

Dispute Resolution

New Regulations of the Shenzhen Court of International Arbitration

Executive Summary

The Standing Committee of the People's Congress of Shenzhen City has passed its new regulations on the Shenzhen Court of International Arbitration ("**SCIA**") with effect from 1 October 2020. The new regulations reflect SCIA's response to some long-standing issues of Chinese arbitral practice. It marks a significant step taken by SCIA towards aligning itself with international arbitral practice.

Introduction

The Shenzhen Court of International Arbitration, also known as the South China International Economic and Trade Arbitration Commission, was established in 1983. It is the first arbitral institution established in South-China provinces. It is also the first arbitral institution in Mainland China whose governance is established through legislation, and has been operating based on governmental regulations since 2012.

On 1 October 2020, a revised Regulations of the Shenzhen Court of International Arbitration ("**SCIA Regulations**") passed by the Standing Committee of the Shenzhen Municipal People's Congress came into effect. The SCIA Regulations are formulated based on the Arbitration Law of the People's Republic of China ("**PRC Arbitration Law**") and is aimed at aligning SCIA's governance and operations with the prevailing practice of international arbitral institutions. The key features of the SCIA Regulations are discussed below.

Key Features

Independent governance

The SCIA Regulations provide that SCIA shall remain independent of administrative organs and their influence. To that end, SCIA now adopts a corporate governance mechanism where a Board of Directors shall be constituted to undertake its decision-making and supervisory functions. Importantly, at least one third of the total number of members of the Board of Directors shall be from Hong Kong SAR, Macau SAR or other territories outside of Mainland China. This reflects SCIA's commitment to internationalise its organisational structure. It ensures that experienced arbitration experts both at home and abroad will be appointed to the Board of Directors to ensure SCIA's professionalism and independence.

Panel of arbitrators

Similarly, SCIA shall maintain a panel of arbitrators, where at least one third of them shall be arbitrators from Hong Kong SAR, Macau SAR or other territories outside of Mainland China. This facilitates the appointment of impartial and competent arbitrators for cases conducted under the auspices of SCIA. Moreover, under the SCIA Regulations,

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the parties may agree to adopt the rules of another arbitral institution or the UNCITRAL Arbitration Rules. If parties choose to do so, they are also at liberty to select arbitrators who may not be on SCIA's panel. This upholds party autonomy, and fully aligns SCIA with international practice.

***Ad hoc* arbitrations in Shenzhen**

One key feature of China's arbitral practice is that *ad hoc* arbitrations are generally not allowed under the current arbitration legislation framework. The first breakthrough happened when *ad hoc* arbitrations were allowed in the Shanghai Free Trade Zone. The SCIA Regulations now advance this liberalisation by effectively allowing *ad hoc* arbitrations to be conducted in Shenzhen. This gives *ad hoc* arbitral practice an opportunity to take root in the city of Shenzhen and will enable China's arbitration industry to open up to *ad hoc* arbitrations.

SCIA is authorised to appoint arbitrators in *ad hoc* arbitrations should there be a deadlock between the parties in the appointment of arbitrators.

Seat of arbitration

The seat of the arbitration is a key concept in arbitral practice. One of its key functions is to determine the nationality of the arbitral award, which forms the basis for the award to be recognised and enforced under the New York Convention. In China, while rules of Chinese arbitral institutions do make reference to the seat of arbitration, this concept is not found in the PRC Arbitration Law. This apparent lacuna is often a topic of fervent discussion within China's arbitration community. The SCIA Regulations have now broken new ground by expressly including the concept of seat of arbitration and clarifying its central functions and implications.

Foreign seat and applicable law

In Mainland China, the Supreme People's Court had held that domestic parties to a purely domestic dispute could not select foreign laws to govern their dispute, and could not agree to arbitrate their dispute outside of China. However, Shenzhen is also authorised by the Standing Committee of the National People's Congress to make its own law and to depart from the national law. Accordingly, the SCIA Regulations now open the possibility that domestic parties to a purely domestic dispute may choose a foreign law to govern their dispute, and may agree to a seat that is outside of China.

That said, the SCIA Regulations also provide that such agreement must be enforceable, and shall not contravene the mandatory laws of the seat of arbitration. In this regard, the application of the relevant provisions of the SCIA Regulations remains to be tested before the Chinese courts.

Diversification of dispute resolution mechanisms

The PRC Arbitration Law only provides for two traditional methods of dispute resolution: arbitration and mediation. In contrast, the SCIA Regulations incorporate diversified alternative dispute resolution mechanisms, thereby providing a statutory basis for arbitral tribunals to engage in facilitated negotiation, expert evaluation and other methods that may be agreed or requested by parties or interested parties, whether within or outside of Mainland

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China. The SCIA Regulations envisage that SCIA will formulate rules for these alternative dispute resolution mechanisms in due course.

Concluding Remarks

The SCIA Regulations proffer a response to some long-standing issues of China's arbitral practice, and represent a leap forward in its progress and internationalisation. Given the unique legislative nature of the SCIA Regulations, its success will no doubt bode well to push for reform of the PRC Arbitration Law in time to come.

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