Picking the right arbitration institution in China

Two years after the CIETAC split, unresolved issues such as inconsistent court rulings and confusion over enforcement still remain. Parties are advised to clearly specify the desired institution in their arbitration clauses

It has been more than two years since the outburst of the China International Economic and Trade Arbitration Commission (CIETAC)'s internal war, which resulted in the unfortunate split of the former branches in Shanghai and Shenzhen from the main body of CIETAC (Beijing headquarters) in 2012. This left both the international arbitration and business communities in great confusion about the aftermath of the split, such as the enforceability of relevant CIETAC-related arbitration clauses, as well as arbitration awards made by the former branches that have newly stood on their own feet.

How it began

The split was triggered by the promulgation of the CIETAC Arbitration Rules (2012) on May 1 2012, which, among other things, requires all awards issued by the sub-commissions to be affixed with CIETAC Beijing's seals and provides for a default administration by CIETAC Beijing of all cases with arbitration clauses providing for arbitration in CIETAC. Dissatisfied with the default rule that practically deprives autonomy of the branches and reduces their case resources, the Shanghai and Shenzhen sub-commissions soon declared their independence from CIETAC. In response to the declaration, CIETAC Beijing announced the suspension of its authorisation to these two sub-commissions for accepting and administering arbitration cases and further proclaimed them as illegal. These two sub-commissions subsequently adopted their own rules and panel lists of arbitrators, as well as changed their names to the Shanghai International Economic and Trade Arbitration Commission or Shanghai International Arbitration Center (SHIAC) and South China International Economic and Trade Arbitration Commission or Shenzhen Court of International Arbitration (SCIA) respectively. Following the split, CIETAC opened its own new Shanghai and South China offices, competing with its former branches in Shanghai and Shenzhen.

Inconsistent court attitudes

The first uncertainty caused by the CIETAC split lies in the interpretation of CIETAC-related arbitration clauses. Specifically, if the parties have submitted their dispute for arbitration by CIETAC in Shanghai or Shenzhen (Questionable Arbitration Clauses), which institution should be considered as the authorised body to administer the arbitration: the new offices of CIETAC in Shanghai or Shenzhen, or, the SHIAC/SCIA? The issue often arises at the enforcement stage of arbitration awards rendered by SHIAC/SCIA based on such Questionable Arbitration Clauses.

From November 2012 to July 2013, five local courts in China addressed this issue in their civil rulings, showing inconsistent attitudes toward the split.

Hong Kong Jia Development Company v Shenzhen Yong Company (2012)

The Shenzhen Intermediate People's Court was the first to decide a case concerning the split. In that case, the parties concluded an arbitration clause before the split, referring their dispute to the CIETAC South China Sub-commission for arbitration. After the split, the claimant filed a request for arbitration with CIETAC Beijing, and the respondent objected to CIETAC's jurisdiction before the Shenzhen Court on the ground that, *inter alia*, it was SCIA, rather than CIETAC Beijing, that had been vested with the jurisdiction by the parties.

The Shenzhen Court, considering SCIA as a legitimate and independent arbitration commission, concluded that notwithstanding the split, SCIA, rather than CIETAC Beijing, should have jurisdiction over the dispute because the parties had clearly expressed their intention in the concerned arbitration clause to submit their dispute to the arbitration body in Shenzhen.

The SPC's position on the interpretation of a pre-split arbitration clause and the enforceability of an arbitration award rendered based on such clauses remains unclear

Jingzhou Tao, Dechert

Jiangxi LDK Solar Hi-tech v Suzhou CSI Technology (2013)

Another court ruling concerning the split was made by the Suzhou Intermediate People's Court on May 7 2013, whereby the Suzhou Court rejected the enforcement of an arbitral award issued by SHIAC based on an arbitration clause that was concluded prior to the split, which designated CIETAC as the administrating institution and Shanghai as the seat of arbitration.

In deciding whether SHIAC could retain its jurisdiction over the case after the split, the Suzhou Court noted that, SHIAC, which used to be an integral part of CIETAC, had become an independent arbitration institution duly registered with the local authority on December 8 2011 (this observation demonstrated the Suzhou Court's recognition of SHIAC's independence and legitimacy as an arbitration institution). However, it commented that, by choosing CIETAC as the administrating institution and Shanghai as the seat, the parties' true intention was to have the case administrated by CIETAC itself, not a body split from CIETAC. The Suzhou Court further held that, upon receiving the application for arbitration after the split, SHIAC should have asked the parties to reconfirm its jurisdiction over the case, and failure to do so would invalidate the jurisdiction's claim to administer the case.

The Suzhou Court's position was denied by its higher court, the Higher People's Court of Jiangsu Province, which later released a judicial notice announcing that it had requested the Suzhou Court to revoke its ruling of May 7 2013 and to review the case. The Jiangsu Higher Court further specified that any lower courts within its jurisdiction must report their proposed decisions on any issues relating to the split and should not render any formal rulings before obtaining confirmation/approval from the Jiangsu Higher Court.

Risen Energy v Jiangxi LDK Solar Hi-tech (2013)

Similar to the Suzhou Court, the Ningbo Intermediate People's Court issued a formal ruling on May 22 2013, refusing to enforce an arbitral award issued by SHIAC after the split.

This case involves an arbitration clause designating the CIETAC Shanghai Sub-commission as the administering institution. During the arbitration proceedings, the respondent raised an objection to SHIAC's jurisdiction, which was later dismissed by SHIAC. The Ningbo Court decided not to enforce the arbitral award for reasons similar to those given by the Suzhou Court (such as that SHIAC was no longer an integral part of CIETAC after the split). Similarly, the decision of the Ningbo Court was not shared by its higher court, the Higher Peoples' Court of Zhejiang. The Zhejiang Higher Court, at the request of the party seeking enforcement of the arbitral award, ordered the Ningbo Court to revoke its ruling. As a result, the Ningbo Court rendered a new ruling on July 25 2013 that granted the enforcement of the arbitral award.

One of the reasons given by the Ningbo Court in its second ruling was that the name of the arbitration institution chosen by the parties in the arbitration clause (i.e. the CIETAC Shanghai Sub-commission) was the same as the name of the arbitration institution issuing the award. It did not seem to matter to the Ningbo Court and the Zhejiang Higher Court whether these two institutions were the same entity.

The Ningbo Court further held in its second ruling that although the respondent challenged the tribunal's jurisdiction, it participated in the remaining part of these proceedings after the objection was dismissed by SHIAC, which, in the eyes of the Ningbo Court, constituted implied consent by the respondent on SHIAC's jurisdiction.

Jiangxi LDK Solar Hi-tech v Zhejiang Kingdom Solar Energy Technic (2013)

Another case in relation to the split was litigated at the Taizhou Intermediate People's Court, where the plaintiff requested to enforce an arbitral award rendered by SHIAC.

The arbitration clause provided for the CIETAC Shanghai Sub-commission as the arbitration institution for all disputes arising out of a sale contract. On December 26 2011 (before the split), the claimant applied to the CIETAC Shanghai Sub-commission for arbitration and later on November 5 2012 (after the split), the CIETAC Shanghai Sub-commission (after its declaration of independence but prior to its change of name) issued an arbitral award in favour of the claimant.

The claimant applied to the Taizhou Court for enforcement of the arbitral award. The Taizhou Court granted enforcement based on the grounds that i) the CIETAC Shanghai Sub-commission was the arbitration institution specified in the arbitration clause; ii) the arbitral award was issued under the same name: the CIETAC Shanghai Sub-commission; and iii) the respondent did not object to the jurisdiction of the CIETAC Shanghai Sub-commission during the course of the arbitration proceedings.

Similar to the approach of the Ningbo Court, the Taizhou Court held that it would not conduct any substantive investigation on whether the institution specified in the arbitration clause and the institution making the arbitral award were the same entity in reality, and that it would be satisfied upon a *prima facie* proof of the sameness.

Growing Management v Dalian Oriental Marine & Heavy Industry (2013)

For CIETAC-related arbitration clauses, the cases introduced so far all recognised the jurisdictions of SHIAC and SCIA after the split. The courts in Liaoning province took a different position on their decisions concerning a pre-split arbitration clause that provided for arbitration in the CIETAC Shanghai Sub-Commission.

The plaintiff, despite existence of the arbitration clause, filed a lawsuit in the Dalian Maritime Court and argued that, since CIETAC had suspended the Shanghai Sub-commission's authorisation to accept or administer CIETAC cases, the arbitration clause had become invalid. The Dalian Maritime Court and its higher court, the Higher People's Court of Liaoning Province, upon appeal, both denied the jurisdiction of the CIETAC Shanghai Sub-commission and held that CIETAC Beijing should have the jurisdiction to administer the case.

SHIAC's specially-tailored arbitration rules for the Shanghai Free Trade Zone represent some interesting developments for the future of Chinese arbitration

The SPC steps in

The local courts' inconsistent attitudes toward the split add gravity to the uncertainties. Against this backdrop, the SPC released the *Notice on Certain Issues Related to Correct Handling of Judicial Review of Arbitration Matters* (Notice) on September 4 2013, aimed at clarifying issues and streamlining the courts' decisions. According to the Notice, when reviewing the validity of an arbitration clause or application to not enforce an award issued by CIETAC, SHIAC or SCIA involving the split, the local courts are required to report their opinions to the SPC "level by level". The local courts should not render any rulings before the SPC has given its instructions.

However, the SPC's position on the interpretation of a pre-split arbitration clause and the enforceability of an arbitration award rendered based on such clauses remains unclear. It is hoped that the SPC will issue further guidance on these issues.

Drafting an enforceable arbitration clause

In order to ensure the enforceability of both the arbitration clause and the prospective arbitral award, parties are recommended to draft/revise their arbitration clauses in the following ways:

- **For existing contracts:** If there is an existing contract that contains a Questionable Arbitration Clause, the clause may be revised to either i) "arbitration by CIETAC in Beijing, with the seat of arbitration in Shanghai or Shenzhen", or ii) "arbitration by SHAIC in Shanghai or by SCIA in Shenzhen".

  Under the first option, the designation of the arbitration institution is clear and without doubt (i.e. CIETAC), and the choice of the seat of arbitration is only for convenient purposes and has no bearing on the legal effect of the parties' choice of the institution.

  Under the second option, the designation of SHAIC/SCIA will also be valid because both SHAIC and SCIA have been properly registered with the local authorities and have met the relevant requirements on the formation and existence of an arbitration institution. As long as the names of these newly independent arbitration institutions are accurately spelt out in the arbitration clauses, and no confusing reference to the former CIETAC Shanghai/South China sub-commission is involved, the designation shall be regarded as valid.
- **For future contracts:** Although the designation of CIETAC Beijing or SHAIC/SCIA would both be valid from an enforcement perspective, CIETAC Beijing may have an edge over SHIAC/SCIA. The reason is that, although the newly independent SHIAC/SCIA (particularly SHIAC) have demonstrated an innovative spirit in their arbitration rules (for example, the arbitration rules for the Shanghai Free Trade Zone), it is undeniable that CIETAC Beijing, after decades of development and international and domestic publicity, possesses more advantages with respect to its scale of business and the extent of recognition/acceptance by foreign companies. On the other hand, SHIAC's specially-tailored arbitration rules for the Shanghai Free Trade Zone represent some interesting developments for the future of Chinese arbitration. Overall, a comparison of the general arbitration rules of CIETAC and SHIAC/SCIA reveals no material difference in terms of procedural efficiency or costs. There are, therefore, no obvious or compelling reasons to shift from CIETAC to SHIAC/SCIA arbitration or vice versa.

The CIETAC split has created a real competition among the three arbitration institutions in the three most dynamic cities of China. In the long run, this may have positive and productive effects for Chinese arbitrators in general, and for CIETAC in particular.

Jingzhou Tao, Dechert, Beijing