Delhi High Court Rejects Arguments against Enforcement Based on CIETAC Split

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Background on CIETAC Split

Up until May 1, 2012 CIETAC had a branch in Shanghai named CIETAC Shanghai Sub-commission (the "Old Sub-commission"). This Old Sub-commission used the same CIETAC arbitration rules but was administered by a secretariat semi-independent of that of the head office of CIETAC in Beijing.

On May 1, 2012 CIETAC launched its 2012 edition of arbitration rules. Some disagreements arose between the Old Sub-commission and the head office of CIETAC, which triggered the Old Sub-commission declaring independence from CIETAC.

On April 11, 2013 the Old Sub-commission renamed itself as Shanghai International Arbitration Center ("SHIAC") (the "Re-naming"). CIETAC then established a new CIETAC Shanghai Sub-commission (the "New Sub-commission") shortly after the Re-naming. [fn] See e.g. Justin D' Agostino, Kluwer Arbitration Blog, 2 May 2014, *The Aftermath of the CIETAC Split: Two years on, lower courts take clashing views on arbitration agreements and awards– but higher courts strive for consistency*. [/fn]

To clarify uncertainties surrounding the competence of CIETAC and SHIAC over cases with an underlying clause providing for arbitration by CIETAC Shanghai Sub-commission, the Supreme People's Court of China (the "SPC") issued a circular in June 2015 (the "SPC Interpretation"). Article 1 states that disputes in connection with contracts signed before the Re-naming carrying an arbitration clause providing arbitration by CIETAC Shanghai Sub-commission shall be administered by SHIAC. It also provides in article 3 that no party shall be upheld in its application for the set-aside or non-enforcement of an award on the ground of no competence if either CIETAC or SHIAC had accepted the case which it should not have as per the SPC Interpretation prior to the issuance date thereof.

Delhi Court's Decision on Enforcement

As reported in Global Arbitration Review, a Chinese solar power company, LDK Solar Hi-Tech ("LDK"), attempted to enforce a CIETAC award against an Indian counterpart, Hindustan Clean Energy ("Hindustan"), in India. [fn] https://globalarbitrationreview.com/article/1171818/chinese-company-enforces-award-in-delhi-despite-arguments-based-on-cietac-split [/fn]

The underlying arbitration clause carried in a guarantee agreement entered into between LDK, as the beneficiary, and Hindustan, as the guarantor, provides that "*any and call claims, disputes,*

controversies or differences arising between the Parties out of or in connection with this Bond shall be submitted for arbitration before China International Economic and Trade Arbitration Commission (CIETAC) in Shanghai by three arbitrators appointed in accordance with the corresponding rules of arbitration…"

LDK brought arbitration before New Sub-commission in October 2013 and the award was made in February 2015.

When LDK applied for enforcement of the award in the Delhi High Court, Hindustan tried to resist the enforcement raising the following arguments:

1) That the New Sub-commission had no jurisdiction as the arbitration agreement referred disputes to the Old Sub-commission, now renamed as SHIAC. For this argument Hindustan relied on article 1 of the SPC Interpretation.

2) That CIETAC breached principles of natural justice when it appointed a substitute arbitrator to replace the original chair within 2 days.

All the arguments were rejected by Judge Navin Chawla.

Comments

In my view, Judge Navin Chawla made a judicious judgment.

It is important to note the distinction between providing for arbitration before CIETAC Shanghai Sub-commission on the one hand, and arbitration before "CIETAC in Shanghai" as is in the present case, on the other. The former provision refers to a specific institution by the name of CIETAC Shanghai Sub-commission whereas the latter commonly interpreted as "CIETAC" being the name of the institution whereas "Shanghai" the place of arbitration.

According to the 2005 edition of CIETAC Arbitration Rules, the claimant could choose either CIETAC the head office or CIETAC Shanghai Sub-commission to administer its arbitration if there is no such selection in the arbitration clause. Although in practice cases with a contractual provision for arbitration before CIETAC in Shanghai were usually handled by the Old Sub-commission, CIETAC reserved the right to decide otherwise. So provision for arbitration before CIETAC in Shanghai is not 100% equivalent of arbitration before CIETAC Shanghai Sub-commission.

Art. 1 of the SPC Interpretation obviously refers to an express reference to CIETAC Shanghai Sub-commission by name rather than Shanghai by place because the very object of the circular was to eradicate ambiguity and uncertainty.

Alternatively even if the reference to arbitration before CIETAC in Shanghai could be treated as 100% equivalent of CIETAC Shanghai Sub-commission, article 3 of the SPC Interpretation would have deprived Hindustan of any right to challenge the award on the ground of no competence in China. Since China is the place of arbitration, it's only normal for the Indian court to give overriding weight to the positions of PRC laws and courts, particularly the SPC.

Chawla J's rejection of the natural justice point was predicated on the fact that Hindustan had made no effort to achieve agreement with LDK on the choice of presiding arbitrator when it had the opportunity to do so at the start of the case. It's true that as per the 2005 CIETAC Arbitration Rules, the same procedure should have been followed to appoint a replacement arbitrator as that for the one being replaced. In other words, to replace the presiding arbitrator, the parties should have been given 15 days to agree on a candidate. However, when a party had not exercised that right when it

had an opportunity to do so in the first place, it's hardly arguable that its legitimate interests would be compromised in any consequential way if it was not given a second opportunity. Therefore, Chawla J was only right in commenting that Hindustan was "merely trying to take advantage of an inconsequential issue to challenge the arbitral award", and that "there is no such thing as mere technical infringement of natural justice."

Had the presiding arbitrator been appointed without giving the parties an opportunity to agree on a candidate in the first place, would the judge have viewed it as inconsequential and rejected Hindustan's invocation of natural justice? I think it would probably not be so. Hence the crux of the judgment is that Hindustan had waived or been slack in exercising its right to propose a presiding arbitrator candidate in the first place.

The decision of the Delhi court to enforce the award is a welcome pro-arbitration gesture of Indian courts that they would not refuse enforcement of arbitral awards merely based on some non-material technical irregularities.