



JONES DAY  
**COMMENTARY**

## CIETAC: THE SAGA CONTINUES, AND RECENT CASES SUGGEST THAT PARTIES OUGHT TO REVIEW THEIR EXISTING ARBITRATION AGREEMENTS IN CHINA

We reported in our [Commentary](#) in May 2013 that the Shanghai and the South China (Shenzhen) Sub-Commissions of the China International Economic and Trade Arbitration Commission (“CIETAC”) had rebranded themselves respectively as the Shanghai International Arbitration Center (“SHIAC”) (a.k.a. the Shanghai International Economic and Trade Arbitration Commission) and the Shenzhen Court of International Arbitration (“SCIA”) (a.k.a the South China International Economic and Trade Arbitration Commission). Following the rebranding, both the SHIAC and the SCIA announced that they would continue to accept cases where the relevant arbitration agreement specifies “CIETAC Shanghai Sub-Commission” or “CIETAC South China Sub-Commission” respectively. As we foreshadowed in our *Commentary*, despite these announcements, disputes over the jurisdiction and even the validity of such arbitration agreements were bound to arise.

### THE CHINESE COURTS ARE NOW INVOLVED

We are now starting to see cases where the jurisdiction of the “new” institutions is being challenged, and awards issued by these institutions are being refused enforcement.

**The Shenzhen Case.** In the first case, in November 2012, the Intermediate People’s Court of Shenzhen upheld the SCIA’s jurisdiction based on an arbitration agreement referring to the CIETAC South China Sub-Commission. In this case, one party to the arbitration agreement petitioned the court to nullify the arbitration agreement because the SCIA was not the institution selected by the parties. The Shenzhen court held that the reference to the CIETAC South China Sub-Commission should be treated as a reference to the SCIA.

**The Suzhou Case.** The second case is perhaps more far reaching. It was decided on May 7 this year and concerned the refusal by the Intermediate People's Court of Suzhou ("Suzhou Court") of enforcement of an arbitral award issued by the SHIAC.

In the Suzhou case, Chinese company LDK Solar and Ontario-based Canadian Solar entered into an arbitration agreement in 2007 that referred disputes to the CIETAC Shanghai Sub-Commission (the "2007 Agreement"). In 2008, the parties signed two other contracts including an arbitration agreement that referred disputes to CIETAC with the seat of arbitration in Shanghai (the "2008 Agreements"). Later in 2009, these three agreements were combined into one (the "2009 Agreement") and the 2007 Agreement was terminated save for certain supply-related contents that were retained in the 2009 Agreement.

In July 2010, disputes in connection with the 2008 Agreements were submitted to and accepted by the CIETAC Shanghai Sub-Commission. After two hearings, the arbitral award in favor of LDK Solar to the tune of US\$40 million was rendered by SHIAC on December 7, 2012. In other words, the award was issued after the CIETAC Shanghai Sub-Commission transformed itself into the SHIAC. In response to a petition for enforcement by LDK Solar, Canadian Solar filed an application to reject enforcement, including an assertion that the SHIAC did not have jurisdiction over the disputes under the 2008 Agreements.

The Suzhou Court upheld the application on the basis that (i) the arbitration agreement pursuant to which the disputes were submitted for arbitration was the one in the 2008 Agreements, which referred to "CIETAC with seat of arbitration in Shanghai"; (ii) the "seat of arbitration in Shanghai" made the CIETAC Shanghai Sub-Commission the proper forum for the dispute; (iii) the SHIAC did not have jurisdiction once it became a new arbitration institution independent of CIETAC, and therefore the SHIAC should have requested that the parties confirm whether they wished to continue to arbitrate the case under the SHIAC or choose a different arbitration institution; and (iv) because the SHIAC failed to obtain the parties' confirmation, the parties' original intention to select CIETAC as the arbitration commission should be respected.

As a result, the Suzhou Court held that the SHIAC did not have the capacity to hear and arbitrate a CIETAC arbitration after December 8, 2011 when the SHIAC was registered as an independent arbitration institution by the Shanghai Bureau of Justice.

## CONCLUSIONS TO DRAW

It is possible to draw a number of conclusions from these two cases. First, it seems that courts in Shanghai and Shenzhen will likely recognize the jurisdiction of, and enforce awards made by, the SHIAC and the SCIA. Secondly, the position on enforcement of such awards outside Shanghai and Shenzhen is uncertain, and courts in other provinces or municipalities may have different opinions, as the decisions in Shenzhen and Suzhou are not binding on other Chinese courts.

While one could attempt to distinguish the two cases by the fact that in the Suzhou case, the relevant arbitration agreement simply referred to CIETAC (notwithstanding Shanghai being selected as the seat of arbitration) rather than the CIETAC Shanghai Sub-Commission, whereas the Shenzhen case made explicit reference to the CIETAC South China Sub-Commission, this argument did not appear to find favor with the Suzhou court. The jury therefore appears to be out on whether awards made by the SHIAC or the SCIA will be enforced outside Shanghai or Shenzhen.

## AMENDING EXISTING ARBITRATION AGREEMENTS

The Suzhou case in particular highlights the risks if parties to a contract have an arbitration agreement referring to the CIETAC Shanghai Sub-Commission or the CIETAC South China Sub-Commission and might need to enforce outside Shanghai or Shenzhen. In such a case, the parties would be well advised to consider whether they wish to continue to have any disputes resolved in Shanghai or Shenzhen, and if so, whether they are happy to use one of the "new" institutions. If the answer to these two questions is "yes," then the parties should look at revising their arbitration agreement to specify either the SHIAC or the SCIA expressly as the arbitration

institution. If the answer is “no,” then the parties should make a clear decision as to the arbitration institution to which they wish to refer their disputes (such as CIETAC in Beijing or the Beijing Arbitration Commission, for example), taking into account the rules of the various institutions, as well as possible locations of future enforcement of any arbitral awards.

## LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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