

A horizontal banner image divided into several rectangular panels. The panels contain various legal and judicial symbols: a pair of scales of justice, a judge's gavel, a computer keyboard, and open books. Overlaid on this banner is the text "JONES DAY" in a smaller, white, sans-serif font, and "COMMENTARY" in a larger, bold, white, sans-serif font.

JONES DAY COMMENTARY

INTERPRETATION OF THE PRC ARBITRATION LAW BY THE SUPREME PEOPLE'S COURT

On August 23, 2006, the Supreme People's Court promulgated the Interpretation by the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China (the "Interpretation"), which was expressed to be effective as of September 8, 2006. The purpose of the Interpretation is to provide further explanation and guidance on a number of contentious issues relating to the Arbitration Law of the People's Republic of China (the "Arbitration Law"). The Interpretation focuses on four areas: validity of the arbitration agreement, preservation and investigation of evidence, cancellation of the arbitration award, and enforcement of the arbitration award.

The Supreme People's Court from time to time has formed the view that parts of the Arbitration Law are too general and vague, and for this reason the Court has issued a series of judicial interpretations for the purpose of clarifying the Arbitration Law. The Interpretation is the latest attempt by the Court to clarify certain issues that have in the past led to technical challenges to arbitration agreements and arbitral awards.

The main issues covered in the Interpretation are:

- Validity of arbitration agreements.
- Cancellation and rearbitration of an arbitration award.
- Enforcement of arbitration awards.

The Interpretation attempts, therefore, to increase legal certainty and reduce the scope for challenges to arbitration agreements and awards.

VALIDITY OF ARBITRATION AGREEMENTS

Arbitration agreements are often challenged because the content of the arbitration agreement is defective in some way. In other words, the intention for arbitration is not clear or complete enough in the agreement, the agreed arbitration matters are not arbitrable or are too narrow, or there is no clear indication regarding the arbitration commission that has been chosen by the parties. The Interpretation attempts to provide clear provisions regarding the validity of such allegedly defective arbitration agreements.

Intention for Arbitration. The Interpretation provides that any enforceable arbitration agreement reached between the parties will generally be deemed valid. It also provides that where the parties have agreed that the dispute may be submitted either for arbitration or to the People's Court, the arbitration agreement will be deemed void, with the only exception being where one party applies for arbitration with an arbitration institution, and the other party fails to contest the application within the time period as described in Article 20.2 of the Arbitration Law (if the parties contest the validity of the arbitration agreement, the objection must be made before the start of the first hearing of the arbitration tribunal).

Ascertainment of an Arbitration Commission. Several issues are clarified by the Interpretation, namely, (a) where the name of the arbitration institution in the agreement is inaccurate but nevertheless the specific institution is ascertainable, it shall be deemed that an arbitration institution has been chosen; (b) where the arbitration agreement provides for two or more arbitration institutions, the parties must agree to select one of them to be the arbitration institution for the arbitration, and if the parties cannot agree on the institution the arbitration agreement will be deemed void; (c) where the arbitration agreement provides that the arbitration will be conducted in an arbitration institution in a certain place and there is only one arbitration institution in such place, such arbitration institution will be deemed the agreed arbitration institution; (d) where there are two arbitration institutions in such place, the parties must agree on one of the arbitration institutions, and if they fail to agree, the arbitration agreement will become void.

Effectiveness of Arbitration Rules. Often arbitration agreements refer to arbitration rules but are silent on the arbitration institution. In such cases, the Interpretation provides that the reference to the arbitration rules of an institution is not deemed to constitute an agreement to refer the dispute to that particular arbitration institution. This is a peculiarity of the Arbitration Law insofar as it requires that disputes must be referred to a named arbitration commission. If an arbitration commission is not named, the arbitration agreement will be void. This issue has been expressly addressed in the CIETAC rules, which provide at Article 4.3 that, "Where the parties agree to refer their disputes to arbitration under these Rules without providing the name of an arbitration institution, they shall be deemed to have agreed to refer the dispute to arbi-

tration by CIETAC." Accordingly, a reference to the CIETAC rules will be sufficient, but a mere reference to the ICC rules or the HKIAC rules will not, and such a reference will not be deemed to refer the dispute to ICC or HKIAC arbitration.

Successor Parties. The Interpretation provides that where a party is merged or divided after the execution of the arbitration agreement, the arbitration agreement will be binding on the successors of the party. Similarly, if a party dies after the execution of the arbitration agreement, the arbitration agreement shall be binding on that person's successor.

Contract Formation. Where a contract containing an arbitration agreement does not come into effect or is rescinded Article 19.1 of the Arbitration Law provides that the arbitration agreement exists independently and any changes to, rescission, termination or invalidity of the contract shall not affect the validity of the arbitration agreement. This position is reaffirmed by the Interpretation. Further to this, the Interpretation stipulates that the failure of formation of the contract will not affect the validity of the arbitration agreement which has been agreed at the time of execution of the contract.

Objections to the Validity of the Arbitration Agreement. The validity of an arbitration agreement is determined by the relevant arbitration commission. It often happens in practice that after a decision is made by the arbitration commission, one of the parties applies to the People's Court for an ascertainment of the validity of the arbitration agreement or for the cancellation of the arbitral decision. The Interpretation provides that after the arbitration commission has made a decision regarding the validity of the arbitration agreement, the People's Court will not accept an application to challenge such decision. Further, the Interpretation provides that if a party hasn't raised any objection regarding the validity of the arbitration agreement before the initial hearing of the arbitration tribunal, but subsequently applies to the People's Court for the invalidation of such arbitration agreement, the People's Court will not accept such application.

Location of Place of Signing of Arbitration Agreement. The Interpretation provides that the Intermediate People's Court of the place where the selected arbitration commission is located will have jurisdiction over any challenges to the arbitration agreement. In the event that no arbitration commis-

sion is selected or is not clearly identified, the Intermediate People's Court of the place where the arbitration agreement was signed will have jurisdiction. Accordingly, it is wise to avoid specifying arbitration commissions or signing agreements in locations where litigation would be unattractive.

CANCELLATION OF AN ARBITRATION AWARD

Article 58 and Article 70 of the PRC Arbitration Law and Article 260 of the Civil Procedure Law provide that upon application by a party for the cancellation of an arbitration award, the People's Court will constitute a collegiate bench (i.e., at least three judges) to investigate and verify the case before canceling the award and rendering it invalid. In the past, there have been some problems with the "dual system" for the cancellation of domestic arbitration awards and the cancellation of foreign-related arbitration awards.

Article 58.1 of the Arbitration Law specifies six circumstances under which one of the parties may apply to the Intermediate People's Court at the place where the arbitration commission is located for cancellation of an award. The Interpretation clarifies the law in relation to the grounds for cancellation as follows:

- A written arbitration award can exist in the form of an agreement, a letter, or a data message. This interpretation is not only consistent with provisions in the PRC Contract Law but also complies with international practice.
- Where a specific People's Court accepts a party's application to cancel an arbitration award after the other party has applied to enforce the same award, the People's Court that accepts the application for enforcement shall cease enforcement.
- Where an application for the cancellation of an arbitration award is rejected by the People's Court, and the same party subsequently defends enforcement proceedings on the same basis, the People's Court shall not uphold such a defense.

- Where a party has not raised any objection to the validity of an arbitration agreement during the arbitration proceedings, but subsequently applies for the cancellation of the arbitration award or raises any defense for nonenforcement on the ground of the invalidity of the arbitration agreement, the People's Court shall not uphold such a position.

RE-ARBITRATION BY THE ARBITRATION TRIBUNAL

The Interpretation provides that for cases where a party applies for the cancellation of a domestic arbitration award, the People's Court will request the arbitration tribunal to re-arbitrate within a certain period of time designated by the People's Court. Such request can be made only under two circumstances, namely the evidence on which the award is based was falsified, or the other party has concealed any evidence sufficient to affect the impartiality of the award.

This is an important provision because it limits the scope for challenges and should have the effect of curbing the excessive discretion of judges giving notices of re-arbitration. It will also help to inform the arbitral tribunal of the reason for re-arbitration.

ENFORCEMENT OF THE ARBITRATION AWARD

According to the Interpretation, a party's application for the enforcement of an arbitration award shall be under the jurisdiction of the Intermediate People's Court at the place where the party subject to enforcement is domiciled or where the property subject to enforcement is located. This is an improvement on the previous practice where the enforcement court was the Local People's Court. By requiring enforcement by the Intermediate People's Court, it is hoped that a higher level of adjudication will be available.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Ashley M. Howlett

86.10.5866.1113

ahowlett@jonesday.com

Leanne Zheng

86.10.5866.1216

lzheng@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the author and do not necessarily reflect those of Firm.