

Unofficial Translation

*Hemofarm DD, MAG International Trade Holding DD, Suram Media Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd.*

**Supreme People's Court's Reply to the Shandong Higher People's Court's Request for Instruction regarding the Non-recognition and Non-enforcement of the Arbitral Award Rendered by International Chamber of Commerce**

(2 June 2008, [2008] Min Si Ta Zi No. 11)

Shandong Higher People's Court,

We have received your Court's Request for Instruction Regarding the Non-recognition and Non-enforcement of the arbitral award Rendered by International Chamber of Commerce with your reference number "[2007] Lu Min Si Ta Zi No. 12". After deliberation, we reply as follows:

Given that the award was rendered by the arbitral tribunal of the International Chamber of Commerce ("**ICC**"), the judicial review shall be conducted under the 1958 Convention on the Recognition and Enforcement of Foreign Awards ("**New York Convention**") to which China had acceded.

The arbitration clause in the joint venture contract of Jinan Hemofarm Pharmaceutical Company Limited ("**Jinan-Hemofarm**") between Hemofarm DD ("**Hemofarm**"), MAG International Trade Company ("**MAG**"), Suram Media Corporation Limited ("**Suram**") and Jinan Yongning Pharmaceutical Corporation Ltd. ("**Yongning**") has no binding force upon the dispute between Yongning and the Jinan-Hemofarm regarding the lease contract, though it is binding upon the parties for disputes related to the joint venture. In the present case concerning the joint venture contract between Hemofarm, MAG, Suram and Yongning, the ICC International Arbitration Court rendered an arbitral award which contained decisions on matters beyond the scope of the submission to arbitration under the arbitration agreement in the joint venture contract. Furthermore, the ICC tribunal violated the judicial sovereignty of China and the jurisdiction of Chinese courts by arbitrating the disputes between Yongning and Jinan-Hemofarm concerning the lease contract, as a Chinese court had already made several civil orders concerning the disputes between Yongning and Jinan-Hemofarm and had made a civil ruling on the interim measures concerning Jinan-Hemofarm's property.

According to the Article V(1)(c) and Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Supreme People's Court considered that ICC Award No. 13464/MS/JB/JEM in this case shall not be recognized and enforced.

We agree with your Court's views and reply as above.

## **Annex**

### Request for Instruction Regarding the Non-recognition and Non-enforcement of the Arbitral Award Rendered by International Chamber of Commerce

(30 January 2008, [2007] Lu Min Si Ta Zi No. 12)

The Supreme People's Court,

With regard to the case on the application for the recognition and enforcement of the ICC Award No. 13464/MS/JB/JEM between the three applicants, Hemofarm DD ("**Hemofarm**"), MAG International Trade Company Ltd. ("**MAG**"), Suram Media Company Ltd. ("**Suram**") Limited, and the Respondent, Jinan Yongning Pharmaceutical Corporation Ltd. ("**Yongning**"), the Jinan Intermediate People's Court intended not to recognize and enforce the arbitral award on the grounds of excessive authority in arbitration, non-arbitrability of the subject matter and violation of public policy in China. We intend to assent to the views of Jinan Intermediate People's Court. Therefore, we submit this request for instruction in accordance with the Notice of the Supreme People's Court on Several Issues Regarding the Handling by the People's Courts of Foreign-related Arbitrations and Foreign Arbitrations.

#### **I. Parties**

Applicant: Hemofarm DD.

Address: The Republic of Serbia, Beograd ski Putbb, 26300 Vrasac.

Applicant: MAG International Trade Company Ltd.

Address: The Republic of Serbia, Beograd, Mihajla Bogicevica, 11000.

Applicant: Suram Media Company Ltd.

Address: Liechtenstein. Address: Liechtenstein, Lettsrass 10, P. O. B 1218, 9490 Vaduz.

Respondent: Jinan Yongning Pharmaceutical Corporation Ltd.

Address: Jinan, Shandong Province, PRC

#### **II. Background**

On 22 December 1995, Hemofarm, MAG and Yongning concluded a joint venture contract with Jinan Hemofarm Pharmaceutical Company Limited ("**Jinan-Hemofarm**"), under which the joint venture Jinan-Hemofarm was established. Article 57 of the contract provided: "concerning the applicable law: the establishment, validity, interpretation and performance of the contract are subject to the Chinese law". Article 58 of the contract provided: "in case of any dispute arising out of, during the performance of, or related to the contract, both parties shall strive for amicable

settlement. If the amicable settlement fails, the dispute shall be submitted to the ICC Court for arbitration in accordance with the applicable arbitration rules.” In April 2000, Suram became a party to the joint venture, thus becoming a shareholder of the joint venture company.

On 6 August 2002, Yongning filed a lawsuit against the joint venture company, claiming the rent and the return of the property. Jinan-Hemofarm raised an objection to jurisdiction before the court, stating that the dispute shall be submitted to ICC for arbitration according to Article 58. The Jinan Intermediate People’s Court held that the dispute was related to the tenancy between Yongning and Jinan-Hemofarm. However, the arbitration agreement only binds the parties to the joint venture contract. Given that Jinan-Hemofarm is not a party to the contract the arbitration agreement shall not apply in the present case. Therefore, the Court dismissed the objection to the court’s jurisdiction. During the litigation, Yongning applied for property preservation measures and provided the court with a guarantee. The Jinan Intermediate People’s Court approved the application and seized the bank account and the products of the joint venture company. On 9 April 2003, the Jinan Intermediate People’s Court ruled in favor of the Yongning’s claims. On 23 July 2003, this Court made the final ruling in favor of Yongning in line with the ruling at first instance.

On 17 January 2003, Yongning filed another lawsuit against the Jinan-Hemofarm, claiming the rent and the return of the property. The joint venture filed counterclaims against Yongning, requiring Yongning to register the lease of the land. On 25 November 2003, the Jinan Intermediate People’s Court ruled in favor of Yongning and dismissed the counterclaims of the joint venture company. On 16 August 2004, this Court made the final ruling in support of the ruling of the first instance.

On 2 August 2003, Yongning filed a third lawsuit against Jinan-Hemofarm for newly incurred rent and the return of property. Jinan-Hemofarm raised an objection to the jurisdiction of the court, stating that the dispute shall be submitted to the ICC for arbitration. After the dismissal of the objection to jurisdiction, the joint venture appealed the decision before this Court. This Court held that the subject matter for arbitration under the arbitration agreement of the joint venture contract extended to disputes between the parties arising out of the joint venture. Given that Yongning filed the suit on the basis of another legal relationship, *i.e.* the leasing of property between Yongning and the joint venture company, the dispute in the present case fell outside of the scope of the arbitration agreement. Therefore, this court dismissed Jinan-Hemofarm’s appeal to the Jinan Intermediate People’s Court’s decision concerning the challenge of jurisdiction. Yongning however withdrew the application later on.

In April 2004, the Yongning resubmitted the filing of the withdrawn case above, claiming for the rent owed by the joint venture company. On 5 March 2005, the Jinan Intermediate People’s Court made a decision in favor of Yongning. On October 18, this Court supported the judgment of first instance in the Intermediate People’s Court.

On 3 September 2004, Hemofarm, MAG and Suram (“**the joint Applicants**”) as three applicants submitted the dispute to ICC arbitration. The claims include the following points:

(1) The joint Applicants submit that the Respondent breached the obligation owed to the joint applicants for the following reasons: (a) the Respondent breached its obligation under the contract and under the law of China by commencing and maintaining the litigation; (b) during litigation, the Respondent refused to settle the issue between them concerning the dispute under the joint venture contract. Based on the foregoing facts, the Respondent refused to settle the issue through negotiation outside the court; (c) beside the first breach, the Respondent had also breached the obligation to submit the dispute for ICC arbitration under Article 58 of the contract; (d) furthermore, the Respondent had relied on false evidence to support its claims for the rent. The Respondent had violated the obligation under the contract by the illegal withdrawal of its investment.

(2) The joint Applicants apply for the return of the investment for the following reasons: (a) due to the first litigation filed by the Respondent, the bank account of the joint venture was frozen without any justified reason, and the warehouse was closed down. These acts contributed to the operational difficulties experienced by the joint venture and ultimately led to the closure of its business; (b) in July 2003, the joint venture company was forced to close down. Following that, the acts taken by the Respondents, including the litigations, made it impossible to continue the business. The ongoing shutdown was a direct cause of the depreciation of the value of the joint venture; (c) in addition, since the respondent sought the enforcement of the first ruling, the equipment necessary for the daily operation of the joint venture was permanently taken away; (d) pursuant with Article 107 of the Contract Law of People's Republic of China, where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract, the party shall bear such liabilities for breach of contract as to continue to perform its obligations, to take remedial measures, or to compensate for losses. Article 113 of the Contract Law provides that, where one party to a contract fails to perform the contractual obligations or its performance fails to satisfy the terms of the contract and causes losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interests receivable after the performance of the contract, provided they do not exceed the probable losses caused by a foreseeable breach; (e) in accordance with the applicable Chinese law, where one party breaches the contract, the suffering party is entitled to recover foreseeable damages; and (f) the joint Applicants are entitled to recover damages related to the decrease in the total investment value resulting from the Respondent's breach. The investment made by the joint Applicants reached \$ 10,764,514 which included both the secured investment of \$ 8,730,302 and the unsecured investment of \$ 2,034,212.

(3) The joint Applicants applied to recover damages for their losses in interest: (a) as stated above, the party who suffers damages as a result of another's breach is entitled to foreseeable interest if the contract was enforced; and (b) accordingly, since the joint Applicants have the right to claim interest, the joint Applicants reserve their right to apply for the determination of exact amounts of interests.

(4) The joint Applicants requested a ruling that the litigation fees should not be paid to the Respondent. Based on the reasons stated above, the Respondent recovered its investment in the joint venture by filing lawsuits with false evidence, which constituted a breach of its obligation

to the joint Applicants. Therefore, the joint Applicants request the tribunal to rule that the joint Applicants have no obligation to pay the litigation fees.

(5) The joint Applicants requested that the Respondent withdraw the case against the Applicants: (a) the dispute concerns the definition of the assets invested by the Respondents, which “derived from the performance or are related to the contract”; therefore, the dispute falls under Article 58 of the Contract. These disputes should be governed by the agreement for ICC arbitration; and (b) the joint Applicants applied for an award of arbitral tribunal that the ICC has exclusive jurisdiction to arbitrate the dispute between the joint Applicants and Respondent, and the Respondent shall withdraw its cases before the court.

(6) The joint Applicants requested recovery of all of their litigation expenses: (a) due to Respondent’s violation of its obligation, the applicants were forced to argue before the court, which cost a total of \$350,000; and (b) therefore, the joint Applicants requested recovery of the above expenses.

(7) The joint Applicants requested a declaration that the Respondent committed a material breach of the contract and that the joint venture should be terminated. Furthermore, the Respondent breached its obligation under Article 58 of the contract by commencing and maintaining the litigation, which led to the situation under Article 5 where joint venture “is unable to sustain the operation or achieve the goal of the contract”. Based on the above reason, the joint Applicants requested the termination of the joint venture contract.

(8) The joint Applicants requested recovery of all the expenses related to the arbitration. The joint Applicants request a ruling that the Respondent shall bear all of the joint Applicants’ expenses, including but not limited to the registration fee, administrative fee and the expenses for the arbitrators, experts, consultant, witness and the legal service.

Yongning submitted its counterclaims.

The tribunal drafted a letter on the scope of the subject matter of the arbitration and sent the letter to the parties for their signature. Part VI of the scope of the subject matter includes: whether the Respondent breached its obligation under the joint venture contract by filing the lawsuits against the joint venture company; whether the Respondent should submit the dispute for arbitration under ICC Rules of Arbitration rather than institute litigation concerning the disputes (see Paragraph 6, Part 1 of the arbitral award); whether the dispute concerns the investment under the joint venture contract or the lease contract between the Respondent and the joint venture company. Yongning contended that the dispute had already been addressed by the Chinese court and fell outside of the scope of the subject matter for arbitration. For this reason, the Respondent refused to sign the letter of the scope of subject matter.

During the arbitration, the joint Applicants insisted on the jurisdiction of the tribunal on the basis of Article 58 of the joint venture contract, Article 257 of the Civil Procedural Law of the People’s Republic of China, Article 5 of the Arbitration Law of the People’s Republic of China. (See Paragraph 216, Part 3 of the arbitral award)

In Part 3 of the arbitral award, the tribunal addressed the issue “submitted for arbitration” as follows: Yongning did not violate the arbitration agreement by filing lawsuits against the joint venture for the recovery of the rent (Paragraph 224); the first lawsuit had a direct impact on the rights and obligations of the foreign partners, but the impact was a result of the Chinese court’s decision to take property preservation measures rather than the first lawsuit (see paragraph 230); from the perspective of the arbitral tribunal, the decision on the property preservation measures had no justification in terms of the applicable law and commerce (Paragraph 231).; the most direct and the prompt reason for the failure of the joint venture was the enforcement of the court’s preservation measures (see Paragraph 240); the joint Applicants lost their investment because of the Respondent’s application for preservation measures (see Paragraph 260); the tribunal ruled that the Respondent breached the contract by filing the lawsuit and achieving the court’s decision to take preservation measures. The decision contributed to the unnecessary losses in business for the joint venture and led to the seizure of its operation (see Paragraph 281); submitting the dispute concerning the land lease to the court had obviously violated Article 58 of the Joint venture Contract, which was evidently within the scope of the subject matter of the arbitration agreement (see Paragraph 236). Moreover, the arbitral award addressed the issue for the allocation of expenses of the joint Applicants during the lawsuits filed by the Respondent. The arbitral award granted each applicant a 30% recovery of the expenses for the litigation.

Part 4 of the arbitral award summarized the issues for settlement, which include: the Respondent was granted property preservation measures by the court; the enforcement of which had a direct, substantial and disadvantageous impact on the rights and obligations of the joint Applicants under the joint venture contract; and finally forced the joint venture company to close down. Due to the decision to pursue preservation measures, the Respondent committed a violation of the contract, and therefore, the joint Applicants are entitled to submit the issue to the ICC for arbitration in accordance with Article 58 of the joint venture contract. The only direct and effective factor which leads to the termination of the joint venture company was the property preservation measures issued by the Chinese court in the first lawsuit.

The tribunal made a final ruling: (1) Yongning should bear the legal and other fees; (2) Yongning shall pay the joint Applicants \$6,458,708.4 in damages, \$9,509.55 for the litigation expenses, \$1,270,472.99 for legal and other fees, \$295,000 for the arbitration; (3) 5% annual rate of interest of the total amount \$8,033,690.94 starting from the date Yongning is informed of the award to the date of payment; (5) the joint Applicants should transfer the seals of the joint venture to Yongning; (5) the counterclaims of Yongning should be dismissed; and (6) the remaining claims and counterclaims should be dismissed.

### **III. The Application for Recognition and Enforcement of the arbitral award and the Respondent’s Objections**

On 16 March 2007, the Respondent received the arbitral award. In September 2007, the joint Applicants filed the application for recognition and enforcement of the arbitral award before the Jinan Intermediate People’s Court.

The Respondent argued that the arbitral award should not be recognized and enforced for the following reasons:

(1) According to Article V(1)(b) of the New York Convention, the award shall not be recognized and enforced as the arbitral award exceeded the scope of submission to arbitration under the arbitration clause of the joint venture contract. Under the law of China, the scope for arbitration under the arbitration clause of the joint venture contract is limited to disputes between the parties concerning the joint venture, excluding the disputes between Yongning and the joint venture company. The tribunal included the latter in its scope for arbitration against the objection of Yongning. The arbitral award addressed the issue between Yongning and the joint venture, even though our court had made a conclusive judgment on the issue. Furthermore, the arbitral award ordered the Yongning to bear enormous damages and even addressed the issue of expenses for litigation.

(2) The ruling of the tribunal concerning the preservation measures was beyond the scope of arbitration under the arbitration agreement, and exceeded the scope of submission to arbitration by both parties. Yongning was not given any opportunity to raise objections. Pursuant to Article V(1)(b) and Article V(1)(d) of the New York Convention, the arbitral award should not be recognized and enforced.

(3) The arbitral award addressed issues that were regarded as non-arbitrable under the law of China, and should not be recognized and enforced, as provided under Article V(1)(a). The right to apply for preservation measures is protected under the Civil Procedural Law of our country, and it should never be the subject matter of arbitration. The reasons for issuing the preservation measures are exclusively subject to the jurisdiction of People's Courts, and should never be arbitrated.

(4) The recognition and enforcement of the arbitral award would violate the public policy of our country, and the arbitral award should not be recognized and enforced under Article V(2)(b) of the New York Convention.

#### **IV. Opinion of the Jinan Intermediate People's Court**

1. Whether the arbitral award violated the scope of subject matter for arbitration:

According to the arbitration agreement, the scope for arbitration is limited to disputes between the parties concerning the joint venture. Disputes unrelated to the joint venture are not within the scope of arbitration. The disputes between Yongning and the joint venture company and the litigation and preservation measures are issues between Yongning and the joint venture, and were not related to the three joint Applicants. The submission to arbitration by the three joint Applicants based on the reasons stated above, and the arbitration on the issue of the preservation measures fall beyond the scope of the arbitration agreement.

2. Whether the issue of the preservation measures falls beyond the scope of the submission to arbitration by both parties and whether Yongning was given the chance to argue upon it:

The tribunal addressed the matters including the reason for the failure and closure of the joint venture. In the view of the tribunal, whether the preservation measures were justified is an

important reason for the failure and shutdown of the joint venture. Given that the issue concerning the property preservation measure is within the scope of arbitration and Yongning had argued as such during the arbitration, there is no violation of the arbitration procedure.

3. Whether the issue of the grant of preservation measures could be submitted to arbitration:

Although the joint Applicants filed claims on the basis of disputes concerning the joint venture, the reason for the tribunal to rule on the damages owed by Yongning was caused by the preservation measures. Admittedly, the application for preservation measures was initiated by the Respondent; however, the enforcement of the preservation measures constitutes part of the duty of the People's Courts and represents the judicial jurisdiction of the state. Therefore, the subject matter in the arbitration was not arbitrable.

4. Whether the recognition and enforcement of the award would violate the public policy of our country:

Litigation is a constitutional right enjoyed by the citizens and legal persons of China. Yongning's application for preservation measures to claim the rent owed by the joint venture is an enforcement of its procedural right. The litigation and the preservation measures application were supported by the court, which confirmed the legality of these acts. Whereas the tribunal ignored the effective ruling of the Chinese court and arbitrated the lawful act of Yongning, this behavior constituted a denial of the legal effect of the court's judgment. The tribunal's decision is in violation of the court's ruling. It constitutes a denial of the effective judgment and challenges the judicial sovereignty of the courts and violates the public policy of China.

For the above reasons, the Jinan Intermediate People's Court ruled not to recognize and enforce the arbitral award.

## **V. Opinion of Our Court**

We held that the arbitral award was issued by the International Chamber of Commerce with the place of arbitration in Paris, and therefore the arbitral award was of French nationality. Since both China and France are Contracting States to the New York Convention, the judicial review should be conducted in accordance with the Convention. As provided under the New York Convention, we ruled not to recognize and enforce the arbitral award.

1. The arbitral award violated Article V(1)(c) of the New York Convention since it addressed issues beyond the scope of arbitration agreement.

Article 58 of the joint venture contract concluded between Hemofarm, MAG, Suram and Yongning provided that "[i]n case of any dispute arising out of, during the performance of, or related to the contract, both parties shall strive for amicable settlement. Should the amicable settlement fail, the dispute should be submitted to the Arbitration Commission of the International Chamber of Commerce for arbitration in accordance with the applicable arbitration rules." As the contract clause on applicable law provided that the contract was subject to the laws of China, the laws of China shall apply. Most importantly, the three joint Applicants agreed



to the jurisdiction of the arbitral tribunal on the basis of the laws of China. Yongning had assented to the application of Chinese law to interpret the arbitration agreement.

Under the laws of China, the subjects of the joint venture contract should be the Chinese and foreign investors, and the arbitration agreement is only binding upon the parties to the contract. The joint venture company is neither a party to the joint venture contract nor a party to the arbitration agreement, and therefore, a dispute involving the joint venture company is not bound by the arbitration agreement. During the arbitration, the joint Applicants filed claims for the violation of the joint venture contract in relation to the Respondent filing lawsuits against the joint venture company. Despite the objection from Yongning, the tribunal addressed the issue between Yongning and the joint venture, which constituted a violation of the scope of arbitration agreement. First, the tribunal ruled on the substantive issues in dispute between Yongning and the joint venture company. In Paragraph 177 to 214, the tribunal addressed the legal relationship between Yongning and the joint venture. Second, the tribunal had ruled on the procedural matter in the dispute between Yongning and the joint venture company. In Paragraphs 218 to 237 of the arbitral award, the tribunal addressed whether Yongning was entitled to bring the lawsuit against the joint venture concerning the lease, whether Yongning was entitled to preservation measures and whether the dispute between Yongning and the joint venture should be submitted to the court or to arbitration, etc. Third, the tribunal addressed the issue concerning the allocation of the litigation fees and ruled that Yongning should cover the expenses of the three joint Applicants incurred during the litigation.

2. The arbitral award violated Article V(2)(a) of the New York Convention for arbitrating issues that are not subject to arbitration under the laws of China:

Under Article V(2)(a) of the New York Convention, the recognition and enforcement of the arbitral award may be refused if the subject matter is not capable of settlement by arbitration under the law of the country where the enforcement is sought. According to Article 2 of the Arbitration Law of China, only the disputes between citizens, legal persons and other organizations concerning the contractual and commercial matters are capable of settlement by arbitration. Furthermore, according to the commercial reservation made by our country while adhering to the New York Convention, China will apply the Convention to disputes concerning contractual and commercial matters under the laws of China. That is to say, only the disputes concerning contractual and commercial rights and obligations are capable of settlement by arbitration. The recognition and enforcement of arbitral awards under the New York Convention is limited to awards made out of the commercial disputes.

The arbitral award in this case deals with matters that are not capable of settlement by arbitration under the laws of China.

First, we turn to the justice and legality of Yongning's application for property preservation measures before the Chinese court. Yongning's application for property preservation measure before the Chinese court is within the scope of the Civil Procedural Law. Whether the application is justified and legal is a dispute arising out of the procedural legal relationship. The dispute is neither related to the contract and property nor related to contractual or commercial relationship. A dispute of this nature is subject to the exclusive jurisdiction of Chinese courts.

Any objection to justice and legality of the procedural interim measures should be submitted to the competent court or the superior court. The tribunal does not have jurisdiction to arbitrate the relevant issue. In the present case, the tribunal ruled that the preservation measures had no justification under the law or in terms of the business, and reasoned that the preservation measures taken by the Chinese court led to the termination of the joint venture's business. The award is in clear violation of the Chinese laws.

Second, the bearing of the litigation fees between Yongning and the joint venture. With regard to the bearing of the litigation fees, the Chinese courts enjoy exclusive jurisdiction as the issue arises out of the procedural law. The tribunal has no jurisdiction to arbitrate the dispute. However, the tribunal ruled that Yongning should bear the expenses of the three joint Applicants for the litigation, which is in violation of the laws of China regarding arbitrability.

3. The arbitral award violates Article V(2)(b) of the New York Convention since the arbitral award is against the public policy of China.

According to Article V(2)(b) of the New York Convention, the recognition and enforcement of the arbitral award may be refused if the enforcement of the award would be contrary to the public policy of that country.

(1) First, the arbitral award in the present case violates the jurisdiction of the People's Courts and is detrimental to the judicial sovereignty of our country. The more specific reasons are as follows: (a) the arbitral award addressed the justice and legality of the application for preservation measures, which violates the court's authority to review the application for preservation measures; (b) the tribunal ruled that the litigation instituted by Yongning concerning the dispute in the lease of land had violated the arbitration agreement, which constituted a denial of the court's authority to review the objection to jurisdiction and a denial of the court's jurisdiction to hear the case concerning the lease of the contract; (c) the arbitral award reviewed the lease between Yongning and the joint venture company, while the Chinese court had already issued the decision on its jurisdiction to hear the dispute between Yongning and the joint venture company; and (d) the arbitral award ruled on the litigation fees of the three joint Applicants, which violated the court's authority to decide on the allocation of litigation fees.

(2) Second, the arbitral award denies the effective ruling and decisions of the People's Courts, which also violates the judicial sovereignty of our country. (a) In the first lawsuit against the joint venture company, Yongning applied to the court for the commencement of property preservation measures. The Jinan Intermediate People's Court had approved the application after review. However, the arbitral tribunal ruled that the application for preservation measures had no justification under the law and in terms of business. (b) The People's Court granted the application for preservation measures, while the arbitral tribunal ruled that the enforcement of the preservation measures was the most direct and prompt reason for the failure of the joint venture. In essence, the arbitral award is a denial of the decision of the court. (c) The joint venture had already raised objections to the jurisdiction of the court in the first two cases concerning the lease of property dispute and those objections were dismissed by the court. However, the tribunal reviewed the issue of whether Yongning was entitled to bring the lawsuit against the joint venture, which was a denial of court's decision, though the tribunal made the

same ruling in this issue. (d) In the case concerning the lease of land between Yongning and the joint venture, the court ruled to hear the case filed by Yongning, where the joint venture did not raise the objection to jurisdiction of the court. While the arbitral award held that the filing of the lawsuits had violated the arbitration agreement, and the dispute should be submitted to arbitration, which is in denial of the court's decision on the effective decision. (e) In the four cases between Yongning and the joint venture, the court had ruled on the litigation fees. The arbitral award stated that Yongning should bear the litigation fees of the three applicants, which is also a denial of the legal effect of the court's decision.

(3) Third, the recognition and enforcement of the award constitutes a violation of the Civil Procedural Law. The Civil Procedural Law is one of the basic laws in China, and property preservation measures are part of the basic civil procedural law system of our country. Where legal interests are infringed upon, the citizens and legal persons are entitled to preservation measures for protection, which constitutes the most basic procedural right enjoyed by citizens and legal persons. Yet, in the present case, the arbitral tribunal ruled that the application for preservation measures was in breach of the contract and even violated the law. The award denied a procedural right enjoyed by citizens and legal persons. Should the award be recognized and enforced, a misconception would follow leading to the conclusion that a review by the court on an application for preservation measures is not final, and even if it were approved by the court, an arbitral tribunal has the authority rule on the legality of the court's decision. Such a result would fundamentally damage the civil procedural system

(4) Finally, the recognition and enforcement of the award would be in violation of the principle of justice. According to the facts determined by the court in the case between Yongning and the joint venture company concerning the disputes of the land and property lease, the court had supported the substantive requests and the application for preservation measures. Thus, the dispute between Yongning and the joint venture was attributed to the overdue rent owed by the joint venture. The arbitral tribunal held that the justified application for preservation measures was the cause of the joint venture's suspension of the business, and granted the joint Applicants enormous damages, which is obviously unjust to Yongning and violates the basic notion of justice in China.

Concerning whether or not Yongning had the chance to argue the arbitration procedure, we assent to the views of the Jinan Intermediate People's Court.

Based on the reasons stated above, the court considered that the ICC Award No. 13464/MS/JB/JEH shall not be recognized and enforced.

We seek comments of your Court on the above reasoning.