CIETAC Administered Arbitrations: Internal Conflicts Cause Uncertainty

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by Peter Bert and Joachim Glatter

Disputes between the China International Economic and Trade Arbitration Commission ("CIETAC") and its sub-commissions in Shanghai ("CIETAC Shanghai") and Shenzhen ("CIETAC South China") currently cause significant legal uncertainty. These internal issues at CIETAC create risks for parties that have agreed arbitration proceedings with these local sub-commissions in their contracts, or are planning to do so: Many contracts between Chinese and foreign parties do contain CIETAC arbitration clauses, as do joint venture agreements or agreements between foreign invested enterprises in China and their Chinese partners.

CIETAC is headquartered is in Beijing. In addition, sub-commissions have been established in various Chinese cities, including Shanghai and Shenzhen. Parties often agreed to have arbitration proceedings administered by one of these sub-commissions, usually because one or even both parties to the dispute are located in the vicinity of the subcommissions.

Many arbitration clauses used in the past, however, did not explicitly state the name of the local sub-commission as the chosen arbitration institution. In practice, one often finds clauses simply stating that the CIETAC rules shall apply to any disputes and that the arbitration hearings shall take place, for example, in Shanghai. In the past, this was considered a sufficient legal basis for the administration of such proceedings by the respective local sub-commission.

This practice, however, has now become doubtful as a result of the new CIETAC rules that came to force on May 1, 2012. In essence, the new rules permit the administration of arbitration proceedings by a CIETAC sub-commission only if the arbitration clause stipulated that the sub-commission shall be the administrating institution, and the sub-commission is explicitly named in the arbitration clause. Otherwise, the arbitration proceedings will be administered by the CIETAC headquarters in Beijing, even if the arbitration clause provides for the hearing to take place in Shanghai, for example.

The sub-commissions in Shanghai and Shenzhen have not accepted this reduction of their authority, and the loss of income associated with it. The internal disputes that started in May 2012 have led to the sub-commissions in Shanghai and Shenzhen to separate from CIETAC and to their declaration of independence. CIETAC South China has stated it will retain the 2005 CIETAC rules, whereas CIETAC Shanghai published its own "Shanghai Rules", based on the 2005 CIETAC rules. In return, CIETAC Beijing has withdrawn the authorization to the sub-commissions of accepting arbitration cases.

In an "Announcement on the Administration of Cases Agreed to be Arbitrated by CIETAC Shanghai Commission and CIETAC South China Commission" released on August 1, 2012, CIETAC Beijing stated that "CIETAC's authorization to the CIETAC Shanghai Sub-Commission and the CIETAC South China Sub-Commission for accepting and administering arbitration cases is hereby suspended." CIETAC Bejing takes the position that in matters where the arbitration clause provides for arbitration proceedings with one of the sub-commissions, the application for arbitration must be filed with CIETAC Beijing and must be administered by CIETAC Beijing, even if the hearings can still take place in Shanghai or Shenzhen.

However, the two sub-commissions remain of the opinion that they do not need any authorization by CIETAC Beijing, and have issued a joined statement to that effect. In their opinion, it is sufficient that the contracting parties provide for CIETAC Shanghai or CIETAC South China (Shenzhen) as the arbitration institution, and then they are the competent institutions to handle these cases.

As long as it is not clear whether CIETAC Shanghai and CIETAC South China, by declaring their independence, have formed independent arbitral bodies, a risk remains that arbitral awards issued by CIETAC Shanghai or CIETAC South China will not be, where necessary, enforced in court. The same risk applies if CIETAC Beijing accepts an application for arbitration and issues an arbitral award even though the underlying arbitration clause stipulated a decision by one of the two subcommissions.

Against this background, a cautious approach is recommended for the time being:

For new agreements, arbitration clauses that provide for CIETAC Shanghai or CIETAC South China as arbitration institution should currently not be used. If the parties want to agree on CIETAC arbitration proceedings, they should explicitly stipulate CIETAC Beijing as the arbitration institution.

In case of existing contracts that provide either for CIETAC Shanghai or CIETAC South China as the arbitral body, one should ideally revise the arbitration clause and agree either on CIETAC Beijing explicitly, or, in the alternative, on another arbitration institution where the existence is beyond doubt.

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