

# China Legal Briefing\* 241

June 2014



\* CHINA LEGAL BRIEFING is a regularly issued collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL BRIEFING subscribers.

WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for accuracy of quotes or truthfulness of content. CHINA LEGAL BRIEFING is not intended to provide advice.

1. **China-Switzerland Free Trade Agreement enters into force**
2. **Judicial review and enforcement of arbitral awards under the FTZ Arbitration Rules**
3. **SAFE releases new rules for cross-border guarantees**

## **1. China-Switzerland Free Trade Agreement enters into force**

On 6 July 2013 China and Switzerland signed their first Free Trade Agreement (“FTA”). On 25 April 2014, the Customs Tariff Commission of the State Council issued to the General Administration of Customs the Notice [2014] No. 8, stating that upon the adoption of the third plenary session of the Customs Tariff Commission and approval of the State Council, from 1 July 2014, the conventional tariff of 2014 under the China-Switzerland Free Trade Agreement will take effect.

The zero-tariff rate for trade in goods will gradually reach 84.2% of products exported by Switzerland to China over the next few years (while some tariffs are eliminated upon entry into force, others are subject to transition periods of 5, 10 or in a few cases 12 or 15 years. Switzerland will promptly grant zero-tariff to 99.7% of products exported by China to Switzerland, with certain restriction maintained primarily with regard to agricultural products. The FTA will offer particular growth potential to Swiss exporters of machinery, watches, chemical and pharmaceutical products as well as processed foods.

Aside from preferential tariffs for trade in goods, the FTA also provides for greater market access in the service sector, increases protection of intellectual property rights, and establishes benchmarks for technical barriers to trade and sanitary and phytosanitary measures, among other things.

## **2. Judicial review and enforcement of arbitral awards under the FTZ arbitration rules**

The China (Shanghai) Pilot Free Trade Zone Arbitration Rules (“the Rules”) promulgated by Shanghai International Economic and Trade Arbitration Commission (“SHIAC”) became effective on 1 May 2014. Only 3 days after the Rules went into force, the Shanghai No. 2 Intermediate People’s Court released the Opinions on Judicial Review and Enforcement of Arbitration Cases Applying China (Shanghai) Pilot Free Trade Zone Arbitration Rules (“the Opinions”) to ensure clear guidelines with regard to the implementation of the Rules by the courts. The Opinions are composed of twenty articles, the major content of which is as follows:

### **1- Scope of application and competent court**

The Opinions apply to the judicial review and enforcement of arbitration awards which were made by SHIAC applying the Rules. The scope includes applications for property preservation, confirmation of the validity and effectiveness of arbitration agreements, setting aside of awards, enforcement of awards, and challenges of the enforcement of awards. The Opinions designate the Shanghai No. 2 Intermediate People’s Court (“the Court”) to be the competent instance for the judicial review of arbitration cases administered by SHIAC.

## **2- More efficient judicial review system**

In contrast with the longer time limits for judicial review as stipulated in the Arbitration Law (2 months after the case is filed), the Court shall hold a hearing or consult the parties within 15 days after the case is filed and pronounce the judgment within 30 days after the case is filed in case of an application for judicial review or confirmation of the validity of an arbitration agreement or to revoke an award under the Rules.

A summary review procedure can be conducted (1) when the claim is small and the facts are simple and with little doubt and (2) when a party applies for challenging the enforcement of an award based on the same reasons which have been raised in application for the revocation of the same award and have been rejected. In case of an application for judicial review regarding an award rendered by SHIAC applying the procedure for small claims, the Court will review and accept the filing on the same day of the application. Where parties apply to revoke an award applying procedures for small claims, a hearing shall be held or the parties shall be consulted within 10 days after the case is filed, and the ruling shall be rendered within 20 days after the case is filed.

Article 6 of the Opinions shortens the time limit for a decision on preservation of property from 48 hours to 24 hours. Moreover, the Opinions clarify the types of security and the amount of the security to be provided by the applicant, in particular: (a) cash security may be no less than 30% of the value of assets to be preserved; (b) where the value of assets to be preserved exceeds RMB 50 million, the cash security may be reduced to 10% of the value of assets to be preserved; (c) credit security is allowed.

## **3- Special procedures contained in the Rules are recognized**

The Opinions give recognition to several innovations in the Rules, which may affect the validity of the arbitration award, including the procedures for small claims, the appointment of arbitrators not contained in the list of arbitrators, the joinder of third parties, awards *ex aequo et bono*, etc. For example, if an award which is rendered *ex aequo et bono* (not based on legal rules but considering what is fair and equitable) and agreed by both parties, does not violate mandatory provisions of Chinese law and is in accordance with the Rules, the Court will recognize such award.

## **4- Enforcement**

The Opinions set a fast-track for the enforcement of the arbitration awards. A demand of enforcement shall be reviewed on the same day the application is filed. Clues of property will be examined right away: if they are clear, the investigation proceedings shall begin within 24 hours; if they are not clear, the parties have to bring more elements of information to the Court.

Moreover, if the parties or interested parties challenge in writing the enforcement on the basis that the enforcement is in violation of law, or if a third party challenges in writing the subject matter being enforced, the court has to examine and resolve this request within 10 days. Preservative measures have to be taken within 48 hours after the ruling on such measures is rendered.

Enforcement is to be suspended while a judicial review of the arbitral award is pending (preservative measures however are not suspended).

Finally, the Opinions provide for stricter punishments against those who fail to comply with arbitral awards and enforcements measures.

### **3. SAFE releases new rules for cross-border guarantee**

On 19 May 2014, the State Administration of Foreign Exchange of the PRC released the Foreign Exchange Administration Rules on Cross-border Guarantee (the "Rules"). The Rules, which came into effect on 1 June 2014, seek to facilitate the processing and enforcement of cross-border security guarantees.

#### **1- Clarification of the definition of the Cross-border Guarantee**

The following categories of cross-border securities are covered:

- a) Neibaowaidai (内保外贷): refers to a cross-border guarantee where the registered address of the security provider is onshore and that of the creditor and debtor is offshore;
- b) Waibaoneidai (外保内贷): refers to a cross-border guarantee where the registered address of the security provider is offshore and that of the creditor and debtor is onshore; and
- c) Other types of cross-border guarantees other than Neibaowaidai and Waibaoneidai.

#### **2- Main contents of Neibaowaidai (内保外贷)**

- a) Elimination of the quota management: the prior approval or index approval for financing and non-financing Neibaowaidai.
- b) Abolishment of unnecessary qualification restrictions to specific entities (requirements for the asset to debt ratio or affiliated relationship between the security provider and the debtor) or transactions (non-financing security).
- c) Approval of SAFE on the enforcement of security is abolished. The bank may conduct the enforcement of security itself, non-banking financial institution and enterprises may conduct the enforcement of security directly with the bank by presenting the security registration certificate.
- d) Where any creditor's rights form after the enforcement of security, such creditor's rights shall be registered with SAFE.

### **3- Main contents of Waibaoneidai (外保内贷)**

- a) Business qualification is clarified. The creditor shall be a domestic financial institution, the debtor shall be a non-financial institution, and the secured obligation shall be a domestic or foreign currency loan extended by a financial institution or a committed facility;
- b) Collective registration of the creditors: The creditors need to collectively file the data with SAFE through the capital account information system.
- c) The debtors shall submit the foreign debt registration to SAFE for examination after enforcement of the security.

### **4- Other types of cross-border guarantees**

Unless otherwise required by SAFE, no registration or filing is required for cross-border guarantees other than Neibaowaidai and Waibaoneidai. However, if according to the relevant laws or regulations, the underlying obligations or any changes thereof are subject to approval or registration, such approval or registration shall be obtained in advance.

Since 1 June 2014, the new rules have greatly simplified the process as all the approval, filling and registration conditions have been removed and the registration is no longer a requirement for PRC companies with regard to the validity of the cross-border security and guarantee agreements.

© Wenfei, Beijing, June 2014

Check the China Legal Briefing archives on: <http://www.wenfei.com/publications.html>  
Obtain your personal subscription from: [china@wenfei.com](mailto:china@wenfei.com)