



DILEMMAS IN CHOOSING THE VENUE OF ARBITRATIONS FOLLOWING CIETAC SPLIT: VALIDITY OF VENUE CLAUSES

BACKGROUND

The China International Economic and Trade Arbitration Commission (CIETAC) is the largest arbitration commission in China and has been the favoured arbitration venue for international investors for years. However, the recent internal disputes between CIETAC headquarters ('Beijing CIETAC') and two of its sub-commissions in Shanghai ('Shanghai CIETAC') and Shenzhen ('SCIA') cast doubts on the validity of arbitral awards issued by Shanghai CIETAC and SCIA.

On 31 December 2012, the Beijing CIETAC published its *Announcement on Issues concerning CIETAC Shanghai Sub-Commission and CIETAC South China Sub-Commission* ('Announcement') in which:

- Beijing CIETAC terminated its authorisation to its sub-commissions in Shanghai and Shenzhen to accept and administer arbitration cases;
- Shanghai CIETAC and SCIA can no longer conduct any further arbitration activities in the names of CIETAC; and
- Beijing CIETAC would establish new branch offices in Shanghai and Shenzhen shortly.

On 21 January 2013, the Shanghai CIETAC and SCIA issued a joint announcement ('Joint Announcement'), in effect declaring independence and autonomy from Beijing CIETAC commission, in which:

- both Shanghai CIETAC and SCIA insisted that they are independent arbitration institutions, approved by the Shanghai municipal government and the Shenzhen municipal government respectively; and

- when the arbitration agreement designates either Shanghai CIETAC or SCIA as the arbitration institution, both institutions are authorised to accept and administer the case (later confirmed by the Shanghai Municipal Bureau of Justice and the Department of Justice of Guangdong Province).

THE REASONS FOR THE CIETAC SPLIT

The conflict between Shanghai CIETAC, SCIA and Beijing CIETAC was triggered by the new CIETAC Arbitration Rules 2012 ('the New Rules'), which came into force on 1 May 2012. The New Rules aimed at centralising the administration of all CIETAC arbitration cases. Article 2.6 of the New Rules stipulated that if the parties do not specify a centre for CIETAC arbitration in the agreement, the secretariat of CIETAC should accept the arbitration and administer the case.

In practice, if the parties do not specify the arbitration centre (ie, Shanghai CIETAC or SCIA) for conducting the CIETAC arbitration, the arbitration would be administered by Beijing CIETAC. Before the adoption of the New Rules, parties had the right to choose between Beijing CIETAC, Shanghai CIETAC or Shenzhen CIETAC (as it was then known). After the adoption of the New Rules, Shanghai CIETAC and Shenzhen CIETAC would inevitably lose a significant amount of cases to CIETAC headquarters. Therefore, Shanghai CIETAC and Shenzhen CIETAC refused to adopt the New Rules and claimed that they are independent arbitration institutions. Later, Shenzhen CIETAC changed its name to Shenzhen Court of International Arbitration or SCIA.



RISKS ASSOCIATED WITH CIETAC ARBITRATION

For international investors and legal practitioners, the ongoing dispute between Beijing CIETAC, Shanghai CIETAC and SCIA creates significant legal uncertainty regarding the selection of a proper arbitration institution in China. Under the Chinese Arbitration Law, a Chinese arbitration commission may engage arbitration involving foreign parties only if it is established by the China Council for Promotion of International Trade (CCPIT). Until now, CCPIT has only established Beijing CIETAC for dealing with arbitration involving foreign parties and Beijing CIETAC established other sub-commissions in various cities in China including Shanghai CIETAC and Shenzhen CIETAC. Since Beijing CIETAC terminated its authorisation to Shanghai CIETAC and SCIA, the authority to hear disputes and render arbitral awards of both institutions will be subject to validity challenges. Therefore, for potential users of the arbitration regime in China, the most important consideration is to ensure that the arbitral process and any arbitral award rendered are both valid and enforceable.

RECOMMENDATIONS

Given the current developments enveloping the Chinese arbitration institutions, parties should be extra cautious in drafting their arbitration clauses, especially forum clauses. Parties should also review their existing clauses to make sure that there are no potential uncertainties concerning the meaning of those clauses concerning venue. Until the dispute between the various CIETAC institutions is resolved, we suggest that investors adopt a prudent approach regarding the selection of arbitration venues and in their draft arbitration clauses in China:

- For new agreements, parties should not designate Shanghai CIETAC and SCIA as the arbitration venue. If the parties insist on pursuing CIETAC arbitration, the agreement should designate Beijing CIETAC as the arbitration venue.
- Parties may consider other regional arbitration institutions, such as the Hong Kong International Arbitration Center (HKIAC) or Singapore International Arbitration Centre. Hong Kong may be preferable due to its proximity to China and may be more acceptable to mainland Chinese counterparties. HKIAC arbitral awards are enforceable in mainland China as long as the awards are issued in Hong Kong in accordance with the Hong Kong Arbitration Ordinance.

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