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CONTENTS

Enforcement of Arbitral Award Made by China's Newly Proclaimed Foreign-Related Arbitration Commissions – a Tale of Two Cities

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Since mid-2012, there has been a rift between China International Economic and Trade Arbitration Commission (CIETAC) China (or as some may prefer, 'CIETAC Beijing' – both to be collectively referred to as 'CIETAC China') and, first, CIETAC Shenzhen (having been the sub-commission of CIETAC China in the city of Shenzhen) and, secondly, CIETAC Shanghai (having been the sub-commission of CIETAC China in the municipal of Shanghai). Both CIETAC Shenzhen and CIETAC Shanghai have severed their relationship with CIETAC China and have become independent foreign-related arbitration commissions in handling foreign-related arbitration disputes. In August of last year, CIETAC Shenzhen announced a change of name to 'Shenzhen Court of International Arbitration' or 'South China International Economic and Trade Arbitration Commission' (SCIA).[2]

Similarly, CIETAC Shanghai has now made itself known as 'CIETAC Shanghai Commission'.[3] It is noteworthy that both CIETAC Shenzhen (SCIA) and CIETAC Shanghai Commission are not new but are long-existing entities, with their status having changed from sub-commissions to independent entities. By doing so, both SCIA and CIETAC Shanghai Commission have since stipulated their own respective arbitration rules,

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2 See, www.sccietac.org, last accessed 1 April 2013.

3 See, www.cietac-sh.org, last accessed 1 April 2013.

named 'South China International Economic and Trade Arbitration Commission Arbitration Rules'[4] and 'China International Economic and Trade Arbitration Commission Shanghai Commission Arbitration Rules'[5] respectively in prescribing their own arbitration procedures and in administering the conduct of arbitral proceedings. They will thereby make their own respective arbitral awards and this paper will discuss the issue of enforceability of these awards in foreign countries. As both SCIA and CIETAC Shanghai Commission have much in common regarding their recent moves, this paper will, to avoid repetition, make reference only to SCIA; however the discussion should equally be applicable to CIETAC Shanghai Commission.

Even though the application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention') encompasses both ad hoc arbitration and institutional arbitration,[6] ad hoc arbitration in China is not allowed, and arbitration in China has to be institutional because it is a mandatory legal requirement for parties to clearly designate a legal arbitration commission in their arbitration agreement, otherwise the arbitration agreement will be void (unless parties are to reach supplemental agreement concerning the same).[7]

Until recently, it has generally been accepted that only institutional arbitration exists in China, with ad hoc arbitration having effectively been disallowed. China's institutional arbitration has a bifurcation of two distinct institutional arbitration regimes: first, the domestic arbitration regime and secondly, the foreign-related arbitration regime. The criterion in determining which regime a particular dispute will fall within is whether or not the dispute is domestic or foreign-related. Disputes with one or more of the following three elements will be considered foreign-related: (i) at least one of the parties is 'foreign' (Hong Kong is deemed a 'foreign jurisdiction' for this purpose); (ii) the subject matter of the contract is or will be wholly or partly outside mainland China; and (iii) civil rights and obligations with their 'occurrence, modification or termination' outside mainland China.[8] The foreign-related arbitration regime focuses on any 'dispute arising from the foreign economic, trade, transport or maritime activities of China'[9] and its activities being 'arbitration of disputes arising from economic, trade,

4 See, www.sccietac.org/main/en/arbitration/arbitrationrules/Rules(English)/index.shtml#Menu=ChildMenu3, last accessed 1 April 2013.

5 See, www.cietac-sh.org/rule.aspx, last accessed 1 April 2013.

6 New York Convention, Article 2.

7 Arbitration Law, Article 6; 16(3); 18.

8 Supreme People's Court Interpretation of General Principles of Civil Law (1988), Article 178.

9 Civil Procedure Law 2012, Article 268 (of Chapter 26).

transportation and maritime activities involving a foreign element',[10] which are disputes of a mercantile nature.

The most interesting development of China's foreign-related arbitration regime is of course the introduction of the CIETAC Arbitration Rules by CIETAC on 1 May 2012 ('CIETAC 2012 Rules')[11] in replacing the 'CIETAC 2005 Rules'. It is apparent that the CIETAC 2012 Rules are written with a view to CIETAC extending its reach both within and outside China. In addition, there are a number of changes that may have a significant impact on the conduct of CIETAC proceedings in the future.

The bifurcation of these two institutional arbitration regimes takes effect in the following stages: first, the arbitration commissions; secondly, the arbitration agreement; thirdly, the arbitration proceedings; and fourthly, the arbitral award. This paper will examine how the enforceability of an arbitral award to be made by SCIA in an arbitration agreement specifying 'CIETAC Shenzhen' to be the arbitration institution (or, alternatively, specifying 'CIETAC Shenzhen arbitration') may be affected differently at different stages, plus the final discussion of whether it matters if the arbitral award so made (under this arbitration agreement specifying 'CIETAC Shenzhen' to be the arbitration) is to be enforced abroad.

Legality of arbitration commission(s)

In exploring the enforcement of an arbitral award to be made by SCIA, the first question to ask is whether SCIA constitutes a legal arbitration commission under Chinese law.

The bifurcation of China's arbitration regimes starts off with the two types of arbitration commissions in China: first, domestic arbitration commissions; and, secondly, foreign-related arbitration commissions. As to domestic arbitration commissions, they may be established, in terms of locality: in cities within which the people's governments of: (i) municipalities directly under the Central Government ('municipalities'); (ii) provinces; and (iii) autonomous regions are located; or in other cities that are divided into districts (collectively 'Qualifying Cities').

In terms of the setting-up body, the domestic arbitration commissions may be established by the people's governments of the Qualifying Cities in accordance with their own needs and with the assistance from relevant governmental departments and chambers of commerce.[12] The establishment

10 Arbitration Law 1995, Article 65 (of Chapter 5).

11 See, www.cietac.org/index.cms, last accessed 1 April 2013.

12 Arbitration Law, Article 10(2).

of an arbitration commission shall be registered with the judicial administrative departments of municipalities, provinces and autonomous regions.[13] The arbitration commissions so set up shall be independent from and shall not be subordinate to any administrative organs of the people's governments[14] and there will be no arbitration commission established at any level of the administrative hierarchy of the people's government, unlike administrative organs of the people's government.[15]

As to foreign-related regimes, foreign-related arbitration commissions 'may' be organised and established by the China Chamber of International Commerce (CCOIC).[16] The CCOIC has also been known as the China Council for the Promotion of International Trade (CCPIT). It is this provision that provides legal authority for the formation of CIETAC and China Maritime Arbitration Commission (CMAC), notably the only two 'foreign-related arbitration commissions' in the whole country. Of course, both CIETAC and CMAC, with their headquarters in Beijing, have their own sub-committees opening in various cities (notably Shanghai, Shenzhen, Chongqing, etc) in China. CIETAC China was set up by the CCOIC. It appears that the above-mentioned legal provision may not be a mandatory provision, which means that CCOIC may not be the sole and exclusive organisation that may have the power to set up foreign-related arbitration commissions.

Arguably, the above-mentioned people's government of the Qualifying Cities, having been vested the power in setting up domestic arbitration commissions, may also set up foreign-related arbitration commissions in dealing with foreign-related arbitration cases. On the other hand, both CIETAC and CMAC were founded by the CCPIT/CCOIC even before the enactment of the Arbitration Law in 1995. At the time, the power for setting up foreign-related arbitration commissions was vested solely to the CCOIC, plus as the above-mentioned Article 66 of the Arbitration Law only lists the CCOIC as the competent organisation for setting up foreign-related arbitration commissions, this may arguably mean that any other body may not be allowed to set up foreign-related arbitration commissions. It is therefore arguable that, under the Arbitration Law 1995, the CCOIC is the listed statutory body for foreign-related arbitration commissions, while the people's governments of the Qualifying Cities are the competent bodies for domestic arbitration commissions.

13 Arbitration Law, Article 10(3).
14 *Ibid*, Article 14.
15 *Ibid*, Article 10(1).
16 *Ibid*, Article 66.

It is noteworthy that one separate chapter of the Arbitration Law[17] has been devoted to regulating foreign-related arbitration. For the categories of cases accepted, it may be argued that the domestic arbitration commissions, having been set up by the people's governments of the Qualifying Cities may, in practice, handle foreign-related arbitration disputes. In fact, Article 271 of the Civil Procedure Law has made such an express reference:

> 'In the case of a dispute arising from the foreign economic, trade, transport or maritime activities of China, if the parties have had an arbitration clause in the contract concerned or have subsequently reached a written arbitration agreement stipulating the submission of the dispute for arbitration to an arbitral organ in the People's Republic of China handling cases involving foreign element, or to any other arbitral body, they may not bring an action in a people's court.'

It is arguable that 'any other arbitral body' may mean a domestic arbitration commission, despite the fact that it may have been generally accepted that it refers to foreign arbitration commissions. If these lines of argument are correct, in addition to the difference of the competent bodies for setting up the foreign-related or domestic arbitration commissions, there may not be much significance in making the differentiation between a domestic arbitration commission and a foreign-related arbitration commission, as both may handle foreign-related disputes. As to the categories of cases, among the hundreds of arbitration commissions in China, there may not be a clear bifurcation of a domestic and a foreign regime. What seems to be much more significant is whether the dispute concerned is foreign-related or not. If it is, it will fall within the foreign-related regime and, vice versa, if it is not, it will fall within the domestic regime.

Given the rather huge difference in terms of judicial supervision (by way of setting aside or refusal to enforce an arbitral award) between the foreign-related regime and the domestic regime (see discussion below), there is a tendency for domestic arbitration commissions in China to claim that, provided the dispute concerned is foreign-related, they too, together with the foreign-related arbitration commission formed by CCOIC, may handle foreign-related disputes and the arbitral award to be made by them may also be classified as a foreign-related arbitral award, which will enjoy more stability and status.

The relationship between CIETAC Shenzhen and CIETAC China – and hence the status of CIETAC Shenzhen – may either be one of the following three types with decreasing level of control and increasing level of its autonomy: first, CIETAC Shenzhen may be one of its branch offices

17 Chapter 7, Article 65 – Article 73.

of CIETAC China in the city of Shenzhen, Guangdong Province; secondly, CIETAC Shenzhen may be a licensee (franchisee) of CIETAC China with CIETAC China being the licensor in granting CIETAC Shenzhen a licence (franchise) to use its 'CIETAC' brand; and thirdly, CIETAC Shenzhen may be an independent body having loosely-held association with CIETAC over the years. It is noteworthy that CIETAC China is openly claiming that its relationship with CIETAC Shenzhen is of the first type (see CIETAC China's official website), while CIETAC Shenzhen (SCIA) is openly claiming that its relationship with CIETAC China is of either the second or the third type.

If the relationship between the two is of the first type, this may mean that CIETAC Shenzhen has to be totally dependent upon CIETAC China and has to be subject to its full and unfettered control. This may mean that it is impossible for CIETAC Shenzhen to become independent from CIETAC China because it has never had its own separate legal status. Likewise, CIETAC Shenzhen may have neither the power to constitute its own independent arbitration commission, nor the power to formulate its own arbitration rules or adopt its own panels of arbitrators. Thus, the recent announcement by the arbitration commission named as 'CIETAC Shenzhen', that its status has always been (or, alternatively, has now become) an independent arbitration commission, may backfire because an independent CIETAC Shenzhen could never have existed in the first place.

This begs the question of the legality of an arbitration agreement specifying 'CIETAC Shenzhen' to be the arbitration institution (or, alternatively, specifying 'CIETAC Shenzhen arbitration') because any arbitration agreement specifying a non-existent arbitration body may render such arbitration agreement to be void.[18] The result of this will be that the arbitral award so made will not be enforceable because an arbitral award made by an illegal arbitration institution is one of the grounds expressly specified in the New York Convention to be refused recognition and enforcement.[19]

Alternatively, such arbitration agreement may be saved, in accordance with the principle of maximum efficiency,[20] by interpreting the reference of 'CIETAC Shenzhen' to mean 'CIETAC China' and the arbitration proceedings will thus be conducted in accordance with the CIETAC Arbitration Rules 2012. This conclusion can also be reached by provisions within the CIETAC Arbitration Rules 2012. Article 2(6) of the same Rules provide that, if the sub-commission agreed upon by the parties in their arbitration agreement does not exist, CIETAC China shall administer the case directly.

18 Arbitration Law, Article 18.

19 New York Convention: Article V(1(d)).

20 ICCA Guide To Interpretation of 1958 New York Convention, 2011; Supreme People's Court Interpretation of Arbitration Law, Article 3 ,15.

If the relationship between CIETAC Shenzhen and CIETAC China is of the second type, this may mean that CIETAC Shenzhen is an independent legal entity but its use of the 'CIETAC' brand has to be dependent upon the continuation of CIETAC China's licensing (franchising) of the 'CIETAC' brand to CIETAC Shenzhen. Thus, the recent announcement by CIETAC China that CIETAC Shenzhen's conduct of setting up its own commission is 'null and void' may mean that the licensing (franchising) of the 'CIETAC' brand by CIETAC China to CIETAC Shenzhen has since, at least, impliedly (if not expressly) been revoked[21] and this entity in Shenzhen originally named 'CIETAC Shenzhen' may no longer be legally entitled to function as a sub-commission of CIETAC under the auspices of 'CIETAC' (or 'China International Economic and Trade Arbitration Commission') and thus no longer be allowed to continue its use of the 'CIETAC' brand in conducting its arbitration activities, thus perhaps prompting the need for this particular entity in Shenzhen to change its old name from 'CIETAC Shenzhen' to its new name 'Shenzhen Court of International Arbitration' (SCIA). With its new name, SCIA may arguably function as an independent foreign-related arbitration commission in Shenzhen, with its own arbitration rules and panel of arbitrators and make its own arbitral award stamped with its own seal.

Of course, SCIA is entitled to accept cases of arbitration agreement specifying SCIA to be the arbitration institution. However, this particular arbitration commission in Shenzhen may, despite the change of name from CIETAC Shenzhen to SCIA, no longer be entitled to accept cases of arbitration agreement specifying 'CIETAC Shenzhen' to be the arbitration institution because: first, it is arguable that 'CIETAC Shenzhen' may no longer refer to the same entity in Shenzhen originally named 'CIETAC Shenzhen', or the organisation newly named as SCIA; and, secondly, this particular arbitration commission in Shenzhen can no longer perform any arbitration activities in Shenzhen under the auspices of CIETAC, including making any arbitral award.

If, under the same arbitration agreement, SCIA is to accept such case, perform arbitration and make an arbitral award, the arbitral award so made will not be enforceable because an arbitral award made under a non-existent arbitral body is one of the grounds expressly specified in the New York Convention to be refused recognition and enforcement.[22] What seems to be important is that the legality of this particular arbitration commission in Shenzhen has not yet been confirmed (and has even been denied) by the CCOIC in the Announcement made by CIETAC China in accordance with the entrustment of the CCOIC.

21 Possibly under the Contract Law 1999, Article 410.

22 New York Convention, Article V(1(d)).

If the relationship between CIETAC Shenzhen and CIETAC China is of the third type, CIETAC Shenzhen's loosely held association with CIETAC China over the past decades may well have recently been revoked by CIETAC China. This being the case, the need to have its own new name 'SCIA' will equally apply (as when the relationship between CIETAC China and CIETAC Shenzhen has been of the second type). This again begs the same question of the legality of an arbitration agreement specifying 'CIETAC Shenzhen' to be the arbitration institution, in much the same way as mentioned above when the relationship between itself and CIETAC China is of the second type.

On the one hand, SCIA and its supporters may argue that the independence of CIETAC Shenzhen and its renaming to SCIA are legal under Chinese law. On the other hand, CIETAC China is claiming that the independence of CIETAC Shenzhen is, under Chinese law, illegal. It seems that these questions will have to be left to China's judiciary or legislature for a final resolution.

Legality of arbitration agreement

In exploring the enforceability of arbitral awards to be made by CIETAC Shenzhen, the second question to ask is, if (even though the chance may be remote) CIETAC Shenzhen/SCIA – being the self-proclaimed independent arbitration commission in Shenzhen – is to be held an illegal arbitration commission under Chinese law, whether an arbitration agreement specifying 'CIETAC Shenzhen' or 'SCIA' to be the arbitration institution is legal.

Under the domestic arbitration regime, if, on the one hand, the arbitration agreement is clear in its reference to the arbitration institution as specifically 'CIETAC Shenzhen' or 'SCIA', and if (even though the chance may be remote) it is to be held that 'CIETAC Shenzhen' or 'SCIA' is to be illegal, the arbitral agreement may well be void because of its failure to specify a legal arbitration commission.[23] The result of this will be that the arbitral award so made will not be enforceable because an arbitral award made under an invalid arbitration agreement is one of the grounds expressly specified in the New York Convention to be refused recognition and enforcement.[24] If, on the other hand, if the arbitration agreement is less clear (or even unclear) as to which arbitration body it is in fact referring to (for instance, the arbitration clause states that 'parties are to arbitrate at CIETAC in the city of Shenzhen'), it may not be so clear whether such arbitration agreement is void because the arbitration agreement may,

23 Arbitration Law, Article 18.

24 New York Convention, Article V(1(a)).

arguably, be so interpreted in giving its meaning, in accordance with the principle of maximum efficiency, by substituting 'CIETAC Shenzhen' with 'CIETAC China', so that CIETAC China is to administer the arbitral proceedings using its own CIETAC China's 2012 Arbitration Rules.

Under the foreign-related regime, examination of the validity of an arbitration agreement shall be governed by the 'laws agreed upon between the parties in dispute'. If the parties concerned did not agree upon the applicable laws but did agree upon the place of arbitration, 'the laws at the place of arbitration shall apply'.[25] If parties neither agreed upon the applicable laws nor upon the place of arbitration, 'the laws at the locality of the court shall apply'.[26] Thus, if the dispute is foreign-related, the validity of an arbitration agreement specifying 'CIETAC Shenzhen' or, alternatively, 'SCIA' to be the arbitration institution without specifying the applicable law governing the arbitration agreement will render it subject to the law at the place of arbitration. With China being the place of arbitration, Chinese laws will apply and thus the Arbitration Law shall apply, rendering such arbitration agreement subject to the same scrutiny as that of the domestic regime. Even so, and like the domestic regime, once CIETAC Shenzhen/ SCIA is held to be an illegal arbitration commission, the arbitral agreement may likewise become void for the same reason as discussed earlier.

Legality of arbitration proceedings and arbitration rules

In exploring the enforceability of arbitral awards to be made by CIETAC Shenzhen, the third question to ask is, assuming that CIETAC Shenzhen/ SCIA is a legal arbitration institution and given that an arbitration agreement specifying 'CIETAC Shenzhen' or 'SCIA' to be the arbitration institution, which institution should legally administer the arbitration proceedings and under what arbitration rules should govern the arbitration proceedings? This depends on whether the arbitration agreement is clear in its reference to the arbitration institution as follows:

1. specifically as 'SCIA'; or
2. specifically as 'CIETAC Shenzhen'; or
3. less clear in its reference to, for example, 'CIETAC in the city of Shenzhen'.

If (1) '*SCIA*', SCIA should be the arbitral commission administering the arbitration proceedings by using its own prescribed South China International Economic and Trade Arbitration Commission Arbitration Rules. If (2) '*CIETAC Shenzhen*', the SCIA may, even assuming that SCIA has

25 Law of Application of Law for Foreign-Related Civil Relation, Article 18.
26 Supreme People's Court Interpretation on Arbitration Law, Article 16.

accepted the case, have difficulty in administering the arbitral proceedings because of the above-mentioned three possible relationships between CIETAC Shenzhen and CIETAC China (see discussion in 'Arbitration commissions' above).

If their relationship is of the first type (CIETAC Shenzhen as a branch office of CIETAC China), CIETAC China will no doubt be in control and see itself administering the arbitral proceedings with its newly introduced CIETAC Arbitration Rules 2012. If their relationship is of the second type (CIETAC Shenzhen as a licensee (franchisee) of CIETAC China), following the recent revocation of CIETAC Shenzhen's licence (franchise) in using the 'CIETAC' brand by CIETAC China, CIETAC China will, at least arguably, have the right to administer the arbitral proceedings with its CIETAC Arbitration Rules 2012 because 'CIETAC Shenzhen' will no longer refer to the same entity in Shenzhen originally named 'CIETAC Shenzhen', or the organisation newly named as SCIA. There will then be uncertainty of the fate of future awards by the entity in Shenzhen originally named 'CIETAC Shenzhen' (now SCIA), where it will not apply the new CIETAC Rules 2012 but will only apply its own South China International Economic and Trade Arbitration Commission Arbitration Rules (similarly, CIETAC Shanghai Commission will only apply its own CIETAC Shanghai Commission Arbitration Rules) in administering arbitration proceedings. There may be doubt as to whether these awards will be deemed to have been rendered in breach of the applicable procedural rules.

If their relationship is of the third type (CIETAC Shenzhen in loosely held association with CIETAC China), following the revocation of the loosely held association by CIETAC China, CIETAC China will arguably have the right to administer the arbitral proceedings with its newly introduced CIETAC Arbitration Rules 2012. If the arbitral proceedings are not to be so administered, the arbitral award so made will not be enforceable because an arbitral award made under an illegal arbitral procedure is one of the grounds expressly specified in the New York Convention to be refused recognition and enforcement.[27]

Judicial supervision of arbitral award

In exploring the enforceability of arbitral awards to be made by CIETAC Shenzhen, the fourth question to ask is whether the award to be made by SCIA is to be a foreign-related arbitral award or a domestic arbitration. If the former, its award will only be subject to restricted supervisory jurisdiction by the Intermediate People's Courts by way of setting aside an

27 New York Convention: Article V(1(d)).

arbitral award only on four grounds of serious procedural irregularities as stipulated in Article 271 of Civil Procedure Law 2012 (repeated in Article 70 of the Arbitration Law 1995), which are as follows:

1. 'the parties have not had an arbitration clause in the contract or have not subsequently reached a written arbitration agreement;
2. the party against whom the application for enforcement is made was not given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or was unable to present his case due to causes for which he is not responsible;
3. the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or
4. the matters dealt with by the award fall outside the scope of the arbitration agreement or which the arbitral organ was not empowered to arbitrate'

('Four Procedural Grounds of Serious Procedural Irregularities')

5. plus an additional ground being 'If the people's court determines that the enforcement of the award goes against the social and public interest of the country, the people's court shall make a written order not to allow the enforcement of the arbitral award'

('Public Policy Ground In Foreign Regime').

It is noteworthy that the Four Procedural Grounds of Serious Irregularities mirror the first four grounds of refusal of recognition and enforcement of an arbitral award as specified in Article V of the New York Convention 1958 (and are also (almost) the same as the first four grounds of refusal of recognition and enforcement of an arbitral award as specified in Article 36 of the UNCITRAL Model Law on International Arbitration 1985).

If it is the latter (that is, the award to be made by SCIA is to be a domestic arbitral award), its award will, in contrast to the foreign arbitration regime, be subject to a more extensive supervision by China's domestic court as the People's Courts enjoy a much wider supervisory jurisdiction over the domestic arbitration regime by way of setting aside an arbitral award on one of the six grounds specified under Article 58 of the Arbitration Law 1995: 'there is no arbitration agreement;

1. the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
2. the formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure;
3. the evidence on which the award is based was forged;
4. the other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or

5. the arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case', plus the additional ground being;
6. 'If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award.'

Of these six grounds, the most notable is the fact that the first three grounds (1-3 above) mirror the Four Procedural Grounds of Serious Irregularities in the foreign arbitration regime (discussed above), whereas the last three grounds of 4-6 involve serious irregularities involving substantive and personnel issues (the 'Two Grounds of Serious Substantive Irregularities and One Ground of Personnel Irregularity').

Likewise, the People's Court has a much wider supervisory jurisdiction over the domestic arbitration regime by way of refusing to enforce an arbitral award on one of the six grounds specified under Article 62 of the Arbitration Law 1995, all of which are the same as the six grounds specified under Article 58 of the Arbitration Law 1995 (discussed above); that is, the Four Procedural Grounds of Serious Irregularities and the Two Grounds of Serious Substantive Irregularities and One Ground of Personnel Irregularity.

By way of comparison, the People's Court has a much narrower supervisory jurisdiction over the foreign-related arbitration regime by way of refusing to enforce a foreign-related arbitral award on the first three (of the above-mentioned six) grounds under Article 273 of the Civil Procedure Law 2012 (same as Article 71 of the Arbitration Law 1995) without the Two Grounds of Serious Substantive Irregularities and One Ground of Personnel Irregularity.

Enforceability of China's domestic and foreign-related arbitral award abroad

In exploring the enforceability of arbitral awards to be made by CIETAC Shenzhen/SCIA in an arbitration agreement specifying 'CIETAC Shenzhen' as the arbitration institution, the fifth (and final, if at all) question to ask is whether it matters if the award to be made by 'CIETAC Shenzhen' or SCIA be classified under Chinese law as a foreign-related arbitral award or a domestic arbitral award? The simple answer is that it does not matter. First, China is a unitary state with a unified legal system across the vast country and is not a federal state (unlike the US, with different legal systems from state to state). Since 2 December 1986, China has been a party to the New York Convention. Secondly, the New York Convention has merely differentiated between a (i) 'foreign' arbitral award; and a (ii) 'domestic' arbitral award, with its application to be

restricted only to the former. The differentiation is by way of either of the two yardsticks: first, territorial in nature, with the arbitral award to have been 'made in the territory of a State other than the State where the recognition and enforcement of such awards are sought' and secondly, legal in nature, with the arbitral awards 'not considered as domestic awards in the State where their recognition and enforcement are sought'.[28]

The first yardstick may be characterised as a 'foreign' arbitral award having been made in a foreign (territory of a) state. The New York Convention will be applicable irrespective of the fact that, according to the domestic law of the foreign (territory of a) state within which the 'foreign' arbitral award is to be made, there may be different types of these awards. For the purpose of enforcement of arbitral awards made in China in a foreign country under the New York Convention, it does not matter that, under Chinese law, any arbitral award made in China is, because of the bifurcated arbitration regimes of China, differentiated into domestic arbitral award and foreign-related arbitral award. The second yardstick (specified by Article I(1) of the New York Convention) extends the application of the New York Convention to cases in which enforcement is sought within the state where the arbitration took place, but where the arbitral award in question is not considered to be a domestic award in that state. The enforcing state's own law determines when an award is 'not domestic' for these purposes.[29]

Conclusion

Enforceability of an arbitral award to be made by CIETAC Shenzhen/SCIA in a foreign country under the New York Convention appears to be a minefield, with a number of uncertainties. When negotiating the arbitration clause of a contract, advice may have to be given by a lawyer to his or her client that the situation has now become unclear, so that steps may be taken to avoid any problem arising by way of refraining from having an arbitration clause specifying either 'CIETAC Shenzhen (Shanghai)', 'SCIA', or 'CIETAC in the city of Shenzhen (Shanghai)' to be the arbitration institution but rather having an arbitration clause with the arbitration institution to be either: CIETAC China; Hong Kong; or even Singapore. Viewed from another perspective, if a lawyer is advising his or her client who has recently received a losing arbitral award having been administered by CIETAC Shenzhen, various attacks against the same award may be considered lodging. It is not advisable to get involved with the many uncertainties outlined here until things have become clear.

28 New York Convention: Article 1(1).

29 Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port, 'Recognition and Enforcement of Foreign Arbitral Awards – A Global Commentary on the New York Convention' (Kluwer Law International 2010), 24.