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Supreme People's Court of the People's Republic of China Clarifies Uncertainties Arising from the Split of the China International Economic and Trade Arbitration Commission

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On 15 July 2015, the Supreme People's Court (the “**SPC**”) of the People's Republic of China (the “**PRC**”) issued its long-awaited notice addressing issues relating to the validity of arbitration agreements and the enforceability of arbitral awards involving China International Economic and Trade Arbitration Commission (“**CIETAC**”) and its former South China and Shanghai sub-commissions. The notice (the “**Notice**”) has been effective since 17 July 2015 (the “**Effective Date**”).

Background

The South China and Shanghai sub-commissions of CIETAC in October 2012 and April 2013, respectively, declared independence from CIETAC and rebranded themselves as the Shenzhen Court of International Arbitration (“**SCIA**”) and the Shanghai International Arbitration Centre (“**SHIAC**”). This split (the “**Split**”) has led to considerable confusion as to the validity of arbitration agreements referring to the former South China and Shanghai sub-commissions as well as the enforceability of resulting arbitral awards. It has also created uncertainty as to where disputes referred to either of these former sub-commissions should be heard – SCIA or SHIAC, as the case may be, or CIETAC.

The uncertainty prevailed as the PRC courts in front of whom these issues were raised granted inconsistent judgments. As a result, on 4 September 2013 the SPC issued a notice requiring all lower courts to report to the SPC prior to making a decision in cases arising from the Split. It is against this backdrop that the SPC issued the Notice.

Analysis

The Notice provides much needed clarification on issues arising from the Split and is binding on all lower courts in the PRC. It generally preserves the validity of arbitration agreements affected by the Split and is a welcomed move in restoring confidence in the PRC arbitration system.

Which arbitration tribunal has jurisdiction?

The Notice draws a distinction between arbitration agreements entered into prior to the Split and those entered into after the Split. If an arbitration agreement entered into prior to the Split specifies

CIETAC Shanghai or CIETAC South China as the arbitral commission, then SHIAC or SCIA, as the case may be, will have jurisdiction, whereas if an arbitration agreement specifying the same was entered into after the Split, CIETAC shall have jurisdiction.

Notwithstanding the foregoing, the parties will not be able to rely on the Notice to challenge the enforceability of any arbitral award which was rendered prior to the Effective Date.

The Notice is, however, capable of having retrospective effect in one respect. The Notice expressly provides that where an arbitration agreement was entered into after the Split but prior to the Effective Date, and any dispute has already been referred to SHIAC or SCIA, as the case may be, then the respondent is precluded from challenging the jurisdiction of the tribunal and the enforceability of any resulting arbitral award *if it has not already challenged such jurisdiction*. In other words, if prior to the Effective Date the respondent has challenged the jurisdiction of the tribunal and the enforceability of any resulting arbitral award, then it would *not* be precluded from doing so now on the basis on the Notice. It would seem logical to apply the same reasoning to the converse situation where the dispute has already been referred to CIETAC, but which, in accordance with the Notice, should be submitted to SHIAC or SCIA, as the case may be. The Notice, however, is silent on this point.

When can the jurisdiction of an arbitration tribunal be challenged?

Where an arbitral tribunal has determined that the arbitration agreement is valid and asserted its jurisdiction over the dispute, any application to the PRC courts for a determination of the validity of the arbitration agreement should be made before the first hearing of the tribunal. Note that this is a departure from the position previously stated in the *Interpretation of the SPC on Certain Issues Concerning the Applicability of the Arbitration Law of the PRC*, and the *Reply of the SPC to Several Issues Regarding the Determination of Validity of the Arbitration Agreement*.

What is the impact on concurrent proceedings?

Lastly, if, prior to the Effective Date, concurrent arbitration proceedings have been commenced before CIETAC and SHIAC or SCIA, as the case may be, and a challenge has been raised prior to the first arbitration hearing, the local PRC courts will determine the validity of the arbitration agreements in accordance with the Notice. If no such challenge has been raised, the arbitral tribunal which first accepted the case will have jurisdiction over the dispute.

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