

NORONHA ADVOGADOS GLOBAL LAWYERS

São Paulo | Rio de Janeiro | Brasília | Curitiba | Porto Alegre | Recife



London | Lisbon | Shanghai | Miami | Buenos Aires

CONFLICT OF LAWS AND ARBITRATION IN CHINA

UIA SEMINAR – *LEGAL ASPECTS OF DOING BUSINESS WITH CHINA*

Palazzo affari dei Giureconsulti, Milan, Italy, 12 April 2008

Durval de Noronha Goyos Jr.
Senior Partner - Noronha Advogados



POINTS OF PRESENTATION

1. **Conflict of Laws in China**
2. **Arbitration in China**





CONFLICT OF LAWS IN CHINA

General information

PRINCIPLE OF THE CLOSEST CONNECTION:

- adopted by Chinese International Private Law

-> Different treatment for Domestic and Foreign-related disputes no longer exists

-> New York Convention

- China has been a signatory to the **New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards** since December 1986.

- According to the Declaration of Commercial Reservation of China, this Convention shall apply to disputes that arise from contractual and non-contractual commercial legal relationships.





CONFLICT OF LAWS IN CHINA

PRINCIPLE OF THE CLOSEST CONNECTION

CONFLICTS BETWEEN NATURAL PERSON'S NATIONALITY AND DOMICILE

The Notice of Supreme Court on General Principles of the Civil Law of the People's Republic of China:

- a. if a foreigner obtains dual nationality or multi-nationality, the law of his /her domicile or with the closest connection with him/her shall be his/her country's law;
- b. if the party's domicile is not clear or not able to be confirmed, the place where he/she used to live shall be his/her domicile;
- c. where the party has two or more than two business address, the address which has the most closest connection with the dispute shall be the business address; if the party has no business address, his domicile or the place where he/she used to live shall be his/her address.



CONFLICT OF LAWS IN CHINA

PRINCIPLE OF THE CLOSEST CONNECTION

CONFLICTS ON FOREIGN RELATED CONTRACT:

- General Principles of the Civil Law of PRC, Article 145 - “The parties to a contract involving foreign interests may choose the law applicable to the settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied.”
- Contract Law of the PRC, Article 126 - “Parties of a contract involving foreign interests may select the applicable law for resolution of a contractual dispute, except if otherwise provided by law. Where the parties to a contract involving foreign interests fail to select the applicable law, the contract in question shall be ruled by the country with the closest connection thereto.”
- Maritime Code of the PRC – Article 269 - “The parties to a contract may choose the law applicable to such a contract, unless the law provides otherwise, Where the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply.”



CONFLICT OF LAWS IN CHINA

GENERAL CASES

CONFLICTS IN RELATION TO THE CIVIL CAPACITY OF INDIVIDUALS:

- General Principles of the Civil Law of PRC, Article 143 – If a citizen of the People's Republic of China resides in a foreign country, the law of that country may be applicable in relation to the civil capacity.

CONFLICTS ON REAL ESTATE PROPERTY:

- General Principles of the Civil Law of PRC, Article 144 – The ownership of property shall be governed by the law of the place where the property is situated.

CONFLICTS ON MARRIAGE:

- General Principles of the Civil Law of PRC, Article 147 – The marriage of a citizen of the PRC to a foreigner shall be governed by the law of the place where they got married.



CONFLICT OF LAWS IN CHINA

CONFLICTS ON INFRINGING ACT

Article 146 - General Principles of the Civil Law of PRC:

- a. The law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act.
- b. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied.
- c. An act committed outside the People's Republic of China shall not be treated as an infringing act if under the law of the People's Republic of China it is not considered an infringing act.



CONFLICT OF LAWS IN CHINA

JURISDICTION OF CHINESE COURT

Article 243: China shall have jurisdiction in relation to a contract dispute or other disputes over property rights and interests, brought against a defendant who has no domicile within the territory of the PRC if:

- the contract is signed or performed within the territory of the PRC; or
- the object of the action is located within the territory of the PRC; or
- the defendant has distrainable property within the territory of the PRC; or
- the defendant has its representative office within the territory of the PRC.

Article 244: A contract concluded with a foreign element or over property rights and interests involving foreign element may, through written agreement between the parties, choose the court of the place which has practical connections with the dispute to have jurisdiction.

In this case, if the jurisdiction of People's Court of PRC is chosen, the provisions of this Law on jurisdiction shall not be violated.”



CONFLICT OF LAWS IN CHINA

JURISDICTION OF CHINESE COURT

Article 245: “Whenever a defendant raises no objection to the jurisdiction of a People’s Court and responds to the civil action involving foreign element by making a defense, the People's Court has jurisdiction over the case.”

Article 246: “Actions brought in relation to disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, or Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources in the People's Republic of China shall fall under the jurisdiction of the people's courts of the People's Republic of China.”

CONFLICT OF LAWS IN CHINA

CONFLICTS ON MARITIME LAW

Maritime Code of the People's Republic of China:

Article 273:

“The law of the place where the infringing act is committed shall apply to claims for damages arising from collision of ships.”

If the colliding ships belong to the same country, no matter where the collision occurs, the law of the flag State shall apply to claims against one another for damages arising from such collision.”





CONFLICT OF LAWS IN CHINA

PUBLIC ORDER RESERVATION

- The application of foreign laws or international practice shall not violate the public interest of PRC.
(Article 150 - General Principles of the Civil Law of PRC)
- The law of PRC will always be applied:
 - for a Sino-foreign Equity Joint Venture Enterprise Contract,
 - for a Sino-foreign Cooperative Joint Venture Contract,
 - for a Contract for Sino-foreign Joint Exploration and Development of Natural Resources which is performed within the territory of PRC*(Article 126 - Contract Law of the PRC)*
- The People's Court shall not assist following any request by a foreign Court, if this would impair the sovereignty, security or social and public interest of the PRC. *(Article 262 - The Civil Procedure Law of the PRC)*



CONFLICT OF LAWS IN CHINA

RECOGNITION OF FOREIGN ARBITRAL AWARDS AND JUDGEMENTS

- PRINCIPLE OF RECIPROCITY

The Civil Procedure Law of the PRC:

Article 262: “In accordance with the international treaties concluded or acceded to by the People’s Republic of China and with the principle of reciprocity, the People’s Courts of China and foreign courts may make mutual requests for assistance in the service of legal documents, in investigation and collection of evidence or in other litigation actions.”*

Article 269: “(...)The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or in accordance with the **principle of reciprocity.**”

* The New York Convention; The Washington Convention



CONFLICT OF LAWS IN CHINA

RECOGNITION OF FOREIGN ARBITRAL AWARDS AND JUDGEMENTS

- shall be followed by its Chinese translation or in the language established in the relevant international treaties (Article 264);
- the party concerned may directly apply for recognition and enforcement to the intermediate Chinese court which has jurisdiction (Article 267);
- must be applied before the competent intermediate People's Court where the party subjected to enforcement has his domicile or where his property is located (Article 269);
- Foreign Arbitral Awards need to apply to the competent intermediate People's Court for enforcement.



ARBITRATION IN CHINA

Arbitration Law

The Chinese Arbitration Law was promulgated on 31 October, 1994 and became effective on 1 September, 1995.





ARBITRATION IN CHINA

CIETAC (The China International Economic and Trade Arbitration Commission)

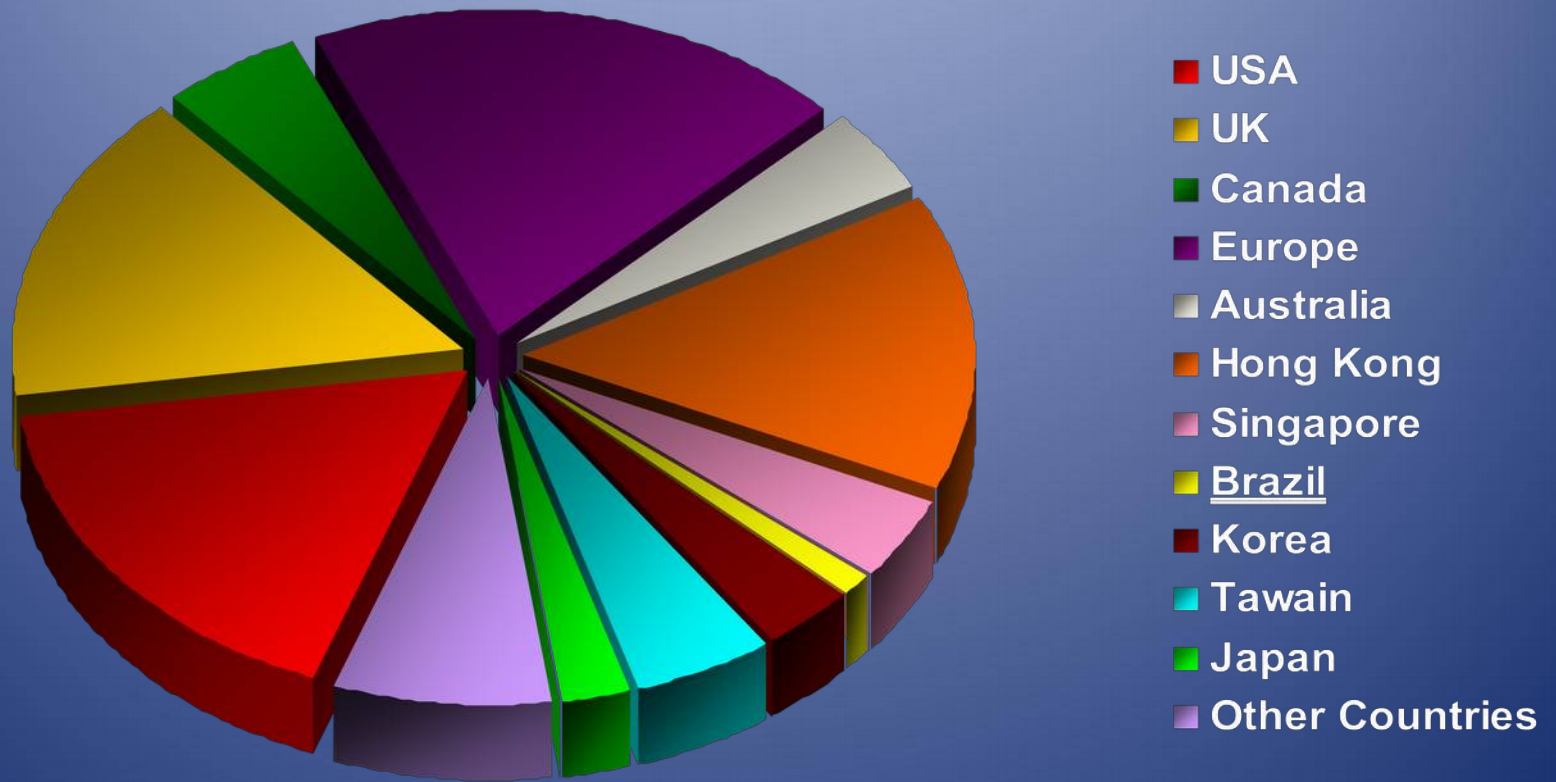
- established in 1956, in Beijing;
- it has 2 sub-commissions established in Shanghai and Shenzhen;
- it has also 19 liaisons in different places in the Chinese territory;
- since 2005, CIETAC has also been known as the Arbitration Court of the China Chamber of International Commerce (CCOIC);
- the most important arbitration institution in China and one of the busiest arbitration centres of the world;
- lists about 1,000 arbitrators from China and also from other countries.





ARBITRATION IN CHINA

CIETAC – Foreign Arbitrators





ARBITRATION IN CHINA

Arbitration Rules of CIETAC

Article 3 – Scope of jurisdiction:

- a. international or foreign-related disputes;
- b. disputes related to Hong Kong, Macao or Taiwan Special Administrative Region;
- c. domestic disputes.

ARBITRATION AGREEMENT:

CIETAC shall, upon written application, accept a case either before or after a dispute, and it is necessary for there to be an arbitration agreement (inclusion of the arbitration clause in the contract, which shall be treated as an independent and separate clause from the others inserted in the contract.



ARBITRATION IN CHINA

Arbitration Rules of CIETAC

Model of an Arbitration Clause:

“Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of the application for arbitration. The arbitral award is final and binding upon both parties.”



ARBITRATION IN CHINA

Arbitration Rules of CIETAC

Objection to an Arbitration Agreement and/or Jurisdiction:

- CIETAC will establish the existence and validity of an arbitration agreement and its jurisdiction.
- All objections shall be made in writing.
- Arbitration shall continue notwithstanding any objections.



ARBITRATION IN CHINA

Arbitration Rules of CIETAC

Arbitral Proceedings:

- Application for Arbitration
- Acceptance of the case: CIETAC sends the Notice of Arbitration
- Within 45 days the defendant shall file a Statement of Defence. This deadline may be extended for justified reasons.
- Counterclaim - the Defendant shall file its counterclaim within 45 (forty five) days of receipt of the Notice of Arbitration. The deadline may be also extended for justified reasons.
- Amendments to the Claim/Counterclaim - the Plaintiff may amend its claim and the Plaintiff its counterclaim. However, the arbitral court may not allow such amendments if considers it is too late and may delay the arbitral proceedings.



ARBITRATION IN CHINA

Arbitration Rules of CIETAC

Representation:

The party may be represented by an authorized representative which can be either a Chinese citizen or a foreign one.

- **Article 16:** “ *A party may be represented by its authorized representative (s) in handling matters relating to the arbitration. In such a case, a Power of Attorney shall be forwarded to the CIETAC by the party or its authorized representative (s). Either Chinese or foreign citizens may be authorized by a party to act as its representative (s).*”

- **Article 21:** “*The parties shall appoint arbitrators from the Panel of Arbitrators provided by the CIETAC. Where the parties have agreed to appoint arbitrators from outside of the CIETAC’s Panel of Arbitrators, the arbitrators so appointed by the parties or nominated according to the agreement of the parties may act as co-arbitrator, presiding arbitrator or sole arbitrator after the appointment has been confirmed by the Chairman of the CIETAC in accordance with the law.*”

- **Article 38:** “*The arbitral tribunal may consult or appoint experts and appraisers for clarification on specific issues of a case. Such an expert or appraiser may either be a Chinese or foreign organization or citizen.*”



ARBITRATION IN CHINA

Arbitration Rules of CIETAC

The Arbitral Tribunal:

- appointment of arbitrators enlisted at the Panel of Arbitrators of CIETAC and/or appointment of arbitrators not enlisted at the Panel of Arbitrators of CIETAC;
- sole arbitrator / three arbitrators;
- the arbitrator shall be jointly chosen by the parties or appointed by the Chairman of CIETAC;
- arbitrator can be challenged and/or replaced.



ARBITRATION IN CHINA

Arbitration Rules of CIETAC

Hearing:

- the arbitration tribunal shall hold oral hearings or exam the case on documents only basis;
- Chinese or foreign organizations or citizens may be appointed by the arbitration tribunal as experts or appraisers for clarification on special issues of the case;
- combination of conciliation and arbitration.

Withdrawal and Dismissal:

- party may file a request to withdrawal its claim or counterclaim. The arbitration tribunal will examine the request and render an award;
- the decision of dismissal shall be made by the Secretary-general of CIETAC before the formation of the tribunal;
- if one of the parties files the request for arbitration for a claim which has been previously withdrawn, CIETAC will decide whether to accept it or not.

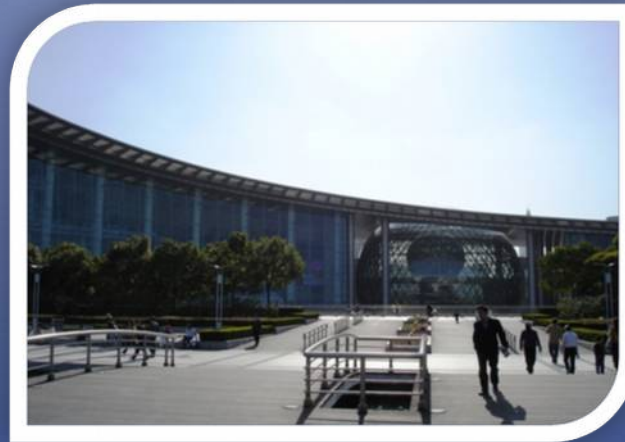


ARBITRATION IN CHINA

Arbitration Rules of CIETAC

Arbitral Awards - Time limits

- a. the arbitral award shall be rendered
- b. within 6 (six) months from the formation of the tribunal;
- c. the Chairman of CIETAC may give an extension upon request in case of justified necessity.



The Arbitral Award is final and binding upon both parties. Neither of the parties will be able to bring a lawsuit before a Court of Law or request any other organization to review the award granted.



ARBITRATION IN CHINA

Arbitration Rules of CIETAC

Article 49 – Enforcement of the Award:

- parties must automatically execute the arbitral award within the time period established in it;
- in case no deadline has been established, the parties shall execute the arbitral award immediately;
- in case one of the parties fails to execute the award, the other party may apply to the competent Chinese or foreign court.



ARBITRATION IN CHINA

Arbitration Rules of CIETAC

SUMMARY PROCEDURE:

- Shall be applied to any case which does:
 - Not exceed RMB 500,000 yuan for the amount in dispute
 - Exceed RMB 500,000 yuan and both parties have agreed for applying for Summary Procedure

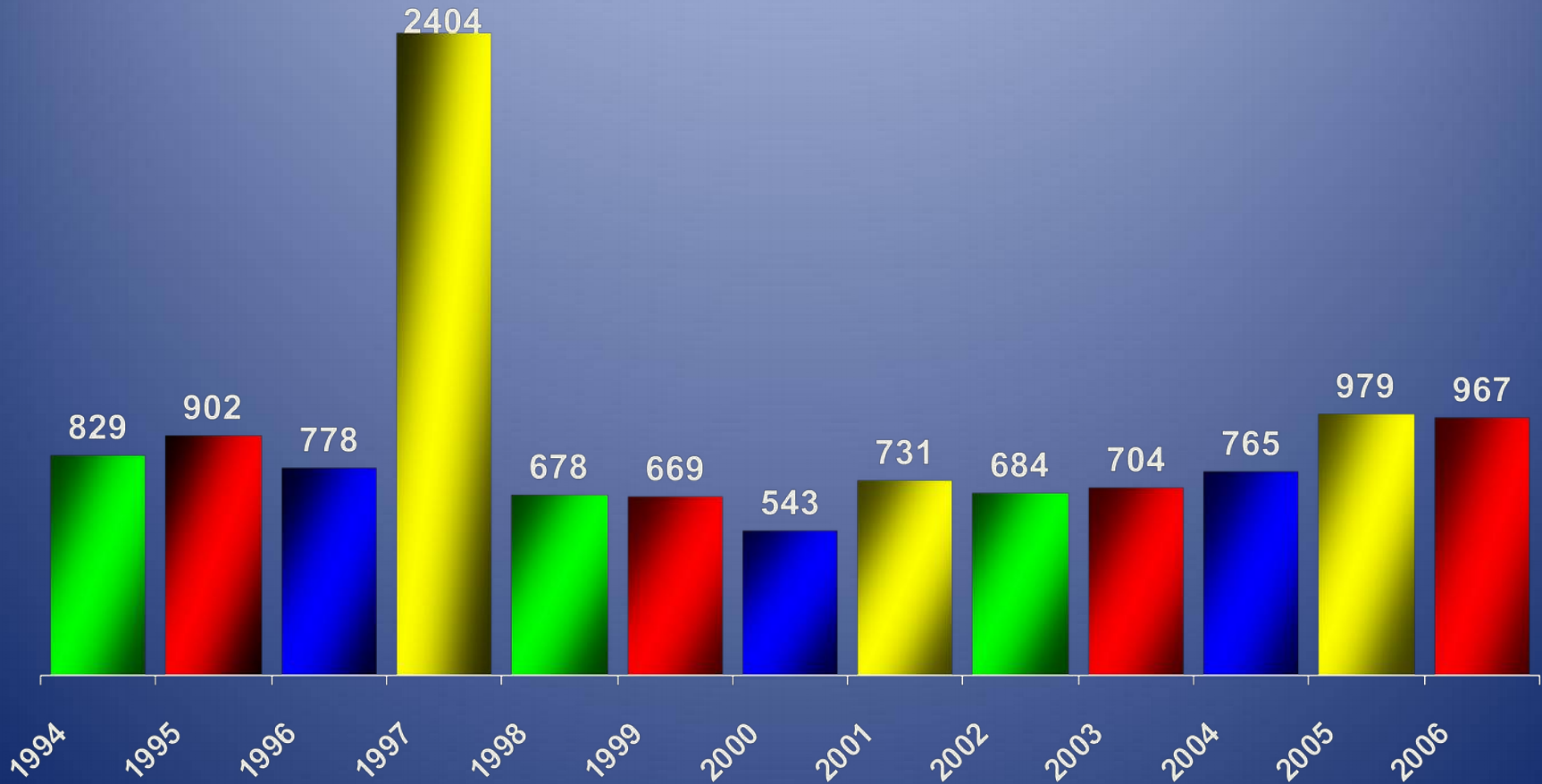
- Arbitration Tribunal must be formed by Sole Arbitrator

- The arbitral award must be rendered within 3 months from the date of the formation of the arbitral tribunal. Such time limit may be extended by the Chairman of CIETAC upon request and verification of its necessity.



ARBITRATION IN CHINA

CIETAC – Cases per year

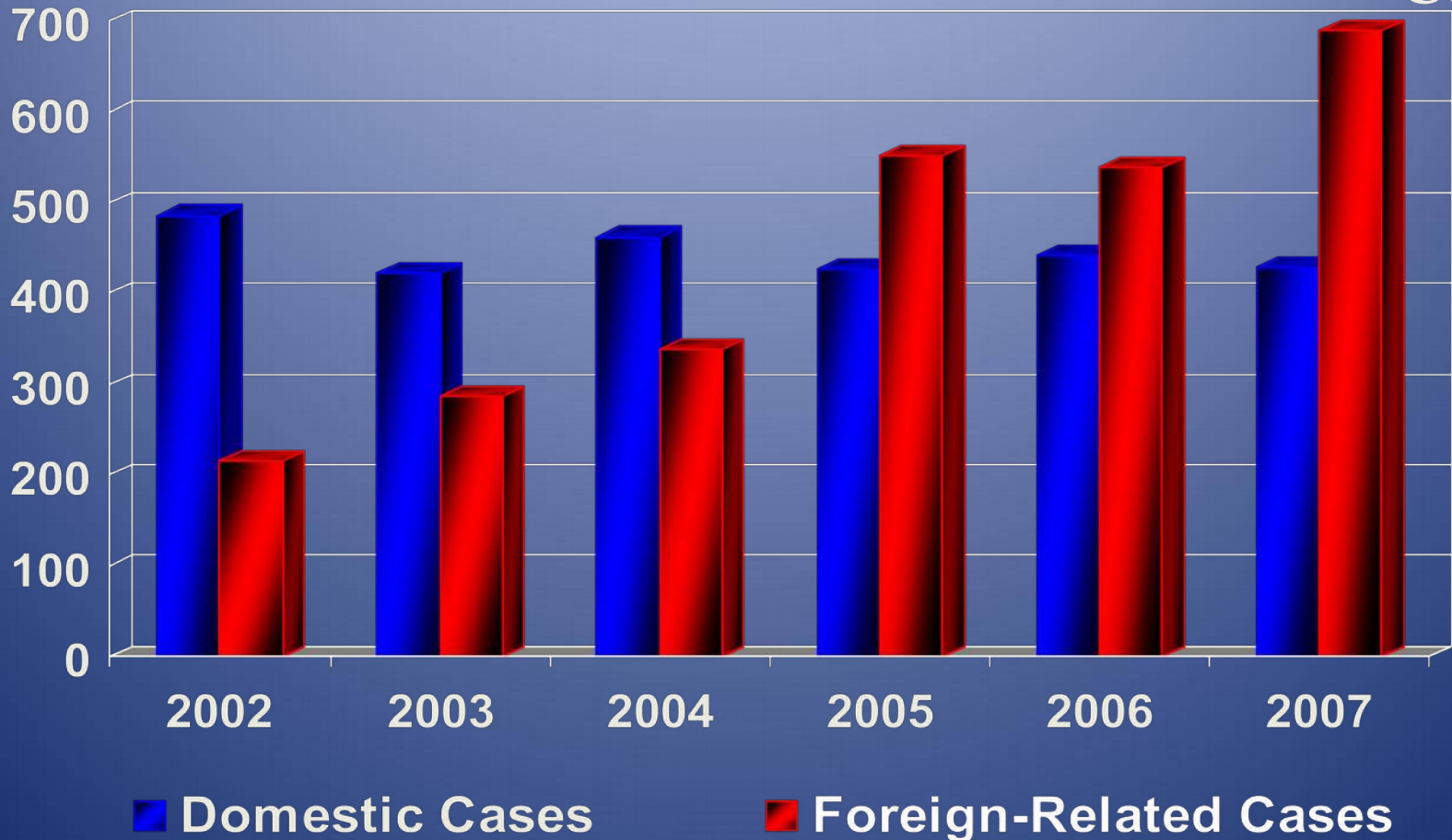


Source: CIETAC



ARBITRATION IN CHINA

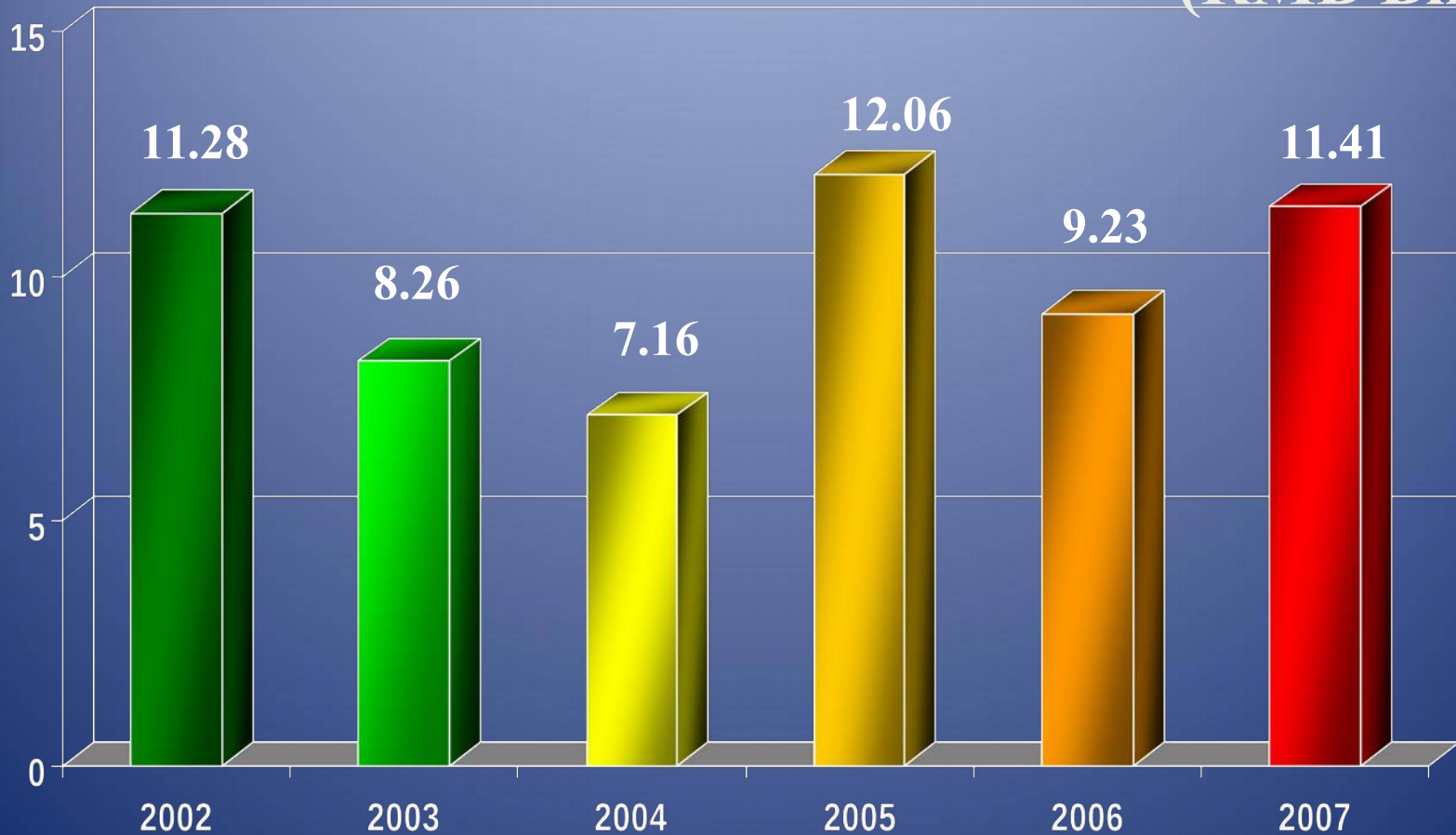
CIETAC – Relation domestic and Foreign Cases





ARBITRATION IN CHINA

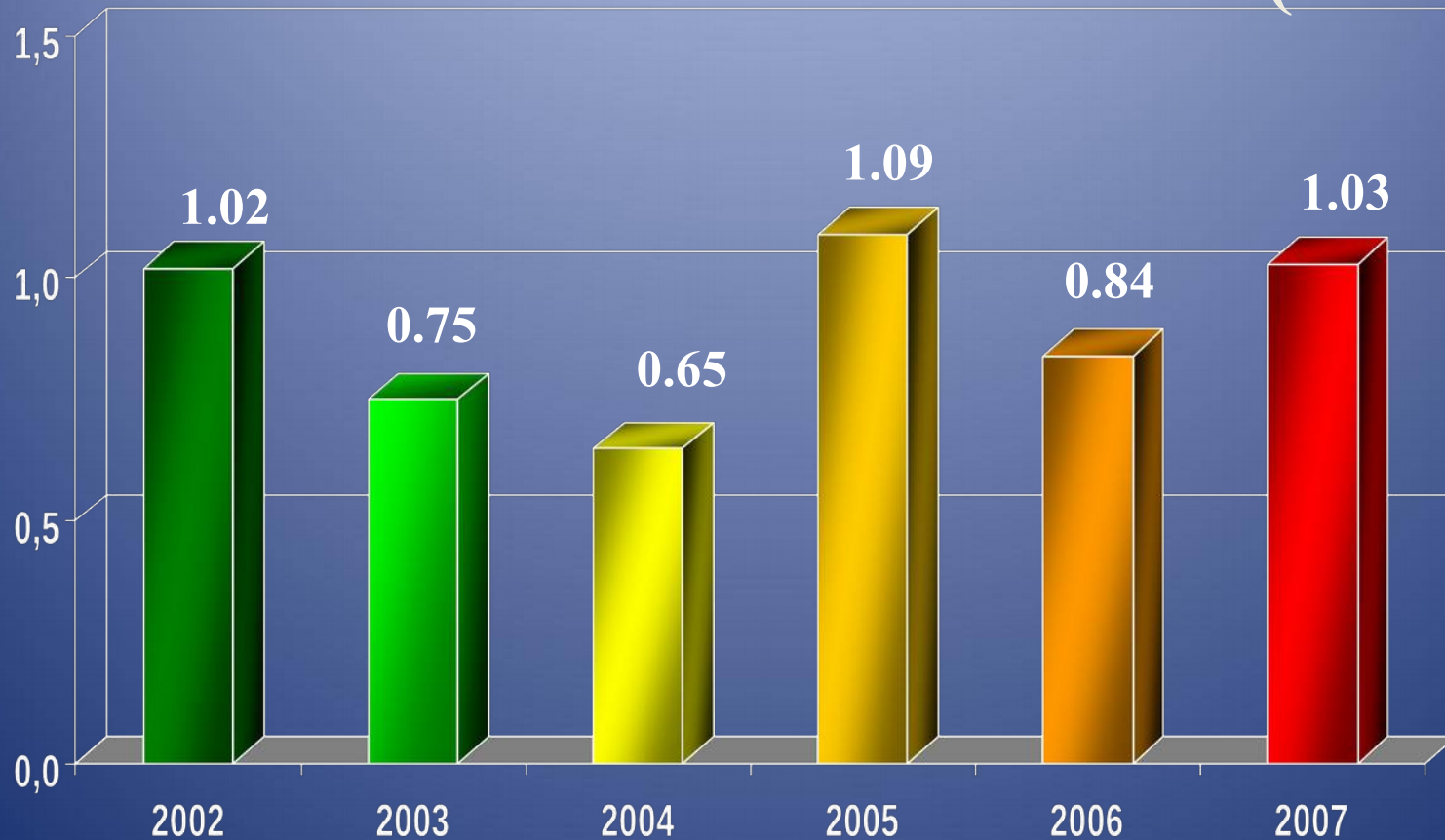
CIETAC – Total Cases Value
(RMB Billion)





ARBITRATION IN CHINA

CIETAC – Total Cases Value
(€ Million)



Estimation based on the rate of 1EUR = 10,98 CNY – Exchange rate on 25 March 2008



ARBITRATION IN CHINA

CMAC

China Maritime Arbitration Commission

- another Chinese arbitration institution within the China Council for the Promotion of International Trade (CCPIT)
- resolves domestic and international maritime disputes arising from transportation, production and navigation.
- with headquarters in Beijing and, since 2003, it has also had a subcommission in Shanghai and four liaison offices in Dalian, Tianjin, Ningbo and Guangzhou respectively.
- the Fishery Dispute Resolution Centre and the Logistic Dispute Resolution Centre have been established within CMAC.





NORONHA ADVOGADOS

Shanghai

Noronha Advogados office in Shanghai opened in April 2001 and it has a team of lawyers fluent in Chinese, English and Portuguese.



450 Fushan Road

14^o floor – Suite F

Suntime International Mansion

Pudong, Shanghai, China - 200122

Tel.: (86-21) 6876-6311

Fax: (86-21) 6876-6312

Email: noadsha@noronhaadvogados.com.br

Contact: Gustavo de Jacobina Rabello



谢谢

Durval de Noronha Goyos Jr.

dng@noronhaadvogados.com.br