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China

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A. Legislation and rules

A.1 Legislation

International arbitration in China continues to be governed by the following legislation and interpretations:

(a) PRC Arbitration Law, which took effect on 1 September 1995;

(b) Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, which took effect on 8 September 2006 and was amended on 31 December 2008;

(c) PRC Civil Procedure Law, as amended on 31 August 2012;

(d) Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, which took effect on 4 February 2015; and

(e) corresponding judicial interpretations.

On 1 September 2017, the PRC Arbitration Law was amended at the meeting of the 29th session of the 12th National People's Congress Standing Committee in relation to the eligibility criteria for arbitrators. The amendments will take effect from 1 January 2018. In particular, the following criteria in relation to arbitrators' experience and credentials have been amended:

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(a) Article 13(1) was amended so that the criterion of "*having engaged in arbitration work for eight years*" is changed to "*having passed the national legal professional qualification examination, obtained legal professional qualifications, and engaged in arbitration work for eight years*;" and

(b) Article 13(3) was amended so that the criterion of "*has been an adjudicator for eight years*" is changed to "*has been a judge for eight years.*"

A.2 Institutions, rules and infrastructure

On 30 December 2016, the Supreme People's Court ("SPC") issued the Opinions on Providing Judicial Protection for the Construction of Pilot Free Trade Zones. This is aimed at strengthening judicial support for the development of pilot free trade zones ("FTZ") in China and provides guidelines to courts for handling cases involving pilot FTZs. The Opinions resolve some of the previous uncertainties in relation to the validity of foreign-seated arbitrations, particularly where parties may be foreign invested enterprises incorporated in pilot FTZs.

The key feature of the Opinions relates to the validity of foreign-seated arbitrations in respect of wholly foreign-owned enterprises ("WFOEs") registered within a pilot FTZ. If these WFOEs enter into an agreement to submit disputes to arbitrations seated outside mainland China, the courts should not hold such arbitration agreements as invalid on the ground that the relevant dispute is not foreign-related. Furthermore, if a party objects to the recognition or enforcement of an arbitration award handed down in a foreign-seated arbitration on the ground that there is no foreign-related element, the courts shall not uphold the objection if:

(a) at least one of the parties to the arbitration is a foreign-invested company registered within a pilot FTZ;

(b) the parties entered into an arbitration agreement submitting disputes to arbitration seated outside mainland China;

(c) the objecting party initiated the foreign-seated arbitration in the first place, or the objecting party participated in the foreign-seated arbitration without challenging the validity of the arbitration clause during the arbitration proceedings.

This development is consistent with the outcome of the 2015 decision in *Siemens International Trading (Shanghai) Co., Ltd v. Shanghai Golden Landmark Co., Ltd* (2013) Hu Yi Zhong Min Ren (Wai Zhong) Zi No. 2 (27 November 2015) (the "*Golden Landmark* case"). The *Golden Landmark* case is the first reported case where a PRC court recognized and enforced a foreign award made in an arbitration between PRC domestic entities. The decision confirmed the position under PRC law that domestic disputes must be arbitrated in China, while parties are permitted to arbitrate their disputes outside China only if the dispute is "foreign-related" (the "Domestic Rule"). The implications of the Opinions are that parties who are WFOEs incorporated in pilot FTZs would thus be eligible for foreign-seated arbitration and would not be bound by the Domestic Rule.

Meanwhile, China continues to streamline its judicial procedures in relation to foreign-related and domestic arbitrations. The SPC recently released the *Provisions of the Supreme People's Court on Certain Issues Related to the Conduct of Judicial Review of Arbitral Cases* and the *Provisions of the Supreme People's Court on Certain Issues Related to the Reporting System of Arbitral Cases* which became effective on 1 January 2018. Prior to the release of these interpretations, the internal reporting system applied only in relation to foreign-related arbitral agreements or awards and foreign arbitral awards. Local courts were not allowed to invalidate foreign-related arbitral agreements, set aside or deny enforcement of foreign or foreign-related arbitral awards without the SPC's final approval. Such reporting system has now been extended to arbitral agreements without foreign elements and domestic cases.

CIETAC has also released the CIETAC Arbitration Rules on International Investment Disputes (the "Investment Arbitration Rules"), which were approved by the China Council for the Promotion

of International Trade and came into force on 1 October 2017. Chinese arbitration institutions did not previously have a practice of accepting international investment disputes nor did they have their own international investment arbitration rules. The Investment Arbitration Rules draw on the experiences of international investment arbitration including elements that ensure respect for the autonomy of the parties, independence of the arbitral tribunal, and credibility of arbitral awards. This development has provided the much-needed framework and support for investment arbitration in China. The new rules also bolster China's Belt and Road Initiative by facilitating the resolution of international investment disputes between investors and host countries.

B. Cases

B.1 Validity of arbitration clauses

B.1.1 SPC upholds validity of an arbitration clause contained in a standard contract

On 2 March 2015, Ya'an Da Yuan Real Estate Development Co., Ltd. (the "Appellant") entered into a State-Owned Construction Land Use Right Transfer Contract ("LUR Contract") with Ya'an Municipal Land and Resources Department (the "Respondent"). Article 40 of the LUR Contract stated that any dispute arising out of the LUR Contract shall be resolved by the parties through negotiation and, should negotiations fail, the dispute shall be resolved in the manner stipulated in Item (1) of this Article: (1) arbitration submitted to the Ya'an Arbitration Commission; (2) lawsuit filed with the People's Court ("Arbitration Clause").

The Appellant unsuccessfully argued that the Arbitration Clause was a standard form clause which should be deemed invalid pursuant to Article 40 of PRC Contract Law (which sets out the circumstances when a standard clause should be deemed invalid). It claimed that as the LUR Contract was a standard form contract provided by the Respondent, the Appellant had no power to negotiate the Arbitration Clause.

On appeal, the SPC upheld the validity of the Arbitration Clause on the basis that the Arbitration Clause provided two options for dispute resolution: arbitration and litigation. The SPC found that as both parties expressed the same intention to choose arbitration, the Arbitration Clause cannot be regarded as a standard clause. There was no evidence that the Appellant did not have power to negotiate when it chose arbitration. Even if the Arbitration Clause was deemed a standard clause, it did not fall under any of the circumstances set out in Articles 52 and 53 of the PRC Contract Law, nor did it exempt one party from liability, impose heavier liability on the other party, or exclude the other party from its main rights. The SPC further held that litigation and arbitration are both methods of dispute resolution, and choosing arbitration cannot be considered as depriving any party of its primary right.

B.1.2 Arbitration clause upheld despite the parties' failure to accurately specify the name of the arbitral institution

In July 2013, Xi'an Agricultural Commodities Exchanges Co. Ltd. (the "Appellant") entered into a capital injection agreement (the "Agreement") with Chongqing Yijifu Technology Co. Ltd. and Chongqing Born Technology Co. Ltd. (the "Respondents"). Clause 7 of the Agreement provided that any disputes shall be resolved by arbitration at the Sichuan Provincial Council for the Promotion of International Trade ("SPCPIT"). The Appellant subsequently commenced court proceedings against the Respondents for breach of the Agreement, but the Respondents raised a jurisdictional challenge on the basis of the arbitration clause in the Agreement.

The first instance court found that there was no registered arbitral institution known as SPCPIT and held that the arbitration clause was invalid due to ambiguity. On appeal, the Shaanxi Province Higher People's Court found that SPCPIT is the abbreviation of the Sichuan Provincial Committee of CCPIT and that the arbitral institution of CCPIT is CIETAC, which has a southwestern branch. Accordingly, the Shaanxi Court found that despite the inaccurate specification of SPCPIT as the arbitral institution, it could be ascertained that the

parties intended CIETAC to be the arbitral institution for any disputes arising from the Agreement. Pursuant to Article 5 of the PRC Arbitration Law and the SPC's Interpretation of Certain Issues Relating to the Application of PRC Arbitration Law, the court held that the arbitration clause and the choice of arbitral institution were valid.

On further appeal, the SPC agreed with the reasoning of the Shaanxi Court and upheld its decision. This decision is in line with the pro-arbitration approach of PRC courts.

B.2 Recognition of foreign arbitral awards

The Shanghai Intermediate (No. 1) People's Court refused an application for the recognition and enforcement of an arbitral award issued by SIAC on the grounds that the composition of the arbitral tribunal was inconsistent with the relevant arbitration clause.

A Singaporean company (the "Seller") and a Chinese company (the "Buyer") entered into an agreement for the sale and purchase of iron ore on 29 October 2014 (the "Agreement"). The Agreement incorporated an arbitration clause which provided that any disputes arising from the agreement shall be arbitrated in Singapore in accordance with the SIAC Rules of Arbitration then in force and that the tribunal shall be composed of three arbitrators.

On 14 January 2015, the Seller brought arbitration proceedings before the SIAC. Despite the Buyer's objections, SIAC accepted the application for arbitration by way of an expedited procedure and appointed a sole arbitrator. The sole arbitrator conducted the arbitration and eventually made an award in favor of the Seller. The Seller subsequently applied for leave to enforce the award in China before the Shanghai Court.

The Shanghai Court refused enforcement on the basis that "*[the] composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties* …" as stipulated by Article 5(1)(d) of the 1958 New York Convention. On its reading of

the applicable SIAC Rules concerning the composition of the arbitration tribunal under the expedited procedure, the court found that expedited procedure did not exclude the possibility of other compositions of the arbitration tribunal being applicable. The court further held that, although the SIAC Rules gave the president of SIAC a right to determine the number of arbitrators, the principle of meaningful autonomy of the parties was the "bedrock" of the proper functioning of arbitration. Accordingly, the court considered that the president did not have the right to determine the composition of the arbitration tribunal without regard to the parties' agreement.

The court found that the Agreement clearly provided for three arbitrators. Such agreement was not inconsistent with the SIAC Rules regarding the composition of the arbitration tribunal under the expedited procedure. Thus, arbitration by the expedited procedure did not affect the rights of the parties to having a three-person arbitration tribunal as stipulated in the Agreement. The court considered that in the face of the parties' agreement for three arbitrators and the Buyer's express objections, SIAC's decision to appoint a sole arbitrator contravened the Agreement and resulted in the award being unenforceable under the New York Convention.

C. Funding in international arbitration

Although third-party funding in arbitration is not expressly prohibited in China, we have not seen any published arbitration cases funded by third parties. The issue is also not addressed in any institutional rules in China. As background, under PRC law, lawyers can charge fees based on hourly rates, fixed fees or contingency fees. For contingency fees, the lawyer and client can agree on whatever conditions they deem appropriate, such as the outcome of the case or duration of the case. As long as those conditions do not violate PRC law, they will be regarded as valid.

The present legal landscape opens up the possibility that parties may agree for third-party funding as part of their funding arrangements. Furthermore, in Chinese arbitration proceedings, the common practice

is that arbitration institutions will require the claimant to pay the arbitration fee in advance. The arbitration institution will not accept the case if the claimant does not fully pay such fees in advance. If the respondent files a counterclaim, that party is also required to pay the arbitration fee relating to the counterclaim, failing which the respondent will be deemed not to have filed any counterclaim. Such a practice may provide the impetus for parties to seek potential funding, but this remains to be seen and we will have to watch for developments.