君合研究简讯

JUNHE

2015 年 4 月 20 日

争议解决热点问题

君合为客户赢得涉 UNCITRAL 规则仲裁协议效力确认案

君合律师事务所上海分所近日在上海市第二中级人民法院（下称“**上海二中院**”）为客户赢得一起当事人约定由“中国国际经济贸易仲裁委员会上海分会”在中国境内根据《联合国国际贸易法委员会仲裁规则》（“**UNCITRAL 规则**”）进行仲裁的仲裁协议效力确认之诉案件（下称“**本案**”）。本案中，法院确认当事人约定由中国国际经济贸易仲裁委员会上海分会（下称“**贸仲上海分会**”）作为仲裁机构、按照 UNCITRAL 规则进行仲裁的仲裁条款合法有效，并确认本案当事人之间的争议应由上海国际经济贸易仲裁委员会（下称“**上海贸仲**”）仲裁解决。

一、案件背景

本案系争仲裁条款约定：“双方同意通过有约束力的仲裁解决所有因本协议引起或与本协议有关的争议。仲裁由三名仲裁员根据联合国国际贸易法委员会仲裁规则进行。仲裁地点为中华人民共和国，上海，仲裁语言为英语。中国国际经济贸易仲裁委员会上海分会应主持仲裁并在联合国国际贸易法委员会仲裁规则要求仲裁员指定机构行动时充当仲裁员指定机构……。”

本案对方当事人主张系争仲裁条款无效的理由有两点：（1）根据中国法律规定，未选定明确仲裁机构的仲裁条款为临时仲裁条款，系无效仲裁条款。而系争仲裁条款中“仲裁由三名仲裁员进行”的条款属于典型的临时仲裁条款，条款中并非约定由贸仲上海分会进行仲裁，只是约定由其作为管理机构、指定机构，不能等同于机构仲裁，上述仲裁条款并未约定明确的仲裁机构，因而为无效仲裁条款；（2）中国国际经济贸易仲裁委员会已在 2012 年 12 月 31 日公告终止对贸仲上海分会从事仲裁活动的授权，其已失去作为为临时仲裁提供服务的管理机构、指定机构的合法主体资格和资质。

我们代表客户向法院提交了相关证据材料及答辩意见，并参加了上海二中院就本案举行的听证，发表主要答辩意见如下：（1）UNCITRAL 仲裁规则并不排斥仲裁机构同时以仲裁机构的身份和“指定机构”的身份管理仲裁案件，系争仲裁条款首先选定贸仲上海分会作为仲裁机构负责主持仲裁、行使程序管理等职责，同时，贸仲上海分会也在需要时充当指定机构。因而，系争仲裁条款并非如对方当事人所述是未选定明确仲裁机构的临时仲裁条款；（2）贸仲上海分会具有独立履行仲裁职能的合法资质，依法有权受理涉案仲裁。

二、法院裁定

2015 年 3 月 12 日，上海二中院作出裁定，驳回对方当事人关于确认仲裁协议无效的申请，确认系争仲裁条款系合法有效的仲裁协议，且本案应由上海贸仲依法行使仲裁管辖权。上海二中院认为：（1）系争仲裁条款中“中国国际经济贸易仲裁委员会上海分会应主持仲裁并在联合国国际贸易法委员会仲裁规则要求仲裁员指定机构行动时充当仲裁员指定机构”的部分文字表述虽有一定的临时仲裁特性，但其中“主持仲裁”（英文表述为 administer the arbitration）和“指定机构”（英文表述为“appointing authority”）两项表述，表明当事人通过系争仲裁协议赋予了中国国际经济贸易仲裁委员会上海分会有别于适用 UNCITRAL 规则进行的临时仲裁中相关机构一般只提供行政管理服务的更多职能，而《中华人民共和国仲裁法》及中国国际经济贸易仲裁委员会上海分会的仲裁规则本身也不排斥当事人选择仲裁过程中所适用的仲裁规则，因此，按照有利于实现当事人仲裁意愿的目的解释的方法分析，系争仲裁条款已经选定了仲裁委员会，且不属于临时仲裁性质；（2）中国国际经济贸易仲裁委员会上海分会系依法设立的仲裁机构，现已更名为上海贸仲，其有权依据当事人签订的仲裁协议受理仲裁案件并作出裁决。

三、案件意义

这是上海地区的法院首次就当事人约定由中国仲裁机构在中国适用 UNCITRAL 规则审理仲裁的案件之仲裁条款的效力作出确认。在此之前，宁波市中级人民法院也曾就当事人约定中国仲裁机构适用 UNCITRAL 规则进行仲裁的仲裁条款之有效性作出确认。上海二中院就本案作出的裁定进一步肯定了中国仲裁机构根据当事人的约定适用 UNCITRAL 规则审理仲裁案件的合法性。

此外，根据本案以及此前有关 UNCITRAL 规则的仲裁协议效力争议的案件可以看出，当事人约定由中国仲裁机构适用 UNCITRAL 规则进行仲裁的仲裁条款专业性很强，若表述不当，很可能导致仲裁条款被认定为是临时仲裁条款而被确认无效。因此，我们建议，若当事人拟约定适用 UNCITRAL 规则作为仲裁规则，在最终确定仲裁条款的内容之前，先寻求专业律师的专业建议，以避免仲裁条款无效的法律风险。

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JUN HE BULLETIN

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Dispute Resolution

JunHe won a case for its client in which court upheld an arbitration agreement using UNCITRAL Arbitration Rules

JunHe recently prevailed in a case before the Shanghai Second Intermediate Court (the **"Court"**). The case concerned the validity of an arbitration agreement that provides that, in arbitration proceedings in China, the UNCITRAL Arbitration Rules (the **"*UNCITRAL Rules*"**) shall be used and the arbitration shall be administered by the China International Economic and Trade Arbitration Commission, Shanghai Sub-commission (**"CIETAC-SH"**). The Court held that the arbitration agreement was valid and binding, and that the Shanghai International Economic and Trade Arbitration Commission (**"SHIAC"**) should handle the dispute.

Background

The arbitration agreement provides in relevant part as follows.

> *The parties agree to resolve all differences arising out of or relating to this AGREEMENT through binding arbitration before three arbitrators pursuant to the UNCITRAL Arbitration Rules. The place of arbitration shall be Shanghai, People's Republic of China and the language of the arbitration shall be English. The China International Economic and Trade Arbitration Commission, Shanghai Commission shall administer the arbitration, and also act as the appointing authority when the UNCITRAL Arbitration Rules call for an appointing authority to act.*

The respondent objected on two grounds. First, an arbitration agreement that did not specify an arbitration institution should be deemed as contemplating an *ad hoc* arbitration, which is not permitted under the law of the People's Republic of China (**"PRC"**). In the case, the provision "resolve all the differences . . . before three arbitrators . . ." was a typical *ad hoc* arbitration clause. In addition, CIETAC-SH was only expected to be an "appointing authority" under the *UNCITRAL Rules,* rather than an arbitration institution. Therefore, the arbitration agreement failed to specify an arbitration institution and was not valid under PRC

law. Second, the China International Economic and Trade Arbitration Commission had effectively terminated the authority of CIETAC-SH to accept and administer arbitration cases; therefore, CIETAC-SH was no longer a legitimate institution to act as an appointing authority and provide services in *ad hoc* arbitration proceedings under the *UNCITRAL Rules*.

Following the submission of briefs and supporting evidence, JunHe presented the following arguments to the court. First, the *UNCITRAL Rules* did not exclude an arbitration institution from acting both as an arbitration institution and as an "appointing authority" to administer cases in arbitration proceedings. The arbitration agreement in question first selected CIETAC-SH as an arbitration institution to administer and manage the arbitration proceedings; it also selected CIETAC-SH as an "appointing authority" under the *UNCITRAL Rules*. Therefore, the arbitration agreement did not provide for *ad hoc* arbitration, which was not permitted under PRC law. Second, CIETAC-SH was a legitimate arbitration institution under PRC law, with jurisdiction to independently accept and administer arbitration cases.

The Court's Decision

On March 12, 2015, the Court issued its decision. The Court dismissed the objection, affirmed the validity of the arbitration agreement and held that SHIAC has jurisdiction to hear the case. The Court reasoned as follows. To a certain extent, the phrase "the China International Economic and Trade Arbitration Commission, Shanghai Commission shall administer the arbitration, and also act as the appointing authority when the UNCITRAL Arbitration Rules call for an appointing authority to act" might have an *ad hoc* feature. However, the text "administer the arbitration" and "appointing authority" clearly showed the parties' intent to give CIETAC-SH more power than that of a body in an *ad hoc* arbitration proceeding conducted under *UNCTIRAL Rules*, which only provides secretarial services. Moreover, the *PRC Arbitration Law* and the *Arbitration Rules of CIETAC-SH* do not prohibit parties from choosing other applicable arbitration rules.

Therefore, from the perspective of respecting the parties' prerogative to select arbitration, the Court believed that the parties did choose an arbitration institution for their dispute, and that the arbitration agreement did not contemplate an *ad hoc* arbitration. In addition, CIETAC-SH was a legitimate arbitration institution under PRC law. As it had changed its name to SHIAC, SHIAC had proper jurisdiction to accept and administer the arbitration case and issue an award.

Meaning of the Case

It is the first case in which a court in Shanghai confirmed the validity of an arbitration agreement providing for the application of the *UNCITRAL Rules* to be administered by a Chinese arbitration institution. Previously, the Ningbo Intermediate Court issued a decision confirming the validity of a similar arbitration agreement in which a Chinese arbitration institution was appointed to administer a case under the *UNCITRAL Rules*.

The Court's decision further affirms the validity of arbitration agreements providing for the application

of the *UNCITRAL Rules* to be administered by Chinese arbitration institutions in China.

It is worth noting from this case and other cases relating to the application of the *UNCITRAL Rules* that there are various technical issues in drafting an arbitration agreement providing for the application of *UNCITRAL Rules*; a minor mistake may lead a court to believe that it provides for *ad hoc* arbitration and is therefore invalid. We suggest that companies seek advice from their counsel when preparing an arbitration agreement specifying the *UNCITRAL Rules*.

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