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Shanghai Xinan Screenwall Building & Decoration Co. Ltd. [2022] SGHC 58 – How the Singapore courts have dealt with unclear arbitration agreements naming a non-existent arbitral institution.

Judgment was handed down by Philip Jeyaretnam J in the General Division of the Singapore High Court on 18 March 2022, the court holding that the tribunal had issued a binding award and the application to set aside an order to enforce the Award was dismissed despite the inaccuracy in the arbitration agreements¹.

Facts

The matter concerned an application by Shanghai Xinan Screenwall Building & Decoration Co. Ltd. ("**Xinan**"), a Chinese entity, to enforce a foreign arbitration award dated 27 November 2020 (the "**Award**") made in respect of claims made under two contracts against Great Wall Technology Aluminium Industry Pte Ltd ("**Great Wall**"), a Singaporean entity.

On 3 August 2021, Xinan obtained leave to enforce under section 19 of the International Arbitration Act ("**IAA**"). On 20 August 2021, Great Wall filed an application under section 31 IAA to set aside the order to enforce.

The arbitration provision contained in the relevant contracts provided:

"Any dispute arising from or in relation to the contract shall be settled through negotiation. If negotiation fails, the dispute shall be submitted to China International Arbitration Center for arbitration in accordance with its arbitration rules in force at the time of submission."

The "China International Arbitration Center" does not exist. In the circumstances, proceedings were brought before the China International Economic and Trade Arbitration Commission ("**CIETAC**").

Great Wall did not participate in the underlying arbitration proceedings. In the Award, it was recorded that CIETAC found that it had jurisdiction.

In the court proceedings, Great Wall raised two serious jurisdictional and procedural defects under Chinese law in the arbitral proceedings:

1. Choice of a non-existent arbitral institution, rendering the arbitration agreements void under Chinese law²; and
2. The Award made reference to CIETAC's domestic provisions even though Great Wall was a Singaporean entity³

Under Articles 16 and 18 of the Arbitration Law of the People's Republic of China, parties must select an arbitral institution. Where one is not selected in the original arbitration agreement, there must be a supplementary agreement between parties choosing an arbitral institution. Otherwise, the arbitration agreement is void and the parties must seek recourse in a national court that has jurisdiction over the matter.

Great Wall argued that in naming an arbitral institution that did not exist, the arbitration agreements were void by virtue of Article 18, and therefore that Xinan should have commenced proceedings in court instead, either in China or Singapore.

¹ https://www.elitigation.sg/gd/s/2022_SGHC_58

² Establishing a challenge under s. section 31(2)(b) IAA

³ Establishing a challenge under s.31(2)(e) IAA

Decision

Philip Jeyaretnam J accepted that the position as stated was correct under Chinese law. However, he held that the matter was one of construction, therefore it was for the court to construe the arbitration agreements in the contracts to determine whether CIETAC was right to conclude that it was indeed the selected arbitral institution. In this regard, he stated that *"an arbitration agreement is to be construed like any other commercial agreement, with a view to giving effect to the intention of the parties as objectively expressed in it"* and to *"the principle of effective interpretation in the law of arbitration, the aim of which is to facilitate and protect party autonomy by striving to make an arbitration clause effective and workable"*.

The judge's starting point was that parties in this case intended to resolve their disputes by arbitration, that this take place in China and that it be administered by the institution that they called *"China International Arbitration Center"*. The intention was not that the parties chose a non-existent institution to administer their arbitration. He found that the *"objective intention of the parties must be that an existing arbitral institution administer the potential arbitration"*.

The judge found that only one of the five possible arbitral institutions was the likely intended organization and held that when the parties agreed on *"China International Arbitration Center"*, they in fact agreed on CIETAC.

Although the name was transcribed inaccurately into the contracts, that inaccuracy did not *"nullify the parties' consent to arbitration or their choice of CIETAC"*. He also commented that:

"[c]ourts in other jurisdictions have taken similar approaches to arbitration agreements which name so-called "non-existent" institutions, striving to give effect to parties' choice of arbitration by identifying the intended but misnamed institution."

Accordingly, it was held that the tribunal had issued a binding award and the Singaporean party's application to set aside the order was dismissed despite the inaccuracy in the arbitration agreements.

In relation to the second ground of challenge, Great Wall *"could not identify any impact or consequence that this error had on the conduct of the arbitration, let alone on the making of the Award"*, and therefore this ground was also rejected.

Conclusion

The parties intended to choose CIETAC as the arbitral institution, the tribunal issued a binding award and any mistaken reference to domestic arbitration provisions had no bearing on the conduct or outcome of the arbitration and therefore Great Wall's application was dismissed.

Comment

This case emphasises the importance of careful drafting of a contract's arbitration provisions. This is of particular importance where parties are domiciled in different countries, the object of the contract is potentially in a third and/or fourth country and therefore any inaccuracy or unenforceability could be litigated in a forum that had not been intended by the parties at the outset of the arrangement.

That said, this case also demonstrates the Singapore Court's willingness to support parties' choice of arbitration and interpret contractual provisions accordingly.

Author



Rebecca Crookenden

Managing associate, Singapore

D: +65 6622 9560

M: +65 8866 2264 / +447712414068

E: rebecca.crookenden@shlegal.com

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