

# Research on Private International Law in Siemens International Trading (Shanghai) Limited's Application for Enforcement of Foreign Arbitral Awards

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**Abstract**—"The application of Siemens International Trading Ltd. (Shanghai) and Golden Landmark Co., Ltd. for recognition and enforcement of Singapore Arbitral Award (hereinafter referred to as Siemens case) marks a new breakthrough in judging foreign-related factors in China's civil and commercial relations. On the basis of adhering to the three elements of legal relationship, judges expansively interpreted the subject, object and legal facts of civil relationship, and applied "other circumstances" to identify foreign-related civil relations for the first time. In the future, legislation should be further improved to recognize that the subject of free trade area has foreign-related elements. Meanwhile, the "substantive connection theory" should be introduced to restrict the discretion of judges and constantly promote the reform and innovation of arbitration.

**Keywords**—*New York Convention; recognition and enforcement of arbitral awards; foreign-related elements*

## I. INTRODUCTION

As one of the ten major cases of arbitration in China in 2015, the Siemens case was determined as the second batch of typical cases involving the construction of "the belt and road initiative" by the Supreme People's court in May 2017. It has made breakthrough demonstration on the foreign-related judgments of civil and commercial relations. It has strong representativeness and practical significance. It reflects the implementation of the enforcement obligations of the New York Convention on arbitration awards, and has great reference value for the dispute resolution in the construction of "the belt and road initiative" and free trade area.

## II. DOCTRINE AND LEGISLATION OF "FOREIGN-RELATED NATURE" OF CASES

### A. Restrictions on the Submission of Disputes Without Foreign-related Elements to Extraterritorial Arbitration

Due to the advantages of arbitration, the parties are keen to agree to submit disputes to arbitration institutions with a

higher degree of specialization in arbitration services. In practice, cases of submitting domestic disputes to foreign arbitration are also common. In order to safeguard the judicial sovereignty, many countries have adopted domestic legislation to restrict the submission of cases without foreign elements to foreign arbitration institutions for arbitration. Western countries are represented by the United States and Italy. Although China's law does not explicitly prohibit the submission of cases without foreign-related elements to foreign arbitration, judicial practice has indirectly stipulated this situation, such as Article 271<sup>1</sup> of the Civil Procedure Law and Article 128<sup>2</sup> of Contract Law. Such restrictions play an active role in safeguarding the judicial sovereignty of the country and promoting the development of domestic arbitration. However, this restriction on the parties' choice of arbitration institutions is not only a domestic issue in the country where the parties are located, but also has a "global" impact under special circumstances. [1] This kind of influence mainly occurs in the wholly foreign-owned enterprises registered in one country, which are closely linked with foreign countries in capital and operation. When they have commercial disputes with domestic legal persons

<sup>1</sup> In Article 271 of the Civil Procedure Law of the People's Republic of China: for the disputes arising in foreign-related economic, trade, transportation and maritime matters, if the parties have arbitration clauses in the contract or reach a written arbitration agreement afterwards, and submit them to the foreign-related arbitration institution or other arbitration institution of the People's Republic of China for arbitration, the parties shall not bring a suit in the people's court. If the parties do not have an arbitration clause in the contract or have not reached a written arbitration agreement afterwards, they may bring a suit in a people's court.

<sup>2</sup> The paragraph 2 of Article 128 of the Contract Law of the People's Republic of China states: if the parties are unwilling to settle, mediate or fail to settle or mediate, they may apply to the arbitration institution for arbitration according to the arbitration agreement. The parties to a foreign-related contract may apply to the Chinese arbitration institution or other arbitration institution for arbitration in accordance with the arbitration agreement. If the parties have not concluded an arbitration agreement or the arbitration agreement is invalid, they may bring a suit in a people's court. The parties shall perform the legally effective judgments, arbitral awards and conciliation letters; if they refuse to perform, the other party may request the people's court to execute them.

in the investment country, they tend to submit the disputes to the third country or investors' own country for arbitration. In practice, foreign arbitration institutions can complete the arbitration procedure to reach an arbitration award, but the award often needs to apply to the investment country court for recognition and enforcement. If the law of that country regards wholly foreign-owned enterprises as domestic legal persons, it is quite possible to invalidate the arbitration agreement on the ground that the disputes involved in the case are not foreign-related, which will lead to the refusal to recognize and enforce foreign arbitration awards. The Siemens case also concerns whether the wholly foreign-owned enterprises established in Shanghai foreign trade area belong to the "entities involving foreign elements". Therefore, the judgment of the case involving foreign elements is the key factor for the parties to initiate overseas arbitration.

### *B. Doctrine and Legislation on Judgment of Foreign-related Elements in China*

At present, there are two main criteria for judging the foreign-related characteristics of civil relations.

1) *Connection doctrine*: The doctrine of connection, also known as the doctrine of multiple elements, is generally applicable to common law countries. Scholars who insist on this view believe that a broader attitude should be adopted in judging foreign-related elements, that is, as long as the case is connected with more than one legal system, it will make the case foreign-related. [2] "World Bank Loan for Highway Construction Project" [3] is a typical case often cited. The doctrine of "connection" makes the criteria of foreign-related characteristics of cases broader. On the premise of adhering to the provisions of the law, it tends to reflect the policy value behind the law. However, this criterion makes the judgment of foreign-related elements fall into the drawback of over-general. Although some cases have some relations with foreign countries, this connection is not enough to regard them as foreign-related cases. The actual impact of this connection should be assessed on the case to determine. Only when this connection has a "substantial" impact on civil relations can it be necessary to consider the legislation and jurisdiction of foreign countries or other jurisdictions. To further limit the doctrine of connection to substantive connection is conducive to affirming the foreign-related nature of "the form is not foreign-related but the substance is foreign-related", and excluding the cases of "the form is foreign-related but the substance is not foreign-related".

Second, the doctrine of constitutive requirements. The doctrine refers to the civil and commercial legal relationship in which the subject, object and content of legal relationship have at least one or more elements which are related to foreign countries. [4] The doctrine holds that the subject of civil relations involving foreign elements refers to the fact that one or both parties are foreign natural persons or legal persons, and also include foreign countries, international organizations and stateless persons according to specific

circumstances. Object involving foreign elements refers to the fact that the subject matter of civil legal relations is located abroad. In terms of content involving foreign elements, it mainly refers to the fact that the relationship between civil and commercial rights and obligations is generated, changed or eliminated in foreign countries. At present, the doctrine of constitution of legal relationship is the viewpoint adopted by Chinese legislation, and the result of following the legal system of the Soviet Union after the founding of the People's Republic of China.<sup>3</sup> Article 178 of General Rule of Civil Law strictly defines foreign-related civil relations from three aspects: subject, object and content. However, the implementation of this provision has been criticized by the academic circles. It is too rigid to judge foreign-related elements strictly according to the three elements, and the relevant provisions are not clear. Some scholars have pointed out that nationality cannot be regarded as the sole criterion for subjects involved in foreign affairs. The domicile and place of business of the parties concerned are also factors that cannot be ignored. The General Rule of Civil Law greatly limits the determination of the subject involved in foreign affairs by domicile or place of business. [5] Through the judicial practice of "Tsinghua Tongfang Co., Ltd. applying for revocation of the trade arbitral award" in 2002 and "Yan Xiangyang and Lao Wen's divorce appeal case" in 2004 [6], the determination of foreign-related civil relations has joined the criterion of "habitual residence".<sup>4</sup> Article 1 of the Supreme People's Court's Interpretation of Several Issues Concerning the Application of the Law of the People's Republic of China on the Application of Foreign-related Civil Relations in 2013 and<sup>5</sup> Article 522 of the latest Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law in 2015 have added

<sup>3</sup> Article 178 of the General Opinion states: any party or both parties to a civil relationship are aliens, stateless persons or foreign legal persons; the subject matter of a civil relationship is in the foreign field; and the legal facts that produce, modify or eliminate civil rights and obligations occur in a foreign country are all foreign-related civil relations. When trying cases involving foreign-related civil relations, the people's court shall determine the applicable substantive law in accordance with the provisions of Chapter VIII of the General Principles of Civil Law.

<sup>4</sup> According to Article 1 of the Interpretation of the Supreme People's Court on the Several Issues in the Law of Application of the People's Republic of China on the Foreign-related Civil Relations (I), if a civil relationship has one of the following circumstances, the people's court may identify it as a foreign-related civil relationship: (1) one or both parties are foreign citizens, foreign legal persons or other organizations, stateless persons; (2) the habitual residence of the two parties is outside the territory of the People's Republic of China; (3) the subject matter is outside the territory of the People's Republic of China; (4) the legal facts of the creation, alteration or elimination of civil relations occur outside the territory of the People's Republic of China; (5) other situations that can be identified as foreign-related civil relations.

<sup>5</sup> According to Article 522 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law, the following circumstances can be regarded as foreign-related civil cases by the People's Court: (1) one or both parties are aliens, stateless persons, foreign enterprises or organizations; (2) the habitual residence of one or both parties is outside the territory of the People's Republic of China; (3) the subject matters are outside the territory of the People's Republic of China; (4) the legal facts of the creation, alteration or elimination of civil relations occur outside the territory of the People's Republic of China; (5) other circumstances that may be recognized as foreign-related civil cases. The fifth item is considered to be a transparency provision.

an transparency provisions to allow judges to decide freely on the basis of the previous one. To a certain extent, these provisions have changed the rigid and fixed legal provisions in the past, making the judgment of foreign-related elements more flexible. However, the simple enumeration provisions cannot include some cases of "involving the domestic in form and involving the foreign-related affair in the substance". [7] Even if the judge is given some discretion space, there is still a lack of definite criteria and the possibility of abuse or dormancy of power. For Siemens case of "involving the domestic in form and involving the foreign-related affair in the substance", it is difficult for the people's court to judge the foreign-related nature of the case according to the legal provisions. Finally, according to the Supreme People's court's opinions on the judicial protection provided by the people's court for the construction of "the belt and road initiative", this case is determined to be foreign-related by combining the basic principles of law and using the discretion.

China is in an important period of strategic opportunities for the construction of "the belt and road initiative" and the free trade area. The pace of "going out" and "bringing in" has been accelerating. The new judicial practice similar to that of the Siemens case has emerged in the free trade area, which poses new requirements and challenges for the judgment of foreign elements in China. The traditional three elements cannot adapt to the new practice of identifying foreign-related elements in free trade area, and are not conducive to giving full play to the policy preferences of providing various relief methods for foreign businessmen in free trade area. [8] Therefore, the judgment of the foreign-related nature of FTA cases can be reformed and innovated on the criteria of judging the three elements. Siemens case provides a successful example for this innovation.

### III. ANALYSIS OF SIEMENS CASE

#### A. Summary of the Case and the Focus of the Dispute

1) *Summary of the case:* In September 2005, Shanghai Golden Landmark Co., Ltd. (Pudong New Area, Shanghai) contracted the "Golden Land Building High (Low) Voltage Distribution System Supply Engineering" to Siemens (Waigaoqiao Free Trade Zone, Shanghai). In the contract for the supply of goods signed by the two parties, it is stipulated that all disputes arising from the contract shall be submitted to the Singapore International Arbitration Center, and the law of the People's Republic of China shall be chosen as the substantive law of the case. After disputes arising from the performance of the contract between the two parties, Golden Landmark Co., Ltd. submitted to the Singapore International Arbitration Center for arbitration by virtue of the pre-agreed arbitration agreement. Siemens Co., Ltd. filed an objection to jurisdiction on the grounds that the case was not foreign-related, which was rejected by the arbitration tribunal and then filed a counterclaim. In the end, the arbitral tribunal supported Siemens' counterclaim. After the award was made, Golden Landmark Co., Ltd. fulfilled

part of the award. For the unfulfilled part, Siemens Co., Ltd. applied to the First Intermediate People's Court of Shanghai for recognition and enforcement of the arbitration award made by Singapore International Arbitration Center in August 2011.

2) *Analysis of the focus of dispute:* Since Singapore and China are contracting parties of the New York Convention, the award belongs to a foreign arbitral award and should be subject to judicial review in accordance with the New York Convention. Golden Landmark Co., Ltd. applies to the People's Court for refusing to recognize and enforce the arbitral award in the case. The reasons are as the following. First, both parties are Chinese legal persons, and the contract for the supply of goods signed by both parties has no foreign-related elements. The clause submitted to Singapore for arbitration in the arbitration agreement is invalid, and the refusal to recognize and enforce the judgement on arbitral award should be made in accordance with the <sup>6</sup> paragraph 1, Article 5 of the New York Convention. Secondly, this case does not have foreign-related elements. According to the judicial practice, China has a negative attitude to submit cases without foreign-related elements to foreign arbitration. Therefore, recognizing and enforcing the award of Singapore International Arbitration Center may violate Chinese public policy. Thirdly, there are errors in the substantive part of the arbitral award. The applicant Siemens refuted the three views of the respondent one by one. The third point of view put forward by the respondent should not be regarded as the focus of the dispute in this case. Article 5 of the New York Convention does not examine the substance content of the arbitral award. The errors in the entity of the arbitral award claimed by the respondent do not belong to the focus of the dispute in this case. Shanghai First Intermediate Court summarized the controversial focus of the case as the followings: 1. whether the arbitration clause in the disputed contract is valid; 2. whether the recognition and enforcement of the arbitration award is contrary to China's public policy. <sup>7</sup>

#### B. Specific Analysis of Court Judgment

The first intermediate people's court of Shanghai reported the case to the higher people's court of Shanghai for examination. The Shanghai high people's court asked the Supreme People's court to answer the case. The Supreme People's court replied to the case in accordance with the application law of foreign-related civil law, the relevant judicial interpretation, and the Supreme People's Court's

<sup>6</sup> According to paragraph 1 (a) of Article 5 of the New York Convention, (a) if the parties to the agreement referred to in Article 2 have some incapacity under the law applicable to them, or if the agreement is null and void under the law applicable to the agreement by the parties, or if it fails to specify what law is on time, the law of the country in which the award is made is null and void.

<sup>7</sup> It is No. 2 Civil Award (No. 2018-06-13) of the first court (foreign-related arbitration of Shanghai First Intermediate People's Court (2013)).



opinions on the judicial protection provided by the people's court for the construction of "the belt and road initiative". This paper will analyze the proof process of the Supreme Court and the final arbitrament made by Shanghai first intermediate people's court.

1) *Comment on the supreme court's reply letter:* In the petition, Shanghai first intermediate people's court held that the dispute in this case had no foreign-related elements. According to the provisions of <sup>8</sup>Article 65 of the Arbitration Law, the arbitration agreement signed by the two parties was invalid, and the submission of the invalid arbitration agreement to foreign arbitration belonged to the case stipulated in subparagraph A, paragraph 1, Article 5 of the New York Convention. The foreign arbitration award should be refused to be recognized and enforced. In judging the validity of an arbitration agreement, the Shanghai First Intermediate Court has obvious errors in applying the law. According to the New York Convention, the applicable law for judging the validity of an arbitration agreement should be agreed by the parties in advance, and the law of the country where the arbitration is not agreed upon should be determined in accordance with the law of the country where the arbitration is conducted. In this case, the two parties only made an agreement that the substantive law of the case should be applied to the law of the People's Republic of China, and did not agree on the applicable law for examining the validity of arbitration agreements. The validity of the arbitration agreement should be judged according to the laws of Singapore, the country of arbitration. In the case that the Golden Landmark Co., Ltd. has not submitted the legal text of Singapore to the court, it is inappropriate to refuse to recognize and enforce the arbitral award in the case in accordance with paragraph 1 (a) of the New York Convention. In the process of argumentation, the Supreme Court decides that the case does not have foreign-related elements according to the law of China. The current laws and judicial policies of China do not recognize the validity of the agreement to submit the case without foreign-related elements to foreign arbitration. Therefore, if the recognition and enforcement of arbitral awards made by Singapore will have a negative impact on Chinese basic legal principles and national judicial sovereignty and violate Chinese public policy, the "Public Policy", Article 5 of the Convention can be invoked, to refuse to recognize and enforce arbitral awards in dispute.

The argument of the Supreme Court evades the validity of arbitration agreement according to Singapore law and applies Chinese law to judge the foreign-related nature of the

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<sup>8</sup> Shanghai First Intermediate People's Court believes that in Article 65 of the Arbitration Law, the arbitration of disputes arising in foreign-related economic, trade, transport and maritime matters applied to the foreign-related arbitration does not allow domestic parties to choose foreign arbitration institutions. In view of the fact that the contract disputes involved in this case do not have foreign-related elements, the arbitration clause referring the contract disputes without foreign-related elements to foreign arbitration institutions for the arbitration shall be invalid.

case. China's legislation does not prohibit parties from submitting cases without foreign-related elements to foreign arbitration. However, due to the judicial nature of arbitration, courts at all levels basically advocate that arbitration jurisdiction has the basic idea of legal award. The "law without prohibition" aiming at protect private rights can not be used as the legal basis for judging the effectiveness of arbitration agreements. China's courts have skillfully resolved the obstacles to the application of the New York Convention by refusing to recognize and enforce foreign arbitrament that does not involve foreign elements, which is contrary to China's public policy. It is also reasonable to apply the provisions of "public policy" to refuse to recognize and enforce disputed arbitrament. However, there is another voice in the discussion process of the Supreme Court. according to the special situation of Shanghai Free Trade Area, the foreign-related elements in this case should be explored, make certain exploration and breakthroughs in the application of law, recognize the foreign-related elements in the case, and then combine the principle of "estoppel" and good faith to determine the validity of the arbitration clauses of both parties, and recognize and enforce the arbitration awards made by Singapore. Ultimately, the Supreme Court adopted the second view that foreign-funded enterprises registered in the free trade area can accept the validity of the foreign arbitration as stipulated in the commercial contracts signed by them. In its reply letter, the Supreme Court clearly pointed out that the arbitration agreement in this case could be found to be in conformity with the paragraph 5, Article 1 of interpretation of the Supreme People's Court on the application of the Law of the People's Republic of China on the Application of Law on Foreign-related Civil Relations (1). It "may be recognized as other situations in foreign-related civil relations"<sup>9</sup>, and the foreign arbitration awards involved in this case can be recognized and enforced. This is also the first time since the implementation of the law that the people's court has used discretion to judge the foreign-related nature of civil relations, which is of positive significance.

2) *Analysis on the arbitrament of Shanghai first intermediate court:* After receiving the Supreme Court's reply, the Shanghai First Intermediate People's Court pointed out in its arbitrament that there was no situation like that in article 5 of the New York Convention in the case and decided to recognize and enforce the award made by the Singapore International Arbitration Center. As for the validity of the arbitration clause raised by the respondent, Shanghai First Intermediate Court believes that the key to this problem lies in judging whether the contractual relationship between the two parties is foreign-related, and the foreign-related elements of case determines whether the recognition and enforcement of the award violates Chinese public policy. Therefore, the judgment of foreign-related elements has become an important issue of the fair award of the Shanghai First Intermediate Court.

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<sup>9</sup> The Supreme Court's reply to Siemens International Trade (Shanghai) Limited's application for recognition and enforcement of foreign arbitral awards, [2015] No. 5 of civil relations.

The "foreign-related nature" of civil relations is a necessary condition for a case to be submitted to an extraterritorial arbitration institution for arbitration and for a court to initiate a trial procedure for a foreign-related civil case. It affects both the choice of law by the parties and the substantive rights. The judgment of foreign-related elements is very important for Siemens case. This case happened in the China (Shanghai) Free Trade Pilot Area (hereinafter referred to as the Shanghai Free Trade Area) where the nature and location of the parties are very special. The free trade area bears the important task of attracting foreign investment and reforming the first test. It plays an important trailbreaker role in the internationalization of the commercial arbitration system and the construction of the Shanghai International Arbitration Center. A series of reforms and innovations in free trade area put forward new requirements for the identification of standards concerning foreign affairs in civil relations. According to the facts of the case, the reply of the Supreme Court, and the relevant legal provisions, it should be recognized that the case with foreign-related elements belongs to foreign-related civil cases. The validity of the arbitration agreement between the two parties should be recognized, and the arbitration award should be recognized and enforced.

#### IV. NEW BREAKTHROUGHS IN THE IDENTIFICATION OF FOREIGN-RELATED ELEMENTS IN SIEMENS CASE

According to the civil arbitrament of Shanghai First Intermediate Court, when deciding the foreign-related nature of FTA cases, judges still make strict demonstration in accordance with the three elements of traditional legal relationship, and apply the "other circumstances" on the basis of the three elements. However, the expanded interpretation of the subject, object and legal facts of civil relations confirms the foreign-related nature of the Siemens case, and recognizes and enforces the awards made by the Singapore International Arbitration Center. It reflects that the relaxation of judicial standards concerning foreign affairs is a manifestation of respecting the choice of the parties, and also a reflection of the principle of "making it as effective as possible". With the continuous development of the "belt and road initiative" construction in China and the formal formation of the free trade area system, the foreign-related standards should be appropriately relaxed, and the following new breakthroughs have been made in the judgment of foreign-related cases in the free trade area.

Firstly, the application of the principle of close connection confirms the subject's foreign-related nature and enlarges the scope of the subject. According to the provisions of Article 2 and Article 8 of the Law of the People's Republic of China on Foreign-funded Enterprises, Siemens Co., Ltd. and Golden Landmark Co., Ltd. are both registered in China in accordance with the laws of the People's Republic of China, and their habitual residence is also located in China. The nature of Siemens Co., Ltd. and Golden Landmark Co., Ltd. should be Chinese legal persons. Therefore, they are not in conformity with the foreign-related phase of the subject of Article 1 of the Interpretation on the Application Law of Foreign-related Civil Relations. Judging

from the traditional three elements of foreign-related legal relationship, the subject of this case is not foreign-related. However, since both parties are wholly foreign-owned enterprises registered in Shanghai Free Trade Area, their sources of capital, organization and management, and flow of interests are significantly different from those of general domestic legal persons, and they are closely related to foreign investors. To sum up, Shanghai First Intermediate Court confirmed the foreign-related attributes of the subjects involved. However, the court held a negative attitude in the case of Beijing Chaolai Xinsheng Company<sup>10</sup>. In this case, both Chaolai Sports Company and Suowang Zhixin Company belong to Chinese legal persons. The legal facts and object of action of equity transfer between the two parties occur in China. Therefore, the court considers that there is no foreign-related element in this case. By comparing the two cases, it can be found that the recognition of the subject's foreign-related nature of Siemens case is mainly due to the special location factors of the two parties registered in the Shanghai Free Trade Area, which are influenced by the arbitration facilitation policy in the Free Trade Area and the breakthrough recognition of the subject's foreign-related nature. Beijing Chaolai Company is only an ordinary foreign-funded enterprise established in China, and its main body is foreign-related and recognized.

Secondly, the performance of contracts comprehensively should be considered and the connotation of the object should be expanded. According to Paragraph 3 of Article 1 of the Interpretation of the Law Applicable to Foreign-related Civil Relations, the only criterion for the object to be involved in foreign affairs is that the subject matter is located outside the territory of China. This standard is more applicable to the case that the object is real estate, and the performance is also an important factor to consider whether the object is foreign-related. The judgment of the subject should be integrated with the performance of the contract. In Siemens case, the court considered the object of civil relationship comprehensively. It believed that the subject matters under the Supply Contract signed by Golden Landmark Co., Ltd. and Siemens Co., Ltd. were first transported from abroad to Shanghai Free Trade Area, and bonded supervision was carried out in the area, then were transferred from the area to the outside after completing customs clearance procedures, and finally were delivered in Shanghai<sup>11</sup>, China. The transfer of the subject matter of the contract is carried out under the special customs supervision of the free trade area, which conforms to the characteristics of international trade in goods and has foreign-related elements. This cognizance breaks through the traditional criteria for judging foreign-related objects, breaks the previous criteria for judging foreign-related objects by the location of the subject matter at the time of delivery, incorporates "quasi-performance behavior" into foreign-

<sup>10</sup> It is No. 10670 of the second court (civil court) of Beijing second intermediate people's court, civil arbitration in 2014.

<sup>11</sup> It is No. 2 Civil Award (No. 2018-06-13) of the first court (foreign-related arbitration of Shanghai First Intermediate People's Court (2013).

related judgments, and expands the connotation of the object of civil and commercial relations.

Thirdly, the discretion of judges is used for the first time. Since the criterion of "other circumstances that can be identified as foreign-related civil relations" was established in 2012, the Siemens case is the only case to apply the basic clause of judging foreign-related elements in the first article of judicial interpretation. When reviewing the foreign-related elements, the judges extended the time of legal facts to the establishment of Shanghai Free Trade Area, expanded the scope of foreign-related subjects, expanded the connotation of foreign-related objects, and achieved a new breakthrough in judging foreign-related elements in FTA cases.

## V. THE IMPROVEMENT OF THE JUDGMENT ON FOREIGN-RELATED ELEMENTS

### A. *Recognition of the Foreign-related Nature of the Subjects in the Free Trade Area*

After the Siemens case, in order to make the judgment of the foreign-related elements in such "atypical" cases in the free trade area have rules to follow, the Supreme Court promulgated the "Supreme People's Court's Opinion on Providing Judicial Guarantee for the Construction of Free Trade Pilot Area" (hereinafter referred to as "Opinion").<sup>12</sup> Article 9 of the Opinion confirmed the validity of submitting foreign enterprise agreement registered in the free trade area to foreign arbitration. Most scholars believe that this provision affirms the foreign-related nature of the subject of wholly foreign-owned enterprises in the free trade area. At the same time, it reflects the application of the principle of "estoppel", which can be directly invoked in judicial trials. However, the article has some limitations, which are embodied in the following points. First, the first paragraph of Article 9 is a principled provision, and there is no clear provision on the validity of submitting disputes without foreign-related elements to extraterritorial arbitration by wholly foreign-owned enterprises in the region. Second, paragraph 2 of article 9 can be applied to cases in which one party submits a dispute to extraterritorial arbitration, and the other party claims that the agreement is invalid or that the dispute is refused recognition and enforcement on the

<sup>12</sup> Article 9 of the Opinion of the Supreme People's Court on Providing Judicial Guarantee for the Construction of Free Trade Pilot Area states that correctly ascertaining the validity of arbitration agreement and standardizing the judicial review of arbitration cases should be stipulated. For a wholly foreign-owned enterprise registered in the free trade area agrees to submit a commercial dispute to extraterritorial arbitration, the relevant arbitration agreement shall not be invalid solely on the grounds that the dispute does not have any foreign-related elements. One or both parties are foreign-funded enterprises registered in the free trade pilot area test, and agree to submit commercial disputes to extraterritorial arbitration. After disputes occur, the parties submit disputes to extraterritorial arbitration. After the relevant award is made, the people's court refuses to recognize, approve or enforce them on the grounds of invalidity of the arbitration agreement, and the other party fails to support arbitration in the arbitration procedure. If the validity of the arbitration agreement is challenged and the relevant award is made, the people's court will not support the claim that the arbitration agreement is null and void because the dispute has no foreign-related elements and refuses to recognize, approve or enforce it.

grounds that there are no foreign-related elements. That is to say, this clause is only a prohibition on the other party's "rebuttal", not a direct regulation on the foreign-related subject of wholly foreign-owned enterprises in free trade area. In fact, the reason for the party's "rebuttal" is to evade the obligation of effective adjudication, which is rooted in the fact that the "foreign-related" nature of the case is not clear and provides the party with the opportunity to drill legal loopholes. Moreover, one party can claim that there is no foreign-related element in the dispute when the other party submits the arbitration. At this time, it should return to the old issue of the subject's foreign-related identification, which provides the parties with a chance to circumvent the law.

Therefore, on the basis of the breakthrough in Siemens case and taking into account the particularity of free trade area, directly recognizing the subject's foreign-related nature of wholly foreign-owned enterprises registered and established in free trade area can be considered. Foreign-funded enterprises can flexibly grasp the foreign-related elements by taking into account such factors as organization and management, sources of funds, trend of interests and so on. [9] In addition, wholly foreign-owned enterprises within and outside China, similar to the parties involved in the Beijing Chaolai Xinsheng Sports Company Case, may also consider recognizing the validity of the extraterritorial arbitration agreements submitted by the parties. Although wholly foreign-owned enterprises within and outside China belong to Chinese legal persons according to China's laws, they have substantial connections with investors' home countries. Recognizing the foreign-related nature of their subjects in the field of commercial arbitration does not fundamentally change the nature of enterprises, but only provides some convenience for dispute settlement. For those enterprises which are in line with the "actual control" of foreign investors, the subject's foreign-related nature of arbitration can be recognized, which is conducive to attracting foreign investment in China, and also to the promotion and application of the reform and innovation achievements in the free trade area.

### B. *Reasonable Limitation of Judges' Discretion*

The criteria for judging foreign-related cases involve the understanding of the transparency provisions. There is uncertainty in the interpretation of the discretion granted to judges by the transparency provisions. At present, the Supreme Court is still cautious about the expansive interpretation of foreign-related elements. At the same time, once the judges are given unclear discretion, it may lead to the judges to deal with the cases of "being foreign-related in form but not foreign-related in substance" in accordance with foreign-related civil cases. It may also lead to the judges to restrict the development of arbitration due to the consideration of reducing workload and strictly grasping the judgment conditions of foreign-related elements. Therefore, it is necessary to restrict the discretion of judges. The connotation of "substantive connection theory" on the basis of the three elements of legal relationship can be added, and the foreign-related nature of cases with substantive

connection with foreign countries can be affirmed. Amending the relevant law, "Other cases with substantive links with foreign countries can be identified as foreign-related civil relations." [7] This cannot only include atypical foreign-related cases, but also avoid the loss of control over the discretion of judges. At the same time, it also solves the problem of foreign-related identification of "domestic and foreign" foreign-funded enterprises.

## VI. CONCLUSION

The Shanghai free trade zone is the advantage platform for docking the construction of "the belt and road initiative". The innovation of arbitration dispute settlement mechanism reflects the judicial protection for arbitration, which is in line with the request for facilitation of dispute settlement in Shanghai free trade area. [10] The expanded interpretation of Siemens case on the foreign-related nature of civil and commercial relations reflects the support for the international commercial arbitration and diversified dispute settlement mechanism in Shanghai free trade area, the application of the principle of "estoppel", and the firm implementation of China's arbitration enforcement obligations under the New York Convention. To a certain extent, it has reversed the bad impression of China by the international community and highlighted the international image of China's arbitration. [11] The case provides great convenience for the settlement of enterprise disputes in free trade area, as well as for the formation of replicable and popularizable successful examples in free trade area.

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