A change in the tides or a drop in the ocean: how will a recent decision by the Suzhou Intermediate People’s Court affect arbitration in China?

The Suzhou Intermediate People’s Court recently refused to enforce an arbitration decision of the Shanghai International Economic and Trade Arbitration Commission (SHIAC), in a ruling that could have a profound impact on the status of both SHIAC and its break away partner the Shenzhen Court of International Arbitration (SCIA).

Background
Since the China International Economic and Trade Arbitration Commission (CIETAC) sub-commissions in Shanghai and Shenzhen, now referred to as SHIAC and SCIA respectively, declared their independence from CIETAC Beijing, their status as arbitration bodies has been in the balance. Both institutions have received the backing of their respective Departments of Justice. Various court rulings enforcing arbitration decisions reached by these bodies, including a previous ruling in Suzhou, appear to have paved the way for SHIAC and SCIA to become legitimate but autonomous arbitration commissions. However, this recent decision can be seen as a setback and again throws the situation into confusion.

The case
The initial dispute involved Jiangxi LDK Solar Hi-Tech Co Ltd and Suzhou Canadian Solar Inc regarding a contract for the sale of wafers for PV (photovoltaic) systems. The contract between the parties provided for arbitration of any disputes to be conducted by CIETAC Shanghai sub-
commission. When the dispute was filed with CIETAC Shanghai in July 2010, the arbitration commission was still operating under the umbrella of CIETAC. However, in late 2011, CIETAC Shanghai broke away from CIETAC Beijing to become an independent arbitration commission, now known as SHIAC. In 2012, the newly formed SHIAC found in favour of LDK Solar and awarded them substantial damages. In February 2013, LDK Solar went to court in Suzhou to enforce SHIAC’s decision. However, the Intermediate People’s Court in Suzhou ruled that SHIAC no longer had jurisdiction in this instance as a result of it becoming an independent arbitration body in 2012 and so the award was unenforceable.

The decision

The decision did not consider whether SHIAC’s split from CIETAC was legal and had created a valid arbitration commission. Rather, it focused on whether SHIAC could be considered as having jurisdiction in this instance. The court decided that it did not.

There appears to be two reasons for the Suzhou Intermediate People’s Court’s refusal to uphold SHIAC’s decision. The first is party autonomy. At the time of contracting, both parties had intended that any dispute between them be arbitrated by CIETAC and the concomitant rules. However, as a result of SHIAC’s split from CIETAC, the second half of the arbitration and the decision of the commission were in fact not conducted by CIETAC but by SHIAC, contrary to the arbitration clause. While SHIAC, when operating as a sub-commission of CIETAC, had initially had jurisdiction over the case, its subsequent independence also resulted in its losing jurisdiction as it no longer represented CIETAC and any decision it reached was not enforceable in this case.

The second reason outlined by the court was that parties who refer their disputes to SHIAC or SCIA have the right to know about the arbitration body’s new status and confirm their desire to continue with the same or re-apply to another CIETAC branch. The SHIAC and SCIA arbitration bodies also have a duty to inform users of their new status. In this instance, this had not happened.

A true reflection of the current situation?

It is possible that this decision by the Suzhou Intermediate People’s Court will in fact not be significant. Viewed in the broader context it can be seen as just another decision that further confuses an already intractable situation. This decision directly contradicts a previous Suzhou court decision, amongst others, that enforced SHIAC and SCIA decisions. Real clarity would probably not be seen until a higher power steps in, perhaps the Chinese Ministry of Commerce or the Supreme People’s Court.

Arguably, the more significant interpretation is that this decision in fact reflects the likelihood of how cases will be decided outside of Shanghai or Guangdong. SHIAC and SCIA are new arbitration bodies, albeit with the backing of their local Departments of Justice, and need to build up their reputation. Many favourable previous court rulings have come from Guangdong and Shanghai, enforcing SHIAC and SCIA decisions, and could themselves be seen as protectionist of the local arbitration bodies and an attempt to validate them. As a result, this decision by an Intermediate court may be seen as a more accurate reflection of the status of both the Shanghai and Shenzhen arbitration bodies nationally. Outside of their hometowns, courts may consider as not having jurisdiction in similar situations. It is also pertinent to note that the party against whom the SHIAC award was sought to be enforced is an entity registered and paying tax in Suzhou. As the writer understands it, an appeal has been filed against the decision of the Suzhou Intermediate People’s Court.

Given the Chinese legal system does not adopt the principle of binding case-precedent, it is hard to predict how this situation will end up. Other courts are not bound to follow this recent decision by the Suzhou Intermediate People’s Court (with an appeal underway), although it will carry some weight. Irrespective of whether there is a reversal of that decision by the higher court, it may take a groundswell of cases either for or against SHIAC and SCIA to determine the matter conclusively. Alternatively, refusal or acceptance by parties to use the two arbitration commissions to settle their disputes could prove decisive.

In the meantime

Much of the content to be found in our previous legal update ‘Arbitral Institutions at War – Beijing v Shanghai and Shenzhen’ (September 2012) remains unaffected by the ruling discussed.

The one thing that is clear from this case is that it re-affirms the need for clarity in arbitration clauses. Parties wishing to have disputes arbitrated by CIETAC must say so explicitly. It may be wise to use foreign arbitral commissions where possible, such as the Hong Kong International Arbitration Centre or the ICC Court for Arbitration.

Similarly, efforts should be made to change arbitration clauses that currently make reference to Shanghai or Shenzhen. Parties should try to agree to enter into a collateral agreement nominating CIETAC or CIETAC Beijing as the seat of arbitration. The new 2012 Rules mean that nominating Beijing as the seat does not mean the case will have to be heard there. It is still strongly recommended that legal advice is sought in such a situation. It is still possible for parties to have their disputes heard by SHIAC or SCIA if they wish, but they may be subject to similar issues of enforceability.
Where arbitration is already underway before SHIAC or SCIA, it is necessary that all parties be made aware of the split with CIETAC and that they are offered the option either to re-affirm their willingness for the case to be heard by that body (not recommended given the current enforcement issues) or withdrawing the case and starting the process again through CIETAC. CIETAC now has a branch / operational office in Shanghai to take over the work originally covered by CIETAC Shanghai Sub-Commission (or SHIAC now). Therefore, according to CIETAC, arbitration to be started under CIETAC rules in Shanghai as per the parties’ arbitration agreement can now be handled by the new CIETAC branch / operational office in Shanghai.

Conclusion
The lack of clarity and certainty on the long term impact of the Suzhou Intermediate People’s Court’s decision (with an appeal underway) reflects the confusing nature of the CIETAC v SHIAC/SCIA situation as a whole. Until the status of the break away arbitral bodies is clear and parties can be safe in the knowledge that their awards will be universally regarded as enforceable in a court of law (by no means a guarantee at this stage), it is recommended that parties exercise caution when deciding SHIAC or SCIA as seat of arbitration.