Client Update

U.S. Court of Appeals Denies Confirmation of CIETAC Arbitral Award Due to Inadequate Notice of Arbitration

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On July 19, 2016, the U.S. Court of Appeals for the Tenth Circuit issued its opinion in *CEEG (Shanghai) Solar Science & Technology Co., Ltd. v. LUMOS LLC n/k/a/ LUMOS Solar LLC* ("*CEEG v. LUMOS*"), affirming a lower court decision from the U.S. District Court for the District of Colorado that had declined to confirm an arbitral award issued under the auspices of the Shanghai branch of the China International Economic and Trade Arbitration Commission ("CIETAC").[1] The Court of Appeals, as did the District Court before it, dismissed the action to confirm the award on the basis that a Chinese-language notice of the proceedings issued by CIETAC was not reasonably calculated to apprise the respondent of the arbitral proceedings, and therefore did not constitute proper notice under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

The parties -- CEEG (Shanghai) Solar Science & Technology Co., Ltd. ("CEEG"), a Chinese solar panel manufacturing company, and LUMOS LLC ("LUMOS"), a Colorado-based company -- entered into agreements for the sale and purchase of solar energy products. Pursuant to both operative agreements between the parties, disputes arising out of the agreements were to be submitted to CIETAC arbitration. The first agreement specified that arbitration proceedings were to be conducted in English, while the second indicated that the arbitration would be conducted under CIETAC's arbitration rules, which designated Chinese as the

[1] Technically, the arbitral award was rendered under the auspices of the Shanghai International Economic and Trade Arbitration Commission (also known as Shanghai International Arbitration Center), after the Shanghai branch of CIETAC broke away from CIETAC in April 2013. However, the Court of Appeals treated the arbitral award as a CIETAC award, and we adopt that description for the purposes of this summary of the Court's decision.

language of arbitration in the absence of an agreement of the parties to use a different language. The second agreement further stipulated that if its Chinese and English versions conflicted, the English version would govern.

Disputes arose out of alleged workmanship defects in the products sold by CEEG to LUMOS. The parties negotiated in English for two years but were unable to reach an amicable resolution of their dispute. Thereafter, CEEG filed an arbitration claim with CIETAC, and CIETAC delivered an arbitration notice and other documents to LUMOS. These documents were entirely in Chinese, except for the name of CEEG's counsel, the amount in dispute, and the shipping label identifying CIETAC as the sender.

LUMOS did not realize that the Chinese documents purported to constitute notice of arbitration. As a result, LUMOS failed to appoint an arbitrator within the 15-day deadline stipulated in the CIETAC arbitration rules. After the appointment window had closed, a representative of LUMOS sent CEEG an email offering to settle the dispute and attaching a copy of the Chinese documents with a note that LUMOS could not understand the documents. It was only at that time that LUMOS received actual notice of the arbitration, when CEEG's counsel emailed a response in English. A few weeks later, CIETAC and CEEG appointed arbitrators without LUMOS's input. LUMOS subsequently obtained a two-month extension of the merits hearing in the arbitration, which was conducted in Chinese and in which LUMOS participated through Chinese counsel. The tribunal eventually issued an award in CEEG's favor and ordered LUMOS to pay contract damages plus interest, costs, and attorneys' fees.

CEEG filed a motion before the U.S. District Court for the District of Colorado, seeking to confirm the award under the U.S. Federal Arbitration Act and the New York Convention. LUMOS moved to dismiss, arguing that the Chinese notice of arbitration was deficient and that the composition of the arbitral tribunal was not in accordance with the parties' agreement, amounting to grounds for refusal of recognition and enforcement of the award under Article V(1)(b) and (d) of the New York Convention. The District Court granted LUMOS's motion to dismiss, holding that the Chinese-language notice was not reasonably calculated to apprise LUMOS of the proceedings because (i) all correspondence between the parties up to the commencement of arbitration had been in English; and (ii) the parties' agreements supported the notion that the arbitration was to be in English. The District Court held that as a result of CEEG's insufficient notice, LUMOS was deprived of the opportunity to appoint an arbitrator and the tribunal's composition was therefore not in accordance with the parties' agreement.

On appeal, the Court of Appeals affirmed the District Court's decision denying confirmation of the CIETAC award due to inadequacy of notice. Article V(1)(b) of the New York Convention provides that one of the grounds for refusal to recognize an award is that "[t]he party against whom the award is invoked did not receive proper notice . . . of the arbitration proceedings." The Court held that the "proper notice" requirement is to be judged by reference to the forum's standards of due process. Therefore, citing the U.S. Supreme Court judgment in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court of Appeals held that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In this case, the Court of Appeals agreed with the District Court that where all previous communications had been in English and where the agreements reinforced the parties' understanding that arbitration would be conducted in English, a Chinese-language notice was not reasonably calculated to inform LUMOS of the CIETAC arbitration. The Court of Appeals also rejected CEEG's argument that CIETAC, not CEEG, sent the arbitration notice, noting that CEEG's counsel had signed the notice letter and that CEEG could have moved for CIETAC to proceed in English.

Without deciding whether a party opposing confirmation of an arbitral award must also demonstrate prejudice from any procedural error, the Court of Appeals added that the insufficient notice prejudiced LUMOS by preventing it from selecting an arbitrator, and this error tainted the remaining arbitration proceedings.

The *CEEG v. LUMOS* decision highlights the importance of providing notice reasonably calculated to inform interested parties of arbitration if there is the potential for an award to be enforced in the United States, even if the institutional rules or curial law of the arbitration do not require it. As a practical matter, it would be prudent for parties who could later be seeking enforcement to ensure that they do not provide their opponents an arguable basis to contest enforcement, whether in the United States or elsewhere. Had the notice of arbitration in this case been delivered with an English translation or some form of notice in English, any procedural flaw may not have risen to the level required to overcome the strong presumption of enforceability of awards under the New York Convention.

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Please do not hesitate to contact us with any questions.