

Latest Development in CIETAC Arbitration

1. Since April 2012, there has been an ongoing dispute among China International Economic and Trade Arbitration Commission (CIETAC) and CIETAC Shanghai Sub-commission (CIETAC Shanghai) and CIETAC South China Sub-commission (CIETAC South China). The internal division and disagreement among them gradually intensified and the disputes continue to bring about confusion and uncertainties.

Background

2. Following the implementation of the CIETAC Articles of Association (2012) and CIETAC Arbitration Rules (2012) (CIETAC Rules 2012) on 1 May 2012, where there is a CIETAC arbitration clause in the agreement but the contracting parties have not specified in the agreement where to submit their CIETAC arbitration, the dispute will be handled by CIETAC (Beijing). These rules are quite different from the old rules (i.e., CIETAC Rules 2005) which provided that the parties could refer their disputes to either CIETAC (Beijing) or one of its sub-commissions of their choice unless their agreement provided otherwise, and the sub-commissions would then have the power to administer cases so submitted to them.
3. As the CIETAC Rules 2012 have reduced the number of new cases referred to the CIETAC sub-commissions quite significantly, CIETAC Shanghai and CIETAC South China, as the two most popular sub-commissions, refused to apply the new rules and to form part of CIETAC. The dispute between CIETAC and these two sub-commissions has been ongoing for almost a year now and no resolution has so far been reached.
4. On 30 April 2012, CIETAC Shanghai made an announcement declaring its independence and the adoption of a new set of arbitration rules as well as a new panel of arbitrators. On 16 June 2012, CIETAC South China made a similar move by using the concurrent name of “Shenzhen Court of International Arbitration” (SCIA) and announcing that it would implement its own set of arbitration rules and set up a new panel of arbitrators.
5. On 1 August 2012, CIETAC (Beijing) published the “Announcement on the Administration of Cases Agreed to be Arbitrated by CIETAC Shanghai and CIETAC South China” (CIETAC August Announcement) and declared that with effect on 1 August 2012:
 - i. CIETAC (Beijing) would suspend its authorisation to CIETAC Shanghai and CIETAC South China for accepting and administering arbitrations; and
 - ii. parties who had agreed to commence arbitration in CIETAC Shanghai or CIETAC South China would still be able to hold the arbitration hearings in the place as provided under the agreement, but they would first have to submit their applications to CIETAC (Beijing) to enable the CIETAC Secretariat to administer the case.
6. In response to the CIETAC August Announcement, CIETAC Shanghai and CIETAC South China (or SCIA) made two joint statements on 4 August 2012 and 28 August 2012 respectively (collectively, the “2012 Joint Announcements”). They maintained that they were “independent legal persons” and refused to

adopt the CIETAC Rules 2012. According to the two sub-commissions, the CIETAC Rules 2012 were passed “unilaterally” by CIETAC and had no binding effect. Meanwhile, they emphasised that the “suspension of authorisation” as claimed by CIETAC was invalid and that where an arbitration agreement referred the disputes to CIETAC Shanghai or CIETAC South China for arbitration, such disputes had to be submitted to CIETAC Shanghai or CIETAC South China (or SCIA) respectively and not to CIETAC (Beijing).

7. Thereafter, CIETAC South China took further steps to show its independence:
 - i. On 22 October 2012, CIETAC South China was re-named “South China International Economic and Trade Arbitration Commission” (South CIETAC), concurrently using the name “SCIA”.
 - ii. On 24 November 2012, the Shenzhen Municipal Government, as a special economic zone, took advantage of its special legislative powers and the Project on Qianhai Shenzhen - Hong Kong Modern Service Industry Cooperation Zone, which is endorsed by the State Council to pass the *Administrative Provisions for SCIA (Trial Implementation)*, which provides that SCIA is founded by the Shenzhen Municipal Government and is an independent legal person which has a right to adopt its own set of arbitration rules and set up its own panel of arbitrators.
 - iii. On 1 December 2012, SCIA announced that it would implement its own set of arbitration rules and use its own new panel of arbitrators.
8. On 31 December 2012, CIETAC (Beijing) published the “Announcement on Issues concerning CIETAC Shanghai and CIETAC South China” (the “CIETAC December Announcement”) and further declared, inter alia, that:
 - i. what CIETAC South China had done in paragraph 7 above was null and void as a matter of law;
 - ii. CIETAC Shanghai and CIETAC South China were forbidden to continue in any way and in any form to use the name, brand and relevant logo of “CIETAC”, either in Chinese or English, and to conduct any further arbitration activities in the name of “CIETAC Shanghai Sub-commission” and “CIETAC South China Sub-commission”;

- iii. authorisation of the CIETAC Shanghai and the CIETAC South China for accepting and administering arbitration cases was terminated;
 - iv. where parties had agreed to arbitrate their disputes by CIETAC Shanghai or CIETAC South China, the parties had to submit their requests for arbitration to CIETAC (Beijing) and the CIETAC Secretariat was to accept such requests and administer such cases. Unless otherwise agreed by the parties, the place of arbitration and the place of oral hearing was to be held in Shanghai or Shenzhen respectively;
 - v. the case accepted and administered by CIETAC Shanghai or CIETAC South China before 1 August 2012 should be concluded in accordance with the CIETAC Rules 2012 and under the uniform leadership of CIETAC in respect of case administration as provided in the CIETAC Rules 2012.
9. In response to the CIETAC December Announcement, CIETAC Shanghai and SCIA made a joint announcement again on 21 January 2013 (the “2013 Joint Announcement”). This time they provided more detailed information to support their independent status. Both of them have been approved and organised by their respective municipal government and have lawfully completed judicial registration with the Shanghai Municipal Bureau of Justice and the Department of Justice of Guangdong Province respectively. Moreover, these two government authorities issued their own replies confirming that CIETAC Shanghai and SCIA are independent arbitration commissions possessing the right to accept and administer arbitration cases on 11 October 2012 and 6 December 2012 respectively.
 10. Recently, SCIA published two newsletters citing two judgments delivered by the Shenzhen Intermediate People’s Court (the “Shenzhen Court”) on 20 November 2012 and 14 November 2012. In these two judgments, the Shenzhen Court confirmed that:
 - i. CIETAC South China had been renamed South CIETAC (or SCIA);
 - ii. the arbitration agreement or arbitration clause providing that the disputes were to be submitted to CIETAC South China had been

held valid, and South CIETAC (or SCIA) had jurisdiction over these disputes;

- iii. CIETAC South China had been in existence as an independent arbitration commission; and
- iv. the parties which agreed to submit the dispute to CIETAC South China but did not specify which set of arbitration rules were to apply were deemed to have agreed to apply the arbitration rules prevailing at the time of arbitration (i.e., 23 May 2012), which were the CIETAC Rules 2005 rather than the CIETAC rules 2012 adopted by CIETAC (Beijing) on 1 May 2012.

11. On 16 April 2013, with the approval of the Shanghai Municipal Government, CIETAC Shanghai was renamed Shanghai International Economic and Trade Arbitration Commission, concurrently using the name Shanghai International Arbitration Center (SHIAC), and with effect from 1 May 2013, there was to be a new version of the arbitration rules implemented and a new panel of arbitrators established.

Analysis and Implications

12. At present, the Arbitration Law of the People's Republic of China (the "Arbitration Law") requires that all arbitrations within Mainland China must be administered by an arbitration commission. It can be inferred from Article 16 and Article 18 of Arbitration Law that it does not recognise the validity of ad hoc arbitrations within the territory of Mainland China. A party who wishes to commence arbitration in Mainland China must therefore select an arbitration commission recognised by law in Mainland China.

13. Article 10 of the Arbitration Law provides that arbitration commissions may be established in municipalities directly under the Central Government and in cities where the people's governments of provinces or autonomous regions are located. They may also be established in other cities divided into districts according to needs.

14. Hence, both the Shanghai Municipal Government and the Shenzhen Municipal Government have the right to establish their arbitration commissions. Moreover, SHIAC and SCIA have already lawfully completed judicial registration with their local government authorities to fulfil the requirements under Article 10 of the

Arbitration Law. Moreover, these government authorities recently separately confirmed that SHIAC and SCIA are independent arbitration commissions which have the right to accept and administer arbitration cases independently. In this respect, SHIAC and SCIA can arguably be treated as the local or domestic arbitration commissions established under Article 10 of the Arbitration Law.

15. On the other hand, under the Chapter on the Special Provisions for Arbitration Involving Foreign Elements (i.e., the foreign-related arbitration) of the Arbitration Law, Article 66 of Arbitration Law provides that foreign-related arbitration commissions may be organised and established by China Chambers of International Commerce (CCOIC). This is a special arrangement allowing CCOIC which is not a municipal government to establish foreign-related arbitration commissions (i.e., CIETAC). From this point of view, CIETAC is a foreign-related arbitration commission.

16. Historically, local or domestic arbitration commissions would only handle domestic arbitration cases whereas foreign-related arbitration commissions would handle foreign-related cases. However, with the development of the arbitration regime in Mainland China over the years, the distinction has become blurred. On 8 June 1996, the General Office of the State Council issued a notice empowering domestic arbitration commissions to handle domestic arbitrations as well as foreign-related arbitrations submitted with the agreement of the parties. Accordingly, SHIAC and SCIA, as domestic arbitration commissions, may handle both foreign-related disputes and domestic disputes. Meanwhile, CIETAC has extended its jurisdiction to pure domestic disputes when it revised its arbitration rules in 2000. As a matter of fact, domestic arbitrations have since become a substantial part of CIETAC's caseload.

17. Based on the developments set out in paragraphs 10 and 11 above, it seems that where an arbitration agreement refers disputes to CIETAC Shanghai or CIETAC South China for arbitration, the courts in the Shanghai and Shenzhen regions are ready to uphold the legality of these agreements and the constitutionality of CIETAC Shanghai (or SHIAC) and CIETAC South China

(or SCIA) as legal independent arbitration commissions. This does not, however, mean the same is necessarily true when these awards are challenged in other enforcement courts, including the courts outside the Shanghai and Shenzhen regions as well as the foreign courts, as the Shanghai and Shenzhen court judgments are not, strictly speaking, binding on these courts outside their jurisdiction. In addition, there remain unsolved issues mentioned in paragraphs 18 to 20 below.

18. Firstly, Articles 2 (1) and (2) of the Plan for Reorganization of Arbitration Institutions issued by the State Council on 28 July 1995 (the “Plan”) provides that:

- i. a city where the law provides for the establishment of an arbitration commission may establish only one unified arbitration commission, and no special arbitration commission or arbitration tribunal shall be established according to different specialties; and
- ii. the names of newly established arbitration commissions shall be regulated; and all arbitration commissions shall begin with the city name where the arbitration commission is located (name of location + arbitration commission), such as Beijing Arbitration Commission, Guangzhou Arbitration Commission or Shenzhen Arbitration Commission.

19. Since the Shanghai Municipal Government and the Shenzhen Municipal Government have already established their own local arbitration commission, namely the Shanghai Arbitration Commission and the Shenzhen Arbitration Commission, arguably they are not allowed to establish another independent arbitration commission, namely CIETAC Shanghai (or SHIAC) or CIETAC South China (or SCIA). It is unclear as to what consequence may follow when the Shanghai Municipal Government or the Shenzhen Municipal Government violates the Plan by establishing more than one arbitration commissions.

20. Secondly, the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and Hong Kong, which was promulgated by the Supreme People’s Court, has listed out the names of the legal arbitration commissions in Mainland China as of 31

May 1999 at its attachment. Neither CIETAC Shanghai nor CIETAC South China are included in the attachment. Although the attachment is not an updated list of the arbitration commissions in Mainland China, it remains arguable that the awards issued by CIETAC Shanghai (or SHIAC) and CIETAC South China (or SCIA) may not be enforceable in Hong Kong under this Arrangement as it now stands.

Conclusion

21. In light of the above, it seems that the courts in the Shanghai and Shenzhen regions would uphold the validity of an arbitration agreement which refers disputes to CIETAC Shanghai (or SHIAC) or CIETAC South China (or SCIA) and enforce their awards. However, the enforceability of these awards issued after 1 August 2012 in enforcement courts outside the Shanghai and Shenzhen regions remains to be seen. Indeed, the enforceability of an award granted by CIETAC (Beijing), pursuant to an arbitration agreement or arbitration clause specifically referring disputes to CIETAC Shanghai or CIETAC South China for arbitration, which arbitration was administered by CIETAC (Beijing) also remains to be seen.

22. Pending resolution of the disputes between CIETAC (Beijing), SHIAC and SCIA, we have the following recommendations to make just to err on the side of caution:

- i. The safest approach is for the parties to refer their disputes for arbitration by other recognised arbitration commissions such as the Hong Kong International Arbitration Centre (HKIAC) and adopt other arbitration rules such as the UNCITRAL Model law or the Rules of Arbitration promulgated by HKIAC.
- ii. If the parties have used the model arbitration clause of CIETAC (see below), it might be safer, unless a new arbitration agreement can be reached under the formulation described in sub-paragraph (i) above, for them to submit their dispute to CIETAC (Beijing) and apply the CIETAC Rules 2012.

Model Arbitration Clause of CIETAC

“Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission for arbitration

which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties."

23. There is still left one scenario which is clouded with much uncertainty, namely, when the existing arbitration agreement or arbitration clause provides that the parties are to submit their disputes to CIETAC Shanghai or CIETAC South China. In this scenario, one has to consider a number of factors, the weight of each depending on the factual matrix of the case in question; that, unfortunately, can be very different based on numerous permutations. Clearly, the sensible move to make is to seek legal advice as and when there is sight of any dispute arising.

24. We will continue to follow up on this matter closely and will notify you of any new development.

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