undertake to honor a demand of up to the maximum amount USD 6,636,169.86 within five banking days without delay from the date of receipt of Beneficiary's first demand in writing stating that Contractor has failed to perform its obligations under the contract.

Both counter guarantees called for receipt of Local Guarantor/Counter Guarantee Beneficiary's first demand in writing through an authenticated SWIFT (or authenticated telex) referencing the

**SEPCO Electric Power Construction Corp.**

**v.**

**GMAR Kamalanga Energy Limited, State Bank of India,  
China Construction Bank, Shanghai Pudong Development Bank,  
Industrial and Commercial Bank of China**

**[2020] (Supreme Court Civil Appeal No. 5152, 4965 & 6776) [P.R. China]**

**by Jun XU<sup>1</sup>**

**Topics:** Bank Guarantee; Independence; Injunction; Counter Guarantee; Abusive Demand; Fraud; Performance Guarantee; Advance Payment Guarantee; First Counter Guarantor; Second Counter Guarantor; Third Counter Guarantor; Governing Law; Extend or Pay; Effectiveness of Guarantee; Payment in Good Faith; URDG458; PRC Independent Guarantee Provisions

**Type of Lawsuit:** Applicant sued Beneficiary for guarantee fraud, petitioned for court injunction orders from the trial court prohibiting payment by Counter Guarantors in the chain of counter guarantees, and by Guarantor under its local guarantees. Appellants petitioned from the Supreme People's Court of P.R. China.

**Parties:** Retrial Applicant in Appeal/Appellee in Second Instance/Plaintiff in First Instance/ Contractor/Applicant – SEPCO Electric Power Construction Corporation, Shandong, P.R. China

Respondent in Appeal/Appellant in Second Instance/Defendant in First Instance/ Employer/Beneficiary – GMAR Kamalanga Energy Limited, Bangalore, Karnataka, India

Respondent in Appeal/Appellant in Second Instance/Defendant in First Instance/ Local Guarantor – State Bank of India, Overseas Branch, Bangalore, India (SBI Bangalore)

Respondent in Appeal/Appellant in Second Instance/Defendant in First Instance/ Second Counter Guarantor [under the Counter Guarantee issued by SPD on 2 December 2011] / Third Counter Guarantor [under Counter Guarantees issued by SPD on 8 December 2011] – State Bank of India, Shanghai Branch, Shanghai, P.R. China (SBI Shanghai)

1. Jun Xu is Deputy General Manager at Bank of China, Jiangsu Branch, China. She is Vice Chair of ICC Banking Commission Steering Committee, Co-leader of ICC SCF Rules Drafting Team, Chair of ICC China Banking Committee Translation Expert Group, member of Global Supply Chain Finance Forum (GSCFF) and ICC China Banking Committee Forfeiting and Factoring Expert Group, ICC DOCDEX expert. She is also a DCW Editorial Advisory Board member.

Respondent in Appeal/Appellee in Second Instance /Defendant in First Instance [In Supreme Court Civil Appeal No. 5152]/First Counter Guarantor – China Construction Bank, Shandong Branch, Jinan, P.R. China (CCB)

Respondent in Appeal/Appellee in Second Instance/Defendant in First Instance [In Supreme Court Civil Appeal No. 6776 and 4965]/First Counter Guarantor – Shanghai Pudong Development Bank Co., Ltd., Jinan Branch, Jinan P.R. China (SPD)

Respondent in Appeal/Appellee in Second Instance /Defendant in First Instance [In Supreme Court Civil Appeal No. 6776 and 4965]/Second Counter Guarantor – Industrial and Commercial Bank of China, Shandong Branch, Jinan, P.R. China (ICBC)

**Underlying Transaction:**

Construction of a thermal power plant in India.

**Bank Guarantees:** In Supreme Court Civil Appeal No. 5152 – First Counter Guarantor issued three counter performance guarantees for USD 18,548,351, USD 8,317,004, and USD 69,227 respectively in favor of the Second Counter Guarantor, who issued three counter performance guarantees for the same amounts in favor of Local Guarantor. Local Guarantor then issued three performance guarantees in favor of Beneficiary.

In Supreme Court Civil Appeal No. 4965 – First Counter Guarantor issued two counter advance payment guarantees for USD 36,517,244 [also in *Supreme Court Civil Appeal No. 6776*] and USD 11,290,763 respectively in favor of Local Guarantor through Second Counter Guarantor and Third Counter Guarantor and each of which issued two counter advance payment guarantees respectively in favor of the subsequent parties for the same amounts. Local Guarantor then issued two advance payment guarantees in favor of Beneficiary.

First Counter Guarantor issued a counter advance payment guarantee for USD 44,906,929.64 in favor of the Second Counter Guarantor, who issued a counter advance guarantee for the same amount in favor of Local Guarantor. Local Guarantor then issued an advance guarantee in favor of Beneficiary.

In Supreme Court Civil Appeal No. 6776 – First Counter Guarantor issued three performance guarantees for USD 24,344,829, USD 11,290,763, and USD 47,037,248 respectively in favor of the Second Counter Guarantor, who issued three counter performance guarantees for the same amounts in favor of Local Guarantor. Local Guarantor then issued three performance guarantees in favor of Beneficiary.

All counter guarantees were issued subject to URDG 458.

**Decision:** The Supreme People's Court of P.R. China reversed the trial court's decisions, upheld Beneficiary's petitions, and rejected Applicant's claims. On appeal, Supreme People's Court of P.R. China rejected the retrial applications of Applicant.

**Rationale:** Beneficiary's demands under independent guarantees cannot be considered fraudulent if Applicant is unable to provide sufficient evidence proving that Local Guarantor and Counter Guarantors made payments in bad faith in knowing of Beneficiary's independent guarantee fraud.



### **Factual Summary:**

After Applicant signed a contract with Beneficiary in 2008 for construction of a thermal power plant in India, the contract was revised on 31 May 2010, requiring Applicant to arrange issuance of performance guarantees and advance payment guarantees (local guarantees) in favor of Beneficiary.

On 16 August 2010, 2 December 2011, 8 December 2011, and 28 April 2013, at the request of Applicant, First Counter Guarantors issued six counter performance guarantees and three counter advance payment guarantees through a chain of counter guarantees in favor of Local Guarantor. (See list of counter guarantees issued). Local Guarantor then issued six performance guarantees and three advance payment guarantees in favor of Beneficiary.

#### **1. Guarantees Addressed in Supreme Court Civil Appeal No. 5152:**

On 4 December 2014, Beneficiary requested Local Guarantor to extend or pay the three local performance guarantees.

On 16 December 2014, Local Guarantor claimed for USD 18,548,351, USD 8,317,004 and USD 69,227 respectively under three counter performance guarantees issued by SBI Shanghai. On 17 December 2014, SBI Shanghai claimed for the same amounts under CCB's three counter performance guarantees.

#### **2. Guarantees Addressed in Supreme Court Civil Appeal No. 4965:**

On 21 November 2014, Beneficiary forwarded extend or pay requests to Local Guarantor under the three local advance payment guarantees. Local Guarantor later demanded from SBI Shanghai, which further claimed from precedent counter guarantor(s).

#### **3. Guarantees Addressed in Supreme Court Civil Appeal No. 6776:**

On 3 November 2014, Beneficiary demanded payment for USD 11,688,378.24 from Local Guarantor under the local advance payment guarantee and the total amounts of the three local performance guarantees.



**L/G Litigation Cases Summary:**

**Inmobiliaria Palacio Oriental S.A. v. Anhui International Economic Construction (Group) Co., Ltd. , the third party Bank of Costa Rica, and the third party China Construction Bank Anhui Branch, Guarantee Fraud Dispute **【Supreme People's Court, Retrial Instance】** (May 6, 2020)**

Caption & Citation	<b><u>Inmobiliaria Palacio Oriental S.A. v. Anhui International Economic Construction (Group) Co., Ltd. , the third party Bancode Costa Rica, and the third party China Construction Bank Anhui Branch, Guarantee Fraud Dispute</u></b> Supreme People's Court (2017) Zui Gao Fa Min Zai No.134
Topics	Independent Bank Guarantee; Injunction; Effectiveness;URDG758;Fraud;Performance Guarantee; Good Faith; Abusive Demand; Discrepancy; Payment Suspension; Jurisdiction; Separate Demand; PRC Independent Guarantee Provisions;
Type of Lawsuit	Counter-Guarantee applicant (Contractor) sued Beneficiary(Developer), and requested court to prohibit Counter Guarantor from honoring Guarantor's claim due to independent guarantee fraud. The trial court, Anhui Hefei Intermediate People's Court (Court of First instance) brought a verdict in favor of the plaintiff, which ordered Counter Guarantor terminate payment to Guarantor; Anhui Higher People's Court (Court of Second instance) affirmed. Defendant applied retrial to the Supreme People's Court of P.R. China.
Parties	1. Inmobiliaria Palacio Oriental S.A.: Defendant, Appellant, Retrial Applicant

	2. Anhui International Economic Construction (Group) Co., Ltd.: Plaintiff, Appellee 3. Bancode Costa Rica: Third Party 4. China Construction Bank Anhui Branch: Third Party
Procedural History (what happened after the Complaint was filed – in other words, how did the case get to this appellate court)	Anhui Hefei Intermediate People's Court (Court of First instance) brought a verdict in favor of the plaintiff, and Anhui Higher People's Court (Court of Second instance) affirmed, the Plaintiff applied for a retrial. Supreme People's Court (Court of Retrial) reversed the judgment of second instance and first instance and held the plaintiff's claims are all dismissed.
Facts (what happened before the Complaint was filed – in other words, what happened that caused the plaintiff to file the Complaint)	<ol style="list-style-type: none"> <li>1. January 16, 2010, Inmobiliaria Palacio Oriental S.A (hereinafter referred to as "Oriental Real Estate ") as the developer, and Anhui International Economic Construction (Group) Co., Ltd. (hereinafter referred to as "Anhui International Economic Company") as the contractor, and Anhui International Economics Construction Central America Co., Ltd. (hereinafter referred to as Central America Company)as the constructor signed the "Costa Rica Lakeside Project Construction Contract" (hereinafter referred to as the "Construction Contract"), and agreed that the contractor worked for a commercial and residential building construction project.</li> <li>2. May 26, 2010, Anhui International Economic Company filed an application to China Construction Bank Co., Ltd Anhui Branch. (hereinafter referred to as "CCB"),who issued a performance counter-guarantee in favor of the beneficiary Bancode Costa Rica (Hereinafter referred to as "Bank of Costa Rica"), in order to guarantee "Costa Rica Bank issue the performance guarantee.</li> <li>3. May 28, 2010, Bank of Costa Rica issued a Letter of Performance Guarantee in favor of beneficiary Orient Real Estate Company while the applicant is Anhui International Economic Company; CCB also issued a Performance counter-guarantee to Bancode Costa Rica, promising to make payment under the performance guarantee within 20 days after</li> </ol>

**L/G Litigation Cases Summary:**

**Changjiang Geotechnical Engineering Co., Ltd. v. China**

**Construction Bank Wenling Branch, Third party ZHONGBO**

**Construction Group Co., Ltd., Guarantee Fraud Dispute [Supreme People's Court, Second Instance] (June 28, 2019)**

Caption & Citation	<b><u>Changjiang Geotechnical Engineering Co., Ltd. v. China Construction Bank Wenling Branch, Third party ZHONGBO Construction Group Co., Ltd., Guarantee Fraud Dispute, Guarantee Fraud Dispute</u></b> Supreme People's Court (2019) Zui Gao Fa Min Zhong No.302
Topics	Independent Bank Guarantee; PRC Guarantee Law; Effectiveness;URDG758;Fraud;Performance Guarantee; Good Faith; Abusive Demand; Force Majeure; Payment Suspension; Breach of Contract; PRC Independent Guarantee Interpretation;
Type of Lawsuit	Beneficiary sued Performance-Guarantee applicant, and requested the issuing bank to make the payment under the Performance Guarantee. The trial court, Zhejiang Higher People's Court (Court of First instance) brought a verdict in favor of the defendant, which dismissed all the claims of the Plaintiff; Plaintiff appealed to the Supreme People's Court of P.R. China.
Parties	1. Changjiang Geotechnical Engineering Co., Ltd.: Plaintiff, Appellant. 2. China Construction Bank Wenling Branch: Defendant, Appellee 3. ZHONGBO Construction Group Co., Ltd.: Third Party
Procedural History (what happened after the	In the first instance, the beneficiary Changjiang Geotechnical Company claimed that the letter of guarantee involved in the case was an independent LG, while the actions of CCB Wenling Branch seriously

Complaint was filed – in other words, how did the case get to this appellate court)	violated the legitimate rights and interests of Changjiang Company. Changjiang Company requested CCB Wenling Branch should pay a total of 700 million RMB yuan and interest under the 7 advanced payment guarantees; CCB Wenling Branch shall also bear the attorney fee and litigation cost. The court of first instance held that CCB's Wenling Branch and Zhongbo Company's claims are correct, which indicated Changjiang Company's demand of the payment under the LG constituted a LG fraud, and the court made a verdict to reject Changjiang Company's claims. Changjiang Company appealed to the Supreme Court and submitted new evidence during the second instance to prove that the project quantity submitted by Zhongbo Company was false (forged), which can prove that Changjiang Company did not commit LG fraud. The trial court, Zhejiang Higher People's Court (Court of First instance) brought a verdict in favor of the defendant, which dismissed all the claims of the Plaintiff; Plaintiff appealed to the Supreme People's Court of P.R. China.
Facts (what happened before the Complaint was filed – in other words, what happened that caused the plaintiff to file the Complaint)	<ol style="list-style-type: none"> <li>July 29, 2009, Changjiang Geotechnical Company (Hereinafter referred to as "Changjiang Company") and Zhongbo Company signed Tawurgha Project and Bani Walid Project Contract in Misratah, Libya (hereinafter referred to as "Contract"), which is a Construction Contract. Changjiang Company is the general contractor while Zhongbo Company is the contractor. The contract stipulates that Zhongbo Company shall apply to China Construction Bank Wenling Branch (hereinafter referred to as "CCB Wenling Branch") for issuing a LG in favor of the.</li> <li>From December 3, 2009 to July 29, 2010, CCB Wenling Branch issued 5 advance payment LGs and 2 performance LGs stipulated Changjiang Company as the beneficiary.</li> <li>February 16, 2011, the civil war broke out in Libya, and all the Chinese workers were evacuated from Libya. The project was suspended,</li> <li>March 25, 2011, Zhongbo Company sent the notice of Suspension of Payment under Advance Payment Guarantee and Performance Guarantee to CCB Wenling Branch, stating that due to riots and wars</li> </ol>

	<p>broke out in Libya, China evacuate all the Chinese citizens from Libya, which constitutes <b>force majeure</b>. In view of the fact that the LG guarantees the performance of the contract, while Zhongbo Company did not breach the contract, Zhongbo Company requested CCB Wenling Branch suspended the payment under the LG.</p> <p>5. March 25, 2011, CCB Wenling Branch sent the notice to Changjiang Company regarding the LGs, which indicated that Project was suspended due to Force Majeure and Zhongbo did not breach the contract. Based on the request of Zhongbo Company, CCB will not made the payment under the LGs.</p> <p>6. March 28, 2011, Zhongbo sent the notice letter to Changjiang Company, indicated that the contract should be suspended, the finished project should be settled, the LGs would no longer be extended.</p> <p>7. August 24, 2015, Changjiang Company raised the demand under 2 Performance Guarantees and 5 Advance Payment Guarantees (7 Guarantees as total) to CCB Wenling Branch on the grounds of breach of contract by Zhongbo Company, but CCB Wenling Branch refuse to make the payment.</p> <p>8. December 7, 2015, CCB Wenling Branch sent the letter of notice to Changjiang Company, indicated the LG was expired and requested Changjiang Company return of original copy of LG.</p>
<p>Legal Issue(s) (what has the appellate court been asked; in other words – what error(s) did the appellant assert had been made by the lower court)</p>	<ol style="list-style-type: none"> <li>1. Whether the LG is an independent guarantee?</li> <li>2. Whether the payment under the independent guarantee should be paid to the beneficiary.</li> </ol>
<p><b>Legal Rule(s)</b> Each legal issue will require its own legal rule (what is the rule the court will use)</p>	<p><b><u>Art.1, Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Disputes over Independent Guarantees,</u></b></p> <p><b><u>Art.3, Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Disputes over</u></b></p>

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## 联系方式 (Contacts information)

Saibo JIN

Law PhD, Attorney at Law

Beijing Jincheng Tongda & Neal Law Firm

10 Floor Third Building, China World Tower,

No. 1 Jianguomenwai Avenue Beijing PRC

Post code: 100004

Tel: +86-10-57068585

Direct line: +86-10-57068012

Email: [jinsaibo@jtn.com](mailto:jinsaibo@jtn.com)