

FOCUS ON ALTERNATIVE DISPUTE RESOLUTION

China provides guidance on its arbitration law

By Rebecca Huang and
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The Supreme People's Court of the People's Republic of China recently released its interpretation of China's Arbitration Law enacted in 1995 (the "Interpretation"). The Interpretation provides significant guidance regarding the application of the Arbitration Law as the law was drafted in very broad and general terms. The Interpretation will have global significance since the Arbitration Law applies to China-related international arbitrations.

The Interpretation addresses the many uncertainties that have



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surfaced over the decade since the passage of the Arbitration Law, including the scope and proper form of arbitration agreements, the selection of arbitral institutions, the effect that arbitration agreements have on successors, the arbitration agreement's autonomy and

the law that applies in international arbitrations. According to s. 58 of the Arbitration Law, a party can apply to a Chinese court to set aside an arbitral award on the jurisdictional ground that there is no valid arbitration agreement or that the matters do not fall within the scope of the arbitration agreement. Therefore, the application of the Interpretation will have a bearing on the issues of the proper jurisdiction of a Chinese or international arbitral tribunal and the recognition of the tribunal's award by the Chinese court.

Form and scope

Article 16 of the Arbitration Law allows an arbitration agreement to be a clause

within a contract or a separate written agreement between the parties. The Interpretation now expands this and adds that these written agreements may be contracts, letters and telecommunication methods like telegram, telex, facsimile transmission, digital data exchange and e-mail. In so providing, the Interpretation is consistent with the UNCITRAL Model Law on International Commercial Arbitration at Article 7 (2). The Interpretation indicates that parties' general agreement to arbitrate disputes arising from their contract empowers the arbitral tribunal to rule on disputes over the contract's formation, validity, amendment, performance, breach, interpreta-

tion and termination.

Selection of arbitral institutions

The Interpretation provides presumptive rules for determining the parties' choice of arbitral institutions. When the parties' agreement inaccurately designates an arbitration institution that nevertheless can be identified with certainty, the Interpretation deems the parties to have selected that institution. It also provides that arbitration agreements that only specify the applicable arbitration rules

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carry a presumption that no arbitral institution has been selected, unless an institution can be identified with certainty based on the agreed rules.

Under the Interpretation, arbitration agreements designating more than one institution are invalid unless the parties can agree on which institution will hear their disputes. If the parties' agreement specifies the location but not the institution, the Interpretation presumes that the parties have selected the institution in that location as long as the location has only one institution. However, if the specified location has several institutions and the parties cannot agree on which institution should arbitrate their disputes, the Interpretation deems the arbitration clause invalid. The Interpretation also deems invalid arbitration clauses specifying that disputes

can be either arbitrated by an arbitral tribunal or adjudicated by the People's Court in China, unless one party requests a decision from an arbitration institution and the other party raises no jurisdictional objection before the arbitral tribunal holds the first hearing.

Successors and Assignees

The Arbitration Law was silent regarding whether arbitration agreements bind successors. The Interpretation clarifies this and states that arbitration agreements bind the contracting parties' successors and assignees, unless the parties' agreement specifies to the contrary, the assignees expressly object or were not aware of the arbitration agreement when the assignment was made.

Agreement's autonomy

Under the Arbitration Law, arbitration agreements expressly survive the main contract being dissolved, terminated or found invalid. The Interpretation extends arbitration agreements' survival to situations where the main contract is repudiated or does not come into force or effect.

Applicable law

Under the Interpretation, parties to disputes arising from international contracts should apply the arbitration provisions of international conventions applicable to the contracts. The Interpretation instructs courts to apply the law the parties have chosen to determine an international arbitration agreement's validity. If the parties have not made the choice, the court should apply the law of the seat of the arbitration. If the parties have failed to select the proper law of the contract or the seat of the arbitration, or if the choice of the seat of the arbitration is

ambiguous, the court should apply the law of the court.

Conclusion

The Interpretation offers both certainty and clarification to many practical issues in China-related arbitration cases. It will affect not only the conduct of arbitrations in China, but the enforcement of international arbitral awards by the Chinese courts. For Canadian lawyers whose clients opt for arbitration for any future disputes they may have relating to their China-related business concerns or are facing a dispute that is to be arbitrated in Canada, awareness of the Arbitration Law and the Interpretation is helpful in assisting the clients on a proper China-related arbitration agreement or the



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enforceability of the Canadian arbitral award by Chinese courts.

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