

## Client Alert

---

August 4, 2015

# SPC Issues Interpretation on Jurisdictional Issues Arising from CIETAC Split

By Craig Celniker, Timothy Blakely, Sarah Thomas, Steve Cheng and Cheryl Zhu

In a welcome development, the PRC Supreme People's Court (the "SPC") issued on July 15, 2015 an interpretation addressing various jurisdictional issues arising from the decision in mid-2012 of the former CIETAC Shanghai and South China Sub-Commissions to become independent arbitral commissions. The interpretation provides valuable guidance from the SPC on the jurisdiction of CIETAC and the former CIETAC Shanghai and South China Sub-Commissions over disputes referred to arbitration administered by the "CIETAC Shanghai Sub-Commission" or the "CIETAC South China Sub-Commission."<sup>1</sup> The interpretation offers welcome clarification of the jurisdictional issues arising from the split, and may help to restore confidence among users of PRC arbitral commissions.

### BACKGROUND TO AND IMPACT OF THE CIETAC SPLIT

Headquartered in Beijing, the China International Economic and Trade Arbitration Commission (CIETAC) is the most commonly-used arbitral commission in the PRC. In mid-2012, its former Shanghai and South China Sub-Commissions very publicly declared their independence from CIETAC. This move followed a dispute over the implementation by CIETAC's Beijing headquarters of a new set of arbitration rules in 2012, which permitted the Sub-Commissions to accept applications and administer cases only with authorization from CIETAC headquarters in Beijing. In late 2012, the South China Sub-Commission changed its name to the South China International Economic and Trade Arbitration Commission/Shenzhen Court of International Arbitration (SCIA). In April 2013, the Shanghai Sub-Commission followed suit and changed its name to the Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center (SHIAC).

Following the split, CIETAC sought to assert jurisdiction over disputes arising from or in connection with contracts providing for arbitration administered by its former Sub-Commissions. For instance, on August 1, 2012, CIETAC announced that where parties had agreed to administration of their disputes by its former Sub-Commissions, they were required to submit their requests for arbitration to CIETAC in Beijing. Ultimately, CIETAC announced a restructuring of its Sub-Commissions, establishing new Sub-Commissions in both Shanghai and South China/Shenzhen, on December 31, 2014. The restructured Sub-Commissions are called "CIETAC Shanghai Sub-Commission" and "CIETAC South China Sub-Commission" respectively.

The split and the subsequent renaming of the former CIETAC South China and Shanghai Sub-Commissions resulted in considerable uncertainty and dispute as to the validity of arbitration agreements specifying, and the

---

<sup>1</sup> The SPC Reply only addresses the handling of clauses that refer disputes to "CIETAC South China Sub-Commission" or "CIETAC Shanghai Sub-Commission." The Reply does not address clauses that unambiguously refer disputes to SCIA or SHIAC, as no clarification is needed.

# Client Alert

enforceability of the arbitral awards rendered by, the breakaway Sub-Commissions, SCIA and SHIAC. This caused concern among users. This concern was heightened when, in 2013, the Intermediate People's Court of Suzhou denied recognition and enforcement, on jurisdictional grounds, of an arbitral award rendered by the SHIAC.<sup>2</sup>

In recognition of these concerns, the SPC issued a notice in 2013 requiring jurisdictional disputes arising from the split of CIETAC to be reported to the SPC prior to a decision being rendered.<sup>3</sup> Notwithstanding this notice, and subsequent rulings issued by courts in Shanghai and Shenzhen affirming the jurisdiction of SHIAC and SCIA following the name changes,<sup>4</sup> some uncertainty remained as to whether CIETAC or SHIAC/SCIA (as appropriate) should have jurisdiction over a dispute governed by an arbitration agreement referring disputes to one of the CIETAC Sub-Commissions, i.e., "Shanghai Sub-Commission" or "South China Sub-Commission."

## THE SPC'S JULY 15 REPLY AND JURISDICTION GUIDELINES

On July 15, 2015, the SPC issued a judicial interpretation in relation to arbitration agreements providing for submission of disputes to either the CIETAC Shanghai Sub-Commission or the CIETAC South China Sub-Commission (the "**Reply**"). The SPC issued the Reply in response to requests from the Shanghai High People's Court, the Jiangsu High People's Court and the Guangdong High People's Court. The Reply, which came into effect on July 17, 2015, has *de facto* precedential effect and is binding upon courts of all levels throughout the PRC. In the Reply, the SPC confirmed that jurisdiction over disputes referred to arbitration administered by the "CIETAC Shanghai Sub-Commission" or the "CIETAC South China Sub-Commission" shall be determined in accordance with the following guidelines (the "**Guidelines**"):

**Table Showing Proper Handling of an Arbitration Agreement to Refer Disputes to "CIETAC Shanghai Sub-Commission" or "CIETAC South China Sub-Commission"**

When was the arbitration agreement concluded?	To which arbitral commission should disputes be referred?	What happens if the dispute was referred to a different arbitral commission prior to July 17, 2015?	What happens if two arbitral commissions have accepted the same case prior to July 17, 2015?
Prior to the name change to SCIA or SHIAC <sup>5</sup> .	SCIA or SHIAC (as appropriate).	This is not a valid ground for challenge.	Prior to the first arbitral hearing, a party may apply to a People's

<sup>2</sup> Jiangxi LDK Solar Hi-tech v Suzhou CSI Technology (2013).

<sup>3</sup> *Notice on Certain Issues Relating to Correct Handling of Judicial Review of Arbitration Matters*(最高人民法院关于正确审理仲裁司法审查案件有关问题的通知) (Fa [2013] No. 194).

<sup>4</sup> The ruling of No. 2 Intermediate People's Court of Shanghai Municipality on 31 December 2014 ((2012) Hu Er Zhong Min Ren (Zhong Xie) Zi Di 5 Hao)); The ruling of Intermediate People's Court of Shenzhen on 6 January 2015 ((2013) Shen Zhong Fa She Wai Zhong Zi Di 133 Hao).

<sup>5</sup> The Reply does not identify specific dates for the name changes by SCIA and SHIAC. The name changes occurred in approximately late 2012 and April 2013 respectively.

# Client Alert

When was the arbitration agreement concluded?	To which arbitral commission should disputes be referred?	What happens if the dispute was referred to a different arbitral commission prior to July 17, 2015?	What happens if two arbitral commissions have accepted the same case prior to July 17, 2015?
		The relevant People's Court should reject any application for set aside or refusal of enforcement of the award.	Court to determine jurisdiction in accordance with the Guidelines. After the first arbitral hearing, the first arbitral commission to accept the case shall be deemed to have jurisdiction.
On or after the name change to SCIA or SHIAC but before July 17, 2015.	(New) CIETAC South China or Shanghai Sub-Commission (as appropriate).	This is not a valid ground for challenge.  The relevant People's Court should reject any application for set aside or refusal of enforcement of the award if the respondent has not already objected to jurisdiction.	Prior to the first arbitral hearing, a party may apply to a People's Court to determine jurisdiction in accordance with the Guidelines. After the first arbitral hearing, the first arbitral commission to accept the case shall be deemed to have jurisdiction.
On or after July 17, 2015.	(New) CIETAC South China or Shanghai Sub-Commission (as appropriate).		

As such, where an arbitration agreement provides for reference of disputes to "CIETAC Shanghai Sub-Commission" or "CIETAC South China Sub-Commission," parties should refer such disputes to the relevant new CIETAC Sub-Commission if the arbitration agreement was concluded after the name change to SCIA or SHIAC (as appropriate).<sup>6</sup> Some ambiguity remains, however, in respect of arbitration agreements entered into

<sup>6</sup> Where the administering arbitration commission is unclear or ill-defined, such as "the arbitral commission in Shenzhen," PRC courts are likely to find the arbitration agreement to be invalid, as no specific arbitral commission is identified.

## Client Alert

---

around the time of the name changes, as the SPC did not identify in its Reply the specific dates on which the name changes by SCIA and SHIAC took place. As such, there remains some potential for dispute; this is, however, likely to affect only a very small number of disputes referred to arbitration.

The Reply confirms that, where the relevant arbitration agreement had been concluded prior to July 17, 2015, PRC courts shall not consider a jurisdictional challenge on the basis of the split and name change to be a valid ground to set aside or refuse enforcement of an arbitral award. The SPC further instructed that a respondent in arbitration may now apply to the PRC courts to determine the validity of an arbitration agreement, even after the relevant arbitral commission has done so, provided that the court application is made before the first arbitral hearing. This is an exception to the general position in PRC law that a court may not accept an application to determine the validity of an arbitration agreement, or to set aside an arbitral award, after an arbitral commission has decided on the validity of the arbitration agreement.<sup>7</sup>

### CONCLUSION

The jurisdiction of PRC arbitration commissions remains an important consideration for foreign parties doing business in the PRC. This is especially true for business done through wholly foreign-owned enterprises (WFOEs), because PRC law requires that disputes between WFOEs and domestic PRC entities be referred for arbitration only to an officially recognized PRC arbitral commission, unless those disputes involve a foreign element. The SPC's Reply provides welcome clarification as to the jurisdictional issues arising from the CIETAC split, and should hopefully restore confidence in Shenzhen and Shanghai as seats of arbitration. The increase in the number of credible arbitral commissions is a positive development for parties arbitrating in the PRC, as increased competition in the market may improve the quality and efficiency of the administration of PRC-seated arbitrations.

### Contact:

**Craig I. Celniker**  
+852 2585 0842  
[ccelniker@mofo.com](mailto:ccelniker@mofo.com)

**Timothy W. Blakely**  
+852 2585 0870  
[tblakely@mofo.com](mailto:tblakely@mofo.com)

**Adrian Yip**  
+852 2585 0802  
[adrianyip@mofo.com](mailto:adrianyip@mofo.com)

---

<sup>7</sup> *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the PRC Arbitration Law* (最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释) (Fa Shi [2006] No. 7), Article 13(2); *Supreme People's Court's Reply to Several Questions Concerning Recognition of the Validity of Arbitration Agreements* (最高人民法院关于确认仲裁协议效力几个问题的批复) (Fa Shi [1998] No. 27), Article 3.

# Client Alert

---

## About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 12 straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*