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The CIETAC Feud: Big Brother Is Watching – But Is It Also Settling The Fight?

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The split between CIETAC headquarters in Beijing and its two former Shanghai and Shenzhen sub-commissions following the adoption of CIETAC's 2012 Arbitration Rules has remained in the spotlight. The feud escalated with the assertion of independence by the two sub-commissions and the revocation by headquarters of their authorisation to administer cases. To add to the confusion, Chinese local courts have adopted different approaches to cases involving the CIETAC split brought before and after 4 September 2013 (as previously commented here on the Blog, as well as here).

On that date, the Supreme People's Court ('SPC') issued a 'Notice on Relevant Issues concerning Correct Handling of Judicial Review of Arbitration Matters' (Fa (2013) 194 Hao) ('the 2013 Notice'), requesting lower courts to report arbitration-related cases affected by the CIETAC split to the SPC for instructions before issuing rulings.

The dust initially appeared to settle following the 2013 Notice. A decision of 31 December 2014 by the Shanghai No. 2 Intermediate People's Court ('IPC') ([2012] Hu Er Zhong Min Ren (Zhong Xie) Zi Di 5 Hao: see SHIAC's news report), however, has stirred the waters once again. The IPC confirmed the validity of an arbitration clause designating 'CIETAC Shanghai Sub-Commission' by interpreting it as actually designating the Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center (SIETAC/SHIAC), as the institution having jurisdiction over the dispute.

Read in conjunction with 2013 Notice, the IPC's ruling raises the question whether it has much broader significance – i.e has the SPC implicitly reached a consensus on how to settle the dust in the CIETAC split? If so, on what terms?

Background

On 8 July 2010, two Chinese individuals (the Chinese parties) entered into a share purchase contract (the 'Contract') in Shanghai with a company registered in Hong Kong. The Contract contained an arbitration clause (the 'Arbitration Clause'), stipulating that any dispute should be submitted to "the China International Economic and Trade Arbitration Commission Shanghai Sub-Commission (hereinafter 'CIETAC Shanghai Sub-Commission')" for arbitration. Disputes subsequently arose and, on 21 November 2012, the Hong Kong company filed a Request for Arbitration with CIETAC Beijing, which accepted the case shortly thereafter.

On 5 December 2012, the Chinese parties filed an Application for Verification of the Validity of the Arbitration Agreement (the 'Application') before the IPC, requesting it to rule that (1) the Arbitration Clause was valid; (2) CIETAC Shanghai Sub-Commission was the only arbitration institution having jurisdiction to resolve the dispute; and (3) the other party should bear the court acceptance fee. The IPC accepted the case on that day.

On 7 December 2012, CIETAC Beijing issued a 'Decision on Jurisdiction and Case Acceptance', confirming that the Arbitration Clause was valid and that it had jurisdiction over the dispute.

Notwithstanding CIETAC Beijing's decision, the IPC instructed it on 8 January 2013 to suspend the arbitration proceedings pending the Court's decision.

The Chinese parties argued that the Arbitration Clause was valid since it fulfilled all the requirements of article 16 of the PRC Arbitration Law (1994), i.e. an express intent to arbitrate, a clear description of the matters subject to arbitration, and an arbitration institution. The Chinese parties argued that the designated arbitration institution was the CIETAC Shanghai Sub-Commission, which had been renamed SIETAC/SHIAC. As such, in accordance with the parties' intentions, only SIETAC/SHIAC and not CIETAC Beijing had jurisdiction over the dispute.

The Hong Kong company argued that the validity of the Arbitration Clause was not disputed by the parties, the only question being the interpretation of the reference to 'CIETAC Shanghai Sub-Commission'. Such question was not, however, subject to the Court's jurisdiction and the IPC had no legal basis for accepting the Application. The company further contested the IPC's powers to instruct CIETAC Beijing to suspend the arbitration proceedings and argued (inter alia) that since CIETAC Beijing had revoked the authorisation of the CIETAC Shanghai Sub-Commission to administer cases, its successor entity, SIETAC/SHIAC, could not be deemed as 'CIETAC Shanghai'. The designated arbitration institution was therefore CIETAC Beijing.

The Decision

Having examined the history and previous legal structure of the CIETAC Shanghai Sub-Commission as part of the China Council for the Promotion of International Trade (CCPIT), the IPC then noted that, according to its own announcement dated 17 April 2013, the sub-commission had been officially renamed concurrently as SIETAC/SHIAC. On 1 May 2013, SIETAC/SHIAC adopted new arbitration rules and established a new panel of arbitrators. The announcement also stated that SIETAC/SHIAC would accept cases "to be arbitrated by SIETAC/SHIAC upon agreement between the parties" and continue to accept cases "that should be arbitrated by CIETAC Shanghai Commission/Branch/Sub-Commission upon agreement between the parties".

The Court answered two preliminary questions as follows.

(1) The arbitration institution designated in the Arbitration Clause, the CIETAC Shanghai Sub-Commission, was domiciled within the jurisdiction of the IPC. The Court therefore had jurisdiction to rule upon the Application, pursuant to article 12 of the SPC Interpretation of the PRC Arbitration Law (2006) (SPC Interpretation [2006] No. 7).

(2) As the case involved a party registered in Hong Kong, the Arbitration Clause was deemed to be Hong Kong-related. Absent party choice as to the law applicable to the validity of the Arbitration Clause, the law of the place of the arbitration institution, i.e. PRC law, should apply, in accordance with article 18 of the PRC Law on the Laws Applicable to Foreign-Related Civil Relations (2010).

On the core question of the validity of the Arbitration Clause, the IPC ruled as follows.

(1) A valid arbitration clause shall contain the following particulars, per article 16(2) of the PRC Arbitration Law (1994): (i) an expression of intention to apply for arbitration; (ii) the matters to be referred to arbitration; and (iii) a designated arbitration commission.

(2) In the present case, the parties had agreed on all of these factors. In particular, the designated arbitration institution, 'CIETAC Shanghai Sub-Commission', now called SIETAC/SHIAC, was established according to law and entitled to administer arbitration cases by agreement of the parties.

The Arbitration Clause was therefore valid and the dispute between the parties should be dealt with by SIETAC/SHIAC as clearly stipulated thereunder.

The IPC therefore confirmed the validity of the arbitration clause and also ordered the Hong Kong company to bear the court fee.

Authors' Commentary

The key question is: does this decision only reflect the view of the Shanghai No. 2 IPC in the specific case, or should it be more broadly interpreted as indicating a general trend that SIETAC/SHIAC is now recognised as the official successor to the CIETAC Shanghai Sub-Commission?

The IPC clearly rules that SIETAC/SHIAC is the deemed successor to the CIETAC Shanghai Sub-Commission and that a clause designating the CIETAC Shanghai Sub-Commission must be read as designating SIETAC/SHIAC and not CIETAC Beijing.

Whilst there is no official published statement by the SPC under the 2013 Notice regarding this case, it may reasonably be assumed that the IPC duly reported the case to the SPC and that the latter approved the former's views. This would mean that the SPC supports the interpretation of clauses referring to 'CIETAC Shanghai Sub-Commission' as now referring to SIETAC/SHIAC and not to CIETAC Beijing. It follows that a similar inference could be drawn with regard to references to 'South China Sub-Commission' being interpreted as referring to the South China International Economic and Trade Arbitration Commission/Shenzhen Court of International Arbitration (SCIETAC/SCIA).

This would mean that CIETAC Beijing has lost the battle in Shanghai and Shenzhen and is now reduced to administering cases (i) which refer simply to 'CIETAC' or 'CIETAC Beijing' arbitration, or (ii) where the parties have otherwise agreed that the case should be handled by CIETAC Beijing.

As a matter of interest, on the very day of the IPC's decision (31 December 2014), CIETAC posted two announcements on its official website regarding the reorganisation of its Shanghai and Shenzhen sub-commissions.

The first, in abbreviated form, is entitled 'Decision of the CCPIT (China Chamber of International Commerce) on the Reorganization of the CIETAC South China Sub-Commission and CIETAC Shanghai Sub-Commission', according to which the CCPIT decided to reorganise the former sub-commissions following their changes in name and structure and their refusal to remain "under the

leadership of CIETAC".

The second announcement is entitled, in abbreviated form, 'CIETAC Announcement on the Reorganization of CIETAC South China Sub-Commission and Shanghai Sub-Commission'. This sets out details of the reorganisation programme, by which CIETAC appears to be reconstituting its current liaison offices in Shanghai and Shenzhen as new 'Sub-Commissions'. CIETAC had opened these liaison offices after revoking its authorisation to the newly established SIETAC/SHIAC and SCIETAC/SCIA to administer CIETAC cases.

Is this really a coincidence, or is CIETAC trying to re-establish 'Sub-Commissions' in order to undermine the reasoning of the Shanghai No. 2 IPC and of any other court that may be inclined to adopt similar reasoning?

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This entry was posted on Monday, January 19th, 2015 at 4:25 pm and is filed under Arbitration, Arbitration Act, China, CIETAC
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