

“ICC arbitration in Beijing” held invalid by Chinese Supreme Court for lack of foreign related elements in the case

[Philip Peng](#) Maritime & commercial lawyer at Hai Tong & Partners, Beijing
Contributor

Trial court: Chinese Supreme Court

Case no.: (2012)MSTZ No. 2

Dated: Aug. 31, 2012

Key words: ICC arbitration, foreign related elements

Summary to this case:

On Dec. 23, 2005, Party A (a Chinese company) and Party B (a foreign invested company registered in China) concluded a sales contract and it was provided in the contract that: “19.2 all the disputes relating to this contract shall be resolved through amicable settlement first...and if the amicable settlement has not commenced within 30 days after the first proposal for settlement, the disputes can be referred to arbitration by ICC...and the place of arbitration can be a place in Beijing agreed upon by the parties”. Whereas, disputes then arose regarding the validity of this arbitration clause and after review, Jiangsu Province High People’s Court holds it as invalid for reason that, as per Art. 128 of the Contract Law of PRC, the parties to a foreign-related contract may, according to the arbitration agreement, apply to a Chinese arbitration institution or any other arbitration institution for arbitration. Whereas, for contracts that have no foreign related elements, it is invalid to submit the same to arbitration before foreign arbitration commissions. Jiangsu Province High People’s Court referred this case to Chinese Supreme Court for decision and the Supreme Court affirmed the decision of Jiangsu Province High People’s Court for reason that:

1. The parties to this contract are both legal persons registered in China;
2. The subject matter of the contract is in China;
3. The contract is concluded and is to be performed in China;
4. There are no foreign related elements in this case and it is not a foreign related contract.
5. Chinese law does not provide that the parties can submit contracts with no foreign related elements to arbitration by foreign arbitration commission, or foreign ad hoc arbitration tribunals. As such, there is no legal basis for the parties to choose ICC arbitration in the sales contract.