The International Arbitration Review

Sixth Edition

Editor
James H Carter

Law Business Research

The International Arbitration Review

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2015

Chapter 12

CHINA

Keith M Brandt and Michael KH Kan[1]

I INTRODUCTION

The Civil Procedure Law and the Arbitration Law of China regulate arbitrations seated in China. China is pro-arbitration and arbitration is preferred to litigation, which suffers from inefficiency, administrative interference and local protectionism. Because the Arbitration Law requires arbitrations seated in China to be administered by a Chinese arbitral institution, a number of prominent arbitral institutions have emerged. Competition among these institutions to be the best has been fierce to date. Importantly, while the China International Economic and Trade Arbitration Commission (CIETAC) has traditionally been the preferred arbitral institution for foreign-related disputes, and has continued to strive to do so with the announcement of its new rules on 1 January 2015, it faces serious challenges from its split-off Shanghai sub-commission, now formally known as the Shanghai International Arbitration Center (SHIAC), which has been able to take advantage of its geographical proximity to offer arbitration-related services to the Shanghai Pilot Free Trade Zone through its launch of the Shanghai Pilot Free Trade Zone Court of Arbitration in 2013, followed by the Shanghai Pilot Free Trade Zone Arbitration Rules in 2014. All the more so when SHIAC's legal status and standing have now been widely confirmed by the highest and intermediate courts in China. The dynamics have certainly changed.

1 Keith M Brandt is the managing partner and Michael KH Kan is a senior managing associate at Brandt Chan & Partners in association with Dentons HK LLP.

II THE YEAR IN REVIEW

i CIETAC updated its arbitration rules to reflect the latest international trends

On 4 November 2014, CIETAC issued its revised arbitration rules (the 2015 Rules) to replace the previous version of the rules issued on 3 February 2012 (the 2012 Rules) in its continued quest to strive for international best practice. The 2015 Rules came into effect on 1 January 2015. The key changes introduced by the 2015 Rules may be summarised as follows.

Dealing with joinder, multiple contracts and consolidation of arbitrations

The 2015 Rules have introduced extensive provisions to deal with joinder, multiple contracts and consolidation of arbitrations.

Joinder (Article 18 of the 2015 Rules)

CIETAC may now join third parties to the arbitration at any stage if the third party is *prima facie* bound by the same arbitration agreement invoked in the arbitration. Either party to the arbitration may request CIETAC to order a third party to join the arbitration proceedings, provided that the applicant can prove that the third party is *prima facie* bound by the same arbitration agreement invoked in the arbitration. However, CIETAC also has the power to refuse ordering a joinder where it deems circumstances exist that make the joinder inappropriate.

Multiple contracts (Article 14 of the 2015 Rules)

Parties may now commence a single arbitration concerning disputes arising out of multiple contracts, provided, among other things, that such contracts comprise a principal contract and its ancillary contracts, or they involve the same parties which have legal relationships of the same nature; the disputes arise out of the same transaction or the same series of transactions; and that the arbitration agreements are identical or compatible.

Consolidation (Article 19 of the 2015 Rules)

Under the 2012 Rules, only upon the agreement of all parties could multiple proceedings be consolidated into a single arbitration. CIETAC's power to consolidate two or more arbitrations has been expanded under the 2015 Rules to include the power to consolidate arbitrations even in the absence of the consent from all parties, where the claims are made under multiple arbitration agreements that are identical or compatible, and they involve the same parties and legal relationships of the same nature; the claims in different arbitrations are made under the same arbitration agreement; or the claims are made under multiple arbitration agreements that are identical or compatible, and the multiple contracts involved consist of a principle contract and its ancillary contracts.

Emergency Arbitrator Procedure (Article 23 of and Appendix III to the 2015 Rules)

Another key change under the 2015 Rules is the introduction of emergency arbitrator procedure, which has been prevalent among established arbitral institutions, including the International Chamber of Commerce (ICC), Singapore International Arbitration

Centre (SIAC) and Hong Kong International Arbitration Centre (HKIAC) in recent years. Under the procedures set out in Appendix III, parties may now apply to an emergency arbitrator to grant urgent interim injunctive relief such as preservation of property, prohibitory or mandatory injunctions, and preservation of evidence, before the arbitral tribunal is constituted. Appendix III provides that once the Arbitration Court (as discussed below) has decided that the emergency arbitrator procedure shall apply, the emergency arbitrator shall be appointed within one day of receipt of the relevant documents and payment. The emergency arbitrator is required to then provide a procedural timetable within two days leading to a decision within 15 days of his appointment. The usual safeguards including procedures for challenging the emergency arbitrator (e.g., on ground of lack of independence or impartiality) and the requirement for the applicant to provide security are provided for. It remains to be seen, however, whether an emergency arbitrator's decision, which under the 2015 Rules may be in the form of an order or award and is stated to be binding upon parties, may be readily enforced in the courts of various jurisdictions in accordance with local laws notwithstanding that it is arguably interim in nature. One example of such a hurdle is that, as mentioned in our previous article, only the Chinese courts have jurisdiction to grant interim measures such as injunctions or preservation of property or evidence order under the current PRC Civil Procedural Code.

Organisational changes within CIETAC

The 2015 Rules has also made changes to CIETAC's internal organisational structure by creating an arbitration court. Under the 2015 Rules, all functions and powers of the former CIETAC Secretariat will be transferred to the Arbitration Court, which are reflected in various provisions throughout the 2015 Rules. As such restructuring is more of an internal adjustment within CIETAC, it is not anticipated to have a significant impact on the actual conduct or progress of the arbitration.

Increasing the threshold for the application of its summary procedure

Under the 2015 Rules, the threshold for the application of its summary procedure has been increased from 2 million to 5 million renminbi. This adjustment is in line with the rules of other international arbitral institutions and is aimed to improve CIETAC's administrative efficiency and effectiveness, by offering parties the option of agreeing upon a leaner, and therefore quicker, arbitration procedure in the appropriate dispute.

Attempted clarification on the relationship (if any) between CIETAC Beijing and its Shanghai and South China (Shenzhen) sub-commissions

On 30 April 2012 and 16 June 2012, the CIETAC's sub-commissions in Shanghai and Shenzhen respectively declared independence from CIETAC headquartered in Beijing, followed by name changes to the SHIAC and the Shenzhen Court of International Arbitration (SCIA), and the adoption of their own respective arbitration rules and panels of arbitrators. The 2015 Rules attempt to address the split between CIETAC Beijing and its Shanghai and South China (Shenzhen) sub-commissions after the latter two broke away from CIETAC in 2012, by providing effectively in Article 6 that where an arbitration agreement provides for arbitration before the old CIETAC Shanghai or

South China (Shenzhen) sub-commissions, the arbitration will fall under the jurisdiction and administration of CIETAC (Beijing). Pursuant to Article 4(2) and Article 84, the 2015 Rules and therefore Article 6 should apply to arbitration commenced after they came into force (i.e., 1 January 2015).

Further, on 31 December 2014, CIETAC announced the reconstitution of its Shanghai and South China sub-commissions.

The validity and effectiveness of Article 6 should be viewed with extreme caution. As will be seen below, there has been a number of judicial authorities, presumably following guidance issued by the Supreme People's Court (SPC), the highest court in China, that the split sub-commissions (not CIETAC (Beijing)) had jurisdiction pursuant to the arbitration agreements providing for administration by such sub-commissions. Accordingly, while there may be more substance in an argument that Article 6 should apply to fresh arbitration agreements entered into after the 2015 Rules came into force on 1 January 2015 expressly providing for the application of those rules and expressly referring to the CIETAC Shanghai or South China Sub-Commission, in each case clearly and accurately identifying the rules or sub-commission, this may well not be the position in other situations, in particular in respect of arbitration agreements entered into prior to 31 December 2014 and arbitrations commenced pursuant to the same.

Special Rules for CIETAC Hong Kong Arbitration Centre

In September 2012, CIETAC established the CIETAC Hong Kong Arbitration Centre. Article 73 to Article 80 of the 2015 Rules make provisions for arbitrations administered by the CIETAC Hong Kong Arbitration Centre. Of significance is that the rules now provide that any arbitration referred to the CIETAC Hong Kong Arbitration Centre shall be seated in Hong Kong and an award shall be a Hong Kong award. As such, the arbitration shall be subject to Hong Kong procedural law, including the Hong Kong Arbitration Ordinance, and the supervisory jurisdiction of the Hong Kong courts. Sino-West business partners may find the prospect of a Hong Kong award carrying a CIETAC hallmark an attractive compromise. First, from the Chinese side, the oversight of arbitration by a familiar Chinese arbitral institution and from the Western side, the supervisory powers exercisable by an internationally recognised quality judicial system displacing concerns of local protectionism and uncertainty associated with arbitrating on the counterparty's turf. Secondly, the Chinese side may perceive that a Hong Kong award may be more readily recognised and enforced in foreign jurisdictions where the counterparty is situated under the New York Convention, and the Western side may perceive that a CIETAC-administered award may be more readily recognised and enforced in the counterparty's hometown in mainland China.

The 2015 Rules have once again reinforced CIETAC's prominence among leading arbitral institutions in the region and internationally. The effectiveness of the highlights remain to be tested, both as a matter of law (at least insofar as enforceability of interim relief award or order before an emergency procedure is concerned) and attractiveness to business people.

ii SHIAC – Pilot Free Trade Zone Arbitration Rules

Since the CIETAC-SHIAC/SCIA split, the SHIAC has been striving to gain recognition and prominence. Since its establishment together with its arbitration rules on 1 May 2012, its arbitration rules have been revised annually, with the current version having come into force on 1 January 2015.

The highlight of SHIAC's efforts in 2014 should, however, be the promulgation of the Shanghai Pilot Free Trade Zone arbitration rules (FTZ Arbitration Rules). As with CIETAC's 2015 Rules and subject to similar issues under Chinese law, the FTZ Arbitration Rules contain an emergency arbitrator procedure (Article 21) for seeking interim relief and joinder or consolidation of arbitrations provisions (Article 36 to Article 38). The distinction from the CIETAC's 2015 Rules is that, first, the FTZ Arbitration Rules (Chapter VI) endorse 'med-arb' and contain a procedure for mediation that may take place before the arbitral tribunal has been constituted, whereby a mediator may be appointed by the SHIAC from its panel of mediators. The mediator may not be appointed as the arbitrator, unless all parties agree, thereby reducing concerns of potential conflict or unfairness that have from time to time been the subject of judicial review of awards where 'med-arb' was conducted.

Secondly, the FTZ Arbitration Rules (Article 44(4)) expressly state that parties may agree upon their own rules of evidence. While those rules must not contravene the Chinese Civil Procedure Law or Arbitration Law, it is open for parties to adopt international best practices, such as the International Bar Association Rules on the Taking of Evidence in International Arbitration.

The FTZ Arbitration Rules are complemented by the designation of the Shanghai Second Intermediate People's Court (the Shanghai Court) to deal with court applications in connection with arbitration pursuant to those rules, such as the seeking of interim relief. The role of the court is in turn augmented by the Opinions on Judicial Review and Enforcement of Arbitration Cases Applying China (Shanghai) Pilot Free Trade Zone Arbitration Rules dated 4 May 2014, which establish procedures and timelines for such applications, such as a 24-hour deadline for determining urgent preservation applications and time limits for judicial reviews.

iii CIETAC – SHIAC/SCIA dispute after the CIETAC split

In our previous article, we reported that the CIETAC – SHIAC/SCIA split has since led to a number of conflicting court decisions as to whether CIETAC Beijing or SHIAC/SCIA should have jurisdiction where parties had agreed to arbitrate before CIETAC Shanghai or CIETAC South China/Shenzhen. It appears, however, that clarity and unity in judicial account is now just around the corner.

On 31 December 2014 (as it happened, the same day when CIETAC announced that it has reconstituted its Shanghai and South China sub-commissions), the Shanghai Court handed down a ruling[2] that SHIAC, instead of CIETAC, had jurisdiction over a contractual dispute arising from a contract which contains an arbitration clause that the

2 *Ni Laibao and Liu Donglian v. Soudal Investments Ltd* (31 December 2014).

parties agree to arbitrate before the CIETAC Shanghai sub-commission and confirmed SHIAC's position as an independent arbitral institution.

According to the Shanghai Court, the CIETAC Shanghai sub-commission was established in 1988 through formal procedures and legitimately registered with the bureau of justice of the Shanghai municipality and that on 17 April 2013, with proper approvals from the Shanghai local authorities, the CIETAC Shanghai sub-commission changed its name to SHIAC. However, despite this change of name, SHIAC continues to accept cases where the parties have agreed to submit disputes to CIETAC Shanghai sub-commission for arbitration.

The Shanghai Court further stated that in assessing the validity of an arbitration clause, the applicable law is Article 16(2) of the PRC Arbitration Law, which requires (1) an agreement to arbitrate, (2) a statement of the matters to be submitted to arbitration, and (3) express designation of the arbitration commission. After being satisfied that requirements (1) and (2) had been met, the court stated that:

> *The arbitration commission designated by said arbitration clause, i.e. 'CIETAC Shanghai Sub-commission' (which has now changed its name to SHIAC), is an arbitration commission duly established by law and is competent to accept cases and make awards according to the parties' arbitration agreement. Therefore, the arbitration clause in this case is a valid arbitration clause. The dispute between the parties in this case shall be administered by SHIAC as expressly agreed in the arbitration clause.*

Thus, this Shanghai Court decision clearly upheld the independence and legitimacy of SHIAC.

Just a few days later, the Shenzhen Intermediate People's Court (the Shenzhen Court) also recognised the legitimacy and independence of SCIA to arbitrate in its decision[3] by confirming that SCIA, instead of CIETAC, had jurisdiction where the parties in dispute agreed in their contract to refer arbitration to the CIETAC South China sub-commission and that SCIA is a duly registered arbitration commission.

On 2 March 2015, the SCIA reported that in a jurisdictional dispute between Walmart and a land development company, the Shenzhen Court held that in relation to an arbitration agreement providing for CIETAC South China sub-commission, the SCIA (not CIETAC Beijing) is the arbitral institution chosen by the parties and has jurisdiction over the dispute. More importantly, perhaps, is that the dispute first came before the Beijing Second Intermediate People's Court which declined to hear the dispute. Instead, it held that the change of name from CIETAC South China sub-commission to SCIA was valid and that jurisdictional disputes concerning the SCIA should be determined by the Shenzhen courts under Chinese law.

According to SHIAC's Arbitration Newsletter Issue 1 of 2015 and also SCIA's announcements, these court decisions follow a final opinion on such arbitration agreements by the highest court in China, the SPC. On 4 September 2013, the SPC

3 *Shandong Fuyu Lanshi Tires Co Ltd v. Shenzhen Nianfu Enterprise Development Co Ltd* (6 January 2015).

published the The Supreme People's Court Notice on Proper Hearing on Judicial Review on Arbitration (Fa 2013 – 194 Hao) (Notice) which requested that all applications at every court level in relation to the validity of arbitration clauses, revocation of arbitral awards or setting aside of the enforcement of arbitral awards as a result of the CIETAC jurisdictional disputes, should be considered by the Judicial Committee and reported to the SPC. Thus, assuming that the Shanghai Court and the Shenzhen Court had followed the SPC's Notice and reported their cases to the SPC before making their decisions (which is likely the case), it is fair to say that their decisions were rendered only after consulting and obtaining approval from the SPC.

One may expect that CIETAC will not rest on this issue and, indeed, has been voicing its protests. As we have seen, in diametrical opposition to the judicial authorities, Article 6 of the 2015 Rules provides that arbitration agreements referring to the sub-commissions shall be administered by CIETAC (Beijing). After all, why should the SHIAC and SCIA, having declared their complete independence, and tribunal constituted under their rules have standing to administer and jurisdiction to determine disputes pursuant to arbitration agreements that so clearly and specifically refer disputes to a sub-commission of CIETAC? It is indeed open for the SPC to overturn its previous opinion. Nonetheless, it appears that CIETAC is fighting against the tide.

In any event, parties are well advised to clearly identify the arbitral institution of their choice by clearly identifying the same by its current name (for example, not CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission) and their rules in their arbitration agreements.

iv Foreign arbitrations seated in China

Given certain perceived restrictions under the PRC Arbitration Law, non-Chinese foreign parties have been cautious about agreeing to administration of an arbitration seated in China by a foreign arbitral institution, such as the ICC.

The SPC has now, in its recent decision published in April 2014,[4] expressed its positive attitude towards foreign arbitral institutions by upholding the validity of an arbitration agreement that provided for ICC arbitration in Shanghai. This decision supports the SPC's view that foreign arbitral institutions are permitted to administer arbitrations seated in China.

Although this decision seems to have brought some good news to foreign parties, it has not addressed perhaps a more important issue on the status of such award and accordingly the enforceability of such award in China (the enforceability of an award depending very much on whether it is 'foreign', 'foreign-related' or 'domestic', each of which enjoy varying status and rights under Chinese law). It is anticipated that until clear guidance has been issued by the Chinese authorities on this issue, the incentive to agree to administration of a China-seated arbitration by a foreign arbitral institution remains low.

4 *Longlide Packaging Co Ltd v. BP Agnati SRL* (dated 25 March 2013 and published in April 2014).

Appendix 1

ABOUT THE AUTHORS

KEITH M BRANDT

Brandt Chan & Partners in association with Dentons HK LLP

Keith M Brandt is the managing partner of the Dentons Hong Kong office. He is a commercial dispute resolution partner specialising in heavyweight dispute resolution, including high court and commercial court litigation, domestic and international arbitration, expert determinations, ADR, mediations with particular experience in the energy, construction and financial services sector.

Keith was educated at the University of Warwick (BA ((Hons) law and sociology).

He qualified as a solicitor in England and Wales in 1985, in Hong Kong in 1985 and in Australia in 1990, and as a solicitor and barrister at the Supreme Court of the Australian Capital Territory in 1990.

He is a member of the Law Society of England and Wales, the Law Society of Hong Kong and has various professional memberships including the International Bar Association and ICC Hong Kong.

Keith has been widely recognised for his expertise. *Chambers Asia-Pacific* 2014 stated Keith 'is tenacious and always available to provide urgent advice', adding that he is 'very responsive and a good guide to the differences between Hong Kong and US procedure'. Fellow lawyers greatly respect his extensive experience in the Hong Kong market. Both *Chambers Global* and *Chambers Asia-Pacific* 2012 and 2013, in the category, dispute resolution China international firm, states of Keith that he 'earns praise for his calm and considered approach'. Placed in 'The Experts' category, Keith appears in the 2011 *Asian Legal Business* 'Hot 100' list of Asia's Leaders, Movers and Shakers. Additionally, *Chambers Global* 2011, 2012, 2013 and 2014 Clients' Guide, places Keith in Band 3 for Asia-Pacific China (international firms) dispute resolution. Chambers and Partners has also certified Keith as a leading lawyer in dispute resolution (international firms) 2011. His experience has led him to advising clients in locations as diverse as Malaysia, Thailand and the Middle East. Clients are quick to underline Brandt's 'upbeat approach and effective interpersonal skills'. In *Chambers Asia-Pacific – a Client's Guide*

to Asia-Pacific's Leading Lawyers for Business 2011, Keith is named in tier 3 of dispute resolution leading individuals; 'Having been in Asia for over 20 years, Keith Brandt of Brandt Chan & Partners affiliated with SNR Denton is well versed in a range of commercial disputes' notes the guide.

His recent work highlights include advising Zhanzuo in a multiparty dispute between the company's founders.

MICHAEL KH KAN

Brandt Chan & Partners in association with Dentons HK LLP

Michael KH Kan was educated at the University of New South Wales, Sydney Australia, and earned a BComm (accounting)/LLB. He was admitted to practise as a solicitor in Hong Kong in 2005. He is a member of the Law Society of Hong Kong.

Since admission as a solicitor in 2005, Michael has led a diversified practice on both contentious and non-contentious sides, both in private practice and at the Hospital Authority as in-house legal counsel. On the contentious side, Michael has particular experience in insurance-related litigation with an emphasis on professional negligence, personal injury and property damage claims and acting for subrogated insurers in recovery actions. While at the Hospital Authority (HA), he was actively involved in the successful defence of a judicial review application, and from time to time advised on a wide range of commercial disputes including product liability and recall issues.

Michael is also experienced in a range of general commercial matters, ranging from acting for a well-known life insurer in the successful transfer of the whole of its long-term business to its Hong Kong subsidiary to drafting and negotiating agreements on behalf of the HA, with particular emphasis on public-private partnership projects, conduct of clinical trials and procurement of pharmaceutical products and medical equipment and services.

Michael joined Dentons as a member of its dispute resolution team. He currently works with the head of the Dentons APAC regional dispute resolution practice, partner Keith Brandt, on a range of contentious litigation and arbitration matters.

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