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New Judicial Guidance on the CIETAC Split – Closure After Three Years of Uncertainty?

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Summary

In the three years since the 2012 declaration of independence by CIETAC's former Shanghai and Shenzhen sub-commissions, affected parties have faced an uncertain and unpredictable arbitration process in Mainland China. In a recent judicial interpretation (the Reply), however, the PRC Supreme People's Court (SPC) has clarified the jurisdictional uncertainties caused by the split.

Background

The CIETAC split first became public on 2 May 2012, when CIETAC's former sub-commissions in Shenzhen and Shanghai jointly announced that they would henceforth operate as independent arbitral institutions.

The announcement came only a day after the 2012 Edition of the CIETAC Arbitration Rules came into force. The causal factor appeared to be new provisions changing the way in which CIETAC dealt with requests for arbitration under agreements which contained no specific nomination of a named sub-commission. These amendments arguably enhanced the role of CIETAC's Beijing Secretariat (CIETAC Beijing) at the expense of its sub-commissions.

Each of the Shanghai and Shenzhen entities subsequently issued its own arbitral rules and appointed panels of arbitrators. In addition, each changed its name so as to remove any CIETAC identification.

Accordingly, (i) as of 8 April 2013, the former CIETAC Shanghai sub-commission became the Shanghai International Arbitration Centre (SHIAC) or Shanghai International Economic and Trade Arbitration Commission (SIETAC), and (ii) as of 22 October 2012, the former CIETAC Shenzhen/South China sub-commission became the Shenzhen Court of International Arbitration (SCIA) or South China International Economic and Trade Arbitration Commission (SCIETAC).

Both entities successfully registered their new status with the local authorities in their respective locations, and both indicated that they would continue to accept and administer cases submitted to 'CIETAC Shanghai' or 'CIETAC South China/Shenzhen'.

For its own part, CIETAC Beijing disputed the legitimacy of the two sub-commissions' actions, suspending, and then terminating, their authorisation to accept and administer CIETAC cases,

declaring their new rules and arbitral panels null and void, and re-establishing its own sub-commissions in Shenzhen and Shanghai.

With regard to cases involving arbitration agreements making reference to 'CIETAC Shanghai' or 'CIETAC South China/Shenzhen', CIETAC Beijing, by an announcement dated 31 December 2012, declared that requests for arbitration under such agreements should be submitted in the first instance to CIETAC Beijing. However, the 'place of arbitration' and 'place of oral hearing' would be in Shanghai or Shenzhen, as appropriate.

Procedural uncertainty

Following CIETAC's split, therefore, two rival institutions to CIETAC, each asserting the sole right to accept and administer affected cases, came into existence. Accordingly, arbitration under such clauses became a less certain and predictable process, with greater scope for opposing parties to delay (and perhaps derail) arbitration proceedings by bringing challenges in the Chinese courts.

In particular, whether a party chose to submit its request for arbitration to CIETAC Beijing or to the relevant former sub-commission, the application effectively invited a challenge that the other entity was in fact the appropriate administering institution. It was therefore open to a respondent to make such a challenge at either the jurisdictional or enforcement phase.

Early cases and SPC measures

On 4 September 2013, in an apparent attempt to ensure consistency in court decisions arising out of the CIETAC split, the SPC issued a notice (SPC Notice) requiring all lower courts hearing cases arising out of the CIETAC split to report upwards before making a decision.

This procedure in effect replicated an existing judicial pre-reporting mechanism applicable to court decisions concerning foreign or 'foreign-related' arbitration cases, whereby the first instance People's Court may not determine a jurisdictional or enforcement challenge without first referring the matter to a Higher People's Court and ultimately to the SPC in Beijing.

However, the SPC Notice, while it ensured judicial oversight of such decisions, fell short of articulating the principles by which the appropriate forum should be determined for arbitration pursuant to an affected clause.

Similarly, while subsequent decisions of the Shanghai and Shenzhen courts, which appeared to have been reached pursuant to the reporting process in the SPC Notice, offered some insight into the SPC's position on such cases, theydid not constitute binding precedent sufficient to provide the necessary certainty to parties.

Indeed, by ensuring that any challenge to jurisdiction or enforcement regarding an affected arbitration clause would traverse all levels of the PRC judiciary, the reporting mechanism in effect guaranteed a recalcitrant counterparty the opportunity to delay substantially an arbitration process by bringing a challenge before the PRC courts.

This is perhaps demonstrated by the long delays faced by parties in the small number of reported cases decided subsequent to the SPC Notice. These delays extended, in certain cases, to two years from the date on which a jurisdictional challenge was brought.

The Reply and the 'Golden Rule'

On 15 July 2015, the SPC issued the Reply, a judicial interpretation that took effect on 17 July 2015. It offers guidance on which institution should exercise jurisdiction and under what circumstances.

For a party considering commencing arbitration proceedings in connection with an affected arbitration agreement, the key date for consideration is when the relevant sub-commission changed its name. If the arbitration agreement were concluded prior to the date of the name change, the former sub-commission would have jurisdiction. If, however, the arbitration agreement was entered into on or after the date of the relevant name change, CIETAC would have jurisdiction. Accordingly, an arbitration commenced pursuant to an arbitration clause specifying 'CIETAC, Shenzhen' should, where the agreement was concluded before 22 October 2012, be submitted to SCIA. Where, however, the agreement was entered into on or after that date, it should be submitted to CIETAC. Similarly, requests for arbitration under pre-8 April 2013 agreements specifying 'CIETAC, Shanghai' should be submitted to SHIAC, whereas requests for arbitration in connection with later arbitration agreements should be submitted to CIETAC.

This principle, which is set out in paragraph 1 of the Reply and is generally consistent with cases decided following the SPC Notice, is referred to below as the 'Golden Rule'.

Historic cases

Given that parties have been facing uncertainty over this issue for more than three years, a number of arbitration cases under affected arbitration clauses had already been commenced, accepted by the relevant arbitration institution and, in some cases, concluded as at 17 July 2015 without the benefit of the SPC's guidance.

Paragraphs 2 and 3 of the Reply limit the scope by which a jurisdictional challenge can be brought in relation to such historic which were not conducted in accordance with the Golden Rule.

Firstly, paragraph 2 provides that, where a chosen arbitral institution accepted a case prior to 17 July 2015, its jurisdiction may not subsequently be overturned by the courts, unless a jurisdictional challenge was brought prior to the first oral hearing in the arbitration proceedings**.**

For example, if arbitration under a pre-22 October 2012 arbitration agreement specifying CIETAC Shenzhen, was 'wrongly' commenced with, and accepted by, CIETAC Beijing rather than SCIA, then, unless the Respondent has raised a jurisdictional challenge to the PRC courts prior to the first oral hearing in the arbitration, that jurisdictional question cannot be decided against the Claimant in subsequent challenges.

The Reply also confirms that this position is unaffected by any finding of the arbitral institution itself that it has jurisdiction. In so ruling, the SPC has created an exception to the usual principle of PRC law that a court shall refrain from ruling on such an issue if the institution has so confirmed.

Secondly, paragraph 3 provides that where a case accepted by the institution prior to 17 July 2015 and an arbitral award has been rendered, the award may not be challenged in the courts at the enforcement stage.

Finally, paragraph 4 of the Reply provides that where, prior to 17 July 2015, both CIETAC and its

former sub-commission have accepted jurisdiction over the same case, then, if a party has applied to a court for a jurisdictional determination, the court will accept and make a civil ruling in accordance with the Golden Rule. Once again, however, application to the courts must be made before the first oral hearing in the arbitration. If no such jurisdictional challenge has been made, the institution which accepted the case first will have jurisdiction to administer it.

Comment

The Reply provides welcome clarity upon the jurisdictional issues arising from the CIETAC split.

It is, however, worth mentioning that the Reply nonetheless comes too late for a small class of parties to affected arbitration proceedings. For example, a party commencing CIETAC arbitration in 2014 in connection with an arbitration clause specifying 'CIETAC Shanghai' as the administering institution may have grounds to feel aggrieved.

Such a party would have chosen that institution in good faith and in compliance with CIETAC's guidance of 31 December 2012. Nonetheless it may have endured a lengthy and costly suspension of proceedings pursuant to a challenge before the Shanghai courts, only to face the further prospect now that such a challenge will be upheld.

Having said that, the Reply improves the predictability and certainty of the arbitration process for the vast majority of affected cases. It is hoped that it will allow the regional arbitration community finally to draw a line under the saga of the CIETAC split and refocus on the many positive arbitration-related developments in the region.

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