

## 争议解决法律热点问题

### 贸仲委管辖权之争的后续进展

贸仲委管辖权之争发生后，原中国国际经济贸易仲裁委员会华南分会（以下简称“CIETAC 华南分会”）、上海分会（以下简称“CIETAC 上海分会”）分别于2012年10月22日和2013年4月17日相继更名。尽管更名有助于当事人在将来约定仲裁条款时对仲裁机构作出明确的选择，但是，这一举动却并未彻底消除上述两家机构与中国国际经济贸易仲裁委员会（以下简称“CIETAC”）之间管辖权之争带来的不利影响。

今年以来，在江苏、浙江等地陆续出现了仲裁当事人申请法院裁定不予执行相关仲裁机构作出的仲裁裁决的案件，当地法院作出的裁定也有所反复，导致众多当事人对三家机构的管辖权问题仍然心存疑虑，并对法院裁判尺度不一的问题有所担心。

在上述背景下，2013年9月4日，最高人民法院（以下简称“**最高院**”）向全国各级法院发出《关于正确审理仲裁司法审查案件有关问题的通知》[法（2013）194号]（以下简称“**《通知》**”），要求地方各级法院在因上述三家仲裁机构管辖权争议案件引发的仲裁协议效力纠纷案件和撤销、不予执行仲裁裁决案件的司法审查中实施“逐级报告制度”，以统一各地法院的裁判尺度，为当事人提供明确的指引。

#### 一、最高院《通知》的出台背景

今年5月，根据当事人的申请，江苏省苏州市中级人民法院（以下简称“**苏州中院**”）和浙江省宁波市中级人民法院（以下简称“**宁波中院**”）先后裁定不予执行 CIETAC 上海分会作出的仲裁裁决（作出被撤销的仲裁裁决时 CIETAC 上海分会尚未更

名），但上述不予执行仲裁裁决的裁定此后均被两地高院在后续的监督程序中予以纠正。

2013年5月7日，苏州中院作出（2013）苏中商仲审字第0004号《民事裁定书》<sup>1</sup>，裁定不予执行 CIETAC 上海分会作出的（2012）中国贸仲沪字第452号裁决书。在该《民事裁定书》中，苏州中院认为由于 CIETAC 上海分会未向当事人说明机构登记变化情况并告知双方确认或重新选择仲裁机构，违背了当事人选择仲裁机构的真实意思表示。因此，CIETAC 上海分会在“独立”后无权对该案继续审理并作出裁决，故裁定不予执行 CIETAC 上海分会作出上述仲裁裁决。

不久之后，宁波中院于2013年5月22日作出（2013）浙甬执裁字第1号《执行裁定书》<sup>2</sup>，裁定不予执行 CIETAC 上海分会作出的（2013）沪贸仲裁字第047号裁决书，其主要理由与苏州中院在上述《民事裁定书》中陈述的理由几乎完全相同。

上述裁定书作出后，引发了当事人对相关案件仲裁管辖权的疑虑，以及对相关仲裁条款效力的担心。为此，很多当事人都在考虑是否应当修改原来约定的仲裁条款，而对一些正在审理过程中的仲裁案件，当事人则在担心仲裁裁决将来能否得以执行。

但是，上述两个裁定作出后不久便形势突变。首先，浙江省高级人民法院（以下简称“**浙江高院**”）在执行监督程序中认为宁波中院作出的《执行裁定

<sup>1</sup> 该不予执行案的申请人为苏州阿特斯阳光电力科技有限公司，被申请人为江西塞维 LDK 太阳能高科技有限公司。

<sup>2</sup> 该不予执行案的申请人为东方日升新能源股份有限公司，被申请人为江西塞维 LDK 太阳能高科技有限公司。

书》存在法律适用不当等错误，于2013年7月17日作出指令要求宁波中院纠正。2013年7月25日，宁波中院重新作出（2013）浙甬执监字第1号《执行裁定书》，自行撤销了该院于2013年5月22日作出的（2013）浙甬执裁字第1号《执行裁定书》，裁定执行CIETAC上海分会的作出的（2013）沪贸仲裁字第047号裁决书。此后，江苏省高级人民法院（以下简称“江苏高院”）发出（2013）苏执监字第0071号《通知书》，表示已在立案监督程序中要求苏州中院依法自行撤销（2013）苏中商仲审字第0004号《民事裁定书》并重新审查作出裁定。

此外，江苏高院还在2013年7月4日发出通知，要求江苏省内的各级人民法院在审理因上海国际经济贸易仲裁委员会（前身即CIETAC上海分会；以下简称“上海贸仲”）、华南国际经济贸易仲裁委员会（前身即CIETAC华南分会；以下简称“华南国仲”）和CIETAC管辖权争议引发的仲裁司法审查案件中，应逐级上报，由江苏高院提出指导意见后，再行作出裁定。

尽管宁波中院、苏州中院作出的不予执行裁定书均被两地高院要求纠正，但是，当事人仍然有理由担心贸仲委管辖权之争是否会影响相关仲裁机构作出的裁决在其他省、市、自治区的执行。我们理解，正是在这一背景下，最高院在2013年9月4日向全国各级人民法院发出《通知》，要求实施“逐级报告制度”。

## 二、 仲裁司法审查案件中的“逐级报告制度”

“逐级报告制度”最初出现在涉外仲裁司法审查案件中。我国于1987年4月22日正式加入联合国于1958年制订的《承认及执行外国仲裁裁决公约》（以下简称“《纽约公约》”），但是，在此后的若干年里，由于各地法院对《纽约公约》及国内相关法律的理解不一致，导致在部分涉外仲裁司法审查案件中出现了裁决尺度不一致的混乱局面。

在此情况下，最高院在1995年8月28日及1998年4月23日先后发布了《关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知》（法发[1995]18号）及《关于人民法院撤销涉外仲裁裁决有关事项的通知》，建立了人民法院审理涉及判定涉外仲裁协议效力、申请不予承认执行涉外仲裁裁决及申请撤销涉外仲裁裁决的逐级报告制度。对于需要作出否定涉外仲裁协议效力、或作出不予执行涉外仲裁裁决或撤销涉外仲裁裁决裁定的案件，均

要报所属高级人民法院审查，如果高级人民法院审查同意后，应将其审查意见报最高院，待最高院答复后，方可作出裁定。这两个通知建立的“逐级报告制度”有效地维护了涉外仲裁司法审查案件的统一裁判尺度。在过去近二十年里，绝大多数外国仲裁裁决获得了承认和执行，个别被裁定撤销或不予执行的仲裁裁决主要是由于仲裁程序存在不当。这对于防止当事人滥用司法资源及地方法院滥用司法审查权、维护涉外仲裁机构仲裁裁决的权威起到了良好的效果。

此次，最高院通过颁布《通知》，在因为三家仲裁机构管辖权之争而引发的司法审查案件中实施“逐级报告制度”，是首次将该制度引入国内仲裁案件的司法审查程序中，充分体现了最高院对此类案件的重视。我们认为，最高院的这一举动具有以下积极意义：

### 1. 统一地方法院的裁判尺度

“逐级报告制度”要求各级法院将因为三家仲裁机构管辖权之争而引发的当事人申请确认仲裁协议效力案件以及当事人申请撤销或不予执行CIETAC、上海贸仲、华南国仲仲裁裁决的案件，均须逐级上报至最高院，待由最高院答复后方可作出裁定，由此将统一各地法院对此类案件的裁判尺度，避免地方法院各自为政，增加案件的可预见性，为当事人提供明确的指引。

### 2. 避免滋生地方保护主义

实践中，地方法院有时被要求承担为地方经济发展保驾护航的责任，因此，当面对当地明星企业、利税大户的案件时，往往会考虑法律之外的因素。假如相关当事人利用贸仲委管辖权之争的机会要求进行司法审查，以逃避对自己不利的仲裁裁决，不排除某些地方法院会滥用司法审查权，从事地方保护主义的行为。而最高院“逐级报告制度”可以有效地避免因地方法院基于地方保护主义考虑而错误认定仲裁协议无效、撤销或不予执行仲裁裁决情况的发生。

### 3. 有效保护善意当事人的合法权益

在因三家仲裁机构管辖权之争而引发的司法审查案件中，善意参加仲裁的当事人往往是最大的受害者。仲裁审理过程中，善意当事人往往会为参加仲裁审理投入大量人力、物力、财力及时间成本，如果在其辛苦取得胜诉仲裁裁决

后，对方当事人利用三家仲裁机构之间的管辖权争议申请法院撤销或不予执行该仲裁裁决，假设该申请被法院支持，必将导致善意当事人已投入的仲裁成本的浪费，并导致仲裁败诉方借机恶意逃避履行仲裁裁决的义务，助长不诚信之风。如果频繁发生这样的事件，甚至可能会对我国仲裁事业的健康发展产生不利的影 响。而“逐级报告制度”的设立在一定程度上弥补了当事人救济权利的缺失，有利于维持仲裁的权威性和稳定性，进而有利于保护善意当事人的合法权益。

### 三、“逐级报告制度”的实施

根据最高院颁布的上述《通知》，我们预计最高院很快会通过 对个案答复的形式，对因为三家仲裁机构管辖权之争而引发的当事人申请确认仲裁协议效力案件，以及当事人申请撤销或不予执行 CIETAC、上海贸仲、华南国仲仲裁裁决的案件作出明确的指导意见。同时，最高院在其指导意见中会对上述争议中的重大问题作出指引，其中包括：

1. 最高院应当会从大局出发，尊重历史，充分考虑地方法治建设发展的需要，以发展的眼光看待问题，并在尊重法律和客观事实的基础上依法审查仲裁机构的法律地位。从目前的情况来看，最高院应当不会否认上海贸仲和华南国仲的独立地位及合法性。
2. 最高院一向支持 CIETAC 以及 CIETAC 上海分会、华南分会的仲裁，不会轻易否定相关仲裁裁决的法律效力。对于当事人申请撤销或不予执行 CIETAC、上海贸仲、华南国仲仲裁裁决的案件，最高院将严格按照我国《仲裁法》、《民事诉讼法》等法律的规定，主要从仲裁程序是否正当

的角度对仲裁裁决的法律效力进行判断，而不会仅因三家仲裁机构之间的纷争轻易否定仲裁裁决的法律效力。

3. 对于三家仲裁机构之间的管辖权划分，最高院会以尊重“当事人意思自治”作为首要原则予以认定。对于有关仲裁案件中一方当事人提出管辖权异议的案件，最高院会对目前已签订的贸仲仲裁条款进行分析，对 CIETAC 与上海贸仲、华南国仲各自的管辖权进行划分，给下级人民法院对管辖权异议的案件作出明确的指引。

我们期待最高院出具简单、明确的指导意见，以便于理解和执行，为各级人民法院提供明确的裁判标准，也为已经订有仲裁协议和即将订立仲裁协议的当事人提供清晰的指引。

随着最高院上述《通知》的出台，各地法院裁判尺度不一、前后不一的情况将得到有效遏制，CIETAC 与上海贸仲、华南国仲的仲裁管辖权限也将日趋明朗。近期，三家仲裁机构都将工作重心转移到了机构的发展上。2013 年 10 月 22 日，上海贸仲在上海自贸区设立“中国（上海）自由贸易试验区仲裁院”，为涉自贸区内的商事纠纷提供仲裁咨询、立案、开庭审理等仲裁法律服务。此前，华南国仲也已于 2013 年 9 月 22 日在深圳市前海深港现代服务业合作区正式挂牌，履行仲裁机构的职能。而 CIETAC 则于 2013 年 9 月 24 日在香港举行了中国国际经济贸易仲裁委员会香港仲裁中心的揭牌仪式。我们期望 CIETAC、上海贸仲及华南国仲能够开展良性竞争，为当事人提供更专业化、国际化的高质量 的仲裁服务，共同推进我国仲裁事业的有序发展。

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## Dispute Resolution

### An Update on CIETAC's Jurisdictional Dispute

After CIETAC's jurisdictional dispute broke out, the previous China International Economic and Trade Commission South China Commission ("**CIETAC South China**") and Shanghai Commission ("**CIETAC Shanghai**") change their names on October 22, 2012 and April 17, 2013 respectively. Although the name change helped parties make a relatively clear designation of a particular institution when drafting an arbitration clause in the future, it did not dispel the smog of doubt brought by the dispute between them and China International Economic and Trade Arbitration Commission ("**CIETAC**").

Starting this year, there were cases in Jiangsu, Zhejiang and other areas in which the parties applied to the courts for setting aside arbitral awards rendered by CIETAC Shanghai and CIETAC South China, and the courts made different decisions on the cases. The decisions caused tremendous concerns to many parties over the consequences of the current jurisdictional dispute among the three CIEATC institutions and over different and often contrary judicial views on the dispute.

Against that background, on September 4, 2013, the Supreme People's Court (the "**Supreme Court**") issued the Notice on Certain Issues Relating to Correct Trial on Cases of Judicial Review on Arbitration (Fa [2013] No.194) (the "**Notice**") to the courts at all levels nationwide. Under the Notice, the Supreme

Court asked all courts to implement a "level-by-level reporting system" when reviewing applications objecting to the validity of an arbitration agreement and to set aside or not to enforce a CIEATC arbitral award, on the basis of the jurisdictional dispute among the CIETAC institutions. The Supreme Court intended to provide a uniform standard on judicial review of the cases and give clear guidance to the parties.

#### I Background

In May this year, both Suzhou Intermediate People's Court of Jiangsu Province ("Suzhou Intermediate Court") and Ningbo Intermediate People's Court of Zhejiang Province ("Ningbo Intermediate Court") made decisions not to enforce arbitral awards rendered by CIETAC Shanghai upon applications from the losing parties. (Shanghai CIETAC was yet to change its name at the time when the two awards were issued.) However, both decisions were reversed by their respective higher provincial courts during subsequent supervision proceedings.

On May 7, 2013, Suzhou Intermediate Court made a ruling ([2013] Su Zhong Shang Zhong Shen Zi No.004), deciding not to enforce an award rendered by CIETAC Shanghai ([2012] Zhong Guo Mao Zhong Hu Zi No.452)<sup>1</sup>. In the

<sup>1</sup> The applicant was Suzhou CSI Solar Power Technology Co., Ltd. and the respondent was Jiangxi LDK Solar Hi-tech Co., Ltd.



ruling Suzhou Intermediate Court held that, as CIETAC Shanghai did not properly inform the parties of the change of the status of the institution and give opportunity to the parties to either confirm or reselect the arbitration institution, CIETAC Shanghai acted against the parties' true intent regarding the selection of the arbitration institution. Suzhou Intermediate Court held that it should not enforce the award as CIETAC Shanghai had no right to continue to hear and subsequently rule on the case after its "independence" from CIETAC.

A few weeks later, on May 22, 2013, Ningbo Intermediate Court made a similar ruling ([2013] Zhe Yong Zhi Cai Zi No.1)<sup>2</sup>, deciding not to enforce an award rendered by CIETAC ([2013] Hu Mao Zhong Cai Zi No.047). The reasoning of the court was exactly the same as that of Suzhou Intermediate Court.

After the two rulings were handed down, people were alarmed over the jurisdiction of CIETAC institutions and the validity of CIETAC-related arbitration agreements. Many people were considering amending existing arbitration agreements. For those pending arbitration proceedings, the parties were worried about the enforceability of future arbitral awards.

However, the situation soon came to an abrupt change. First, the High People's Court of Zhejiang Province ("Zhejiang High Court") held in the supervision proceedings that the ruling by Ningbo Intermediate Court was wrong in application of law, and made a directive on July 17, 2013 ordering Ningbo Intermediate Court to rectify the previous decision. On July 25, 2013, Ningbo Intermediate Court made a new ruling ([2013] Zhe Yong Zhi Jian Zi No.1) revoking the previous ruling and ordering the enforcement of the arbitral award rendered by CIETAC Shanghai. Subsequently, the High

People's Court of Jiangsu Province ("Jiangsu High Court") issued a notice ([2013] Su Zhi Jian Zi No.0071) to the effect that it had during the case filing supervision proceedings asked Suzhou Intermediate Court to revoke its previous ruling and to re-review the case.

On July 4, 2013, Jiangsu High Court issued a general notice asking all courts in the province that, when reviewing cases relating the jurisdictional dispute among the CIETAC institutions, they should report to the higher court level by level and refrain from making any decision until Jiangsu High Court gives its opinion.

Although the cases in Zhejiang and Jiangsu were seemingly settled, people still have good reason to worry about how the jurisdictional dispute among the CIETAC institutions would affect the enforceability of their arbitral awards in other provinces, municipalities and autonomous regions. We understand that, it was against that background that the Supreme Court issued the Notice on September 4, 2013 to courts at all levels nationwide, asking them to implement the "level-by-level reporting system."

## II The "Level-by-Level Reporting System"

The "level-by-level reporting system" was originally put in place for judicial review of foreign or foreign-related arbitral awards. On April 22, 1987, China acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations in 1958 (the "**New York Convention**"). For several years after China's accession to the New York Convention, local courts in China had different understandings of the New York Convention and relevant Chinese laws, and they used different standards when reviewing foreign and foreign-related arbitral awards.

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<sup>2</sup> The applicant was Risen Energy Co., Ltd. and the respondent was Jiangxi LDK Solar Hi-tech Co., Ltd., the same company against whom enforcement of the award was sought in Suzhou.

Aware of the problem, the Supreme Court issued the Notice on Issues Concerning People's Courts' Handling of Foreign-related Arbitration or Foreign Arbitration Items (Fa Fa [1995] No.18) and the Notice on Issues Concerning People's Courts' Setting aside of Foreign-related Arbitral Awards on August 28, 1995 and April 23, 1998 respectively. Under the notices, the Supreme Court set up a "level-by-level reporting system" for people's courts when reviewing cases involving the validity of foreign-related arbitration agreements, petitions for non-recognition and non-enforcement of foreign or foreign-related arbitral awards and for setting aside foreign or foreign-related arbitral awards. A lower court should report for approval to the competent higher people's court if it decides to nullify an arbitration agreement, or not to enforce or to set aside a foreign or foreign-related arbitral award. After approval, the higher people's court shall report its opinion to the Supreme Court. A decision can only be made after the Supreme Court has given its opinion. The "level-by-level reporting system" has effectively maintained a nationwide uniform standard for judicial review of foreign-related arbitration matters. Over the past twenty years, a super majority of foreign-related arbitral awards have been recognized and enforced, leaving only a few cases which were not recognized or were set aside mainly due to procedural "due process" violations in the arbitration proceedings. The system has worked effectively in preventing abuse of judicial resources by the parties and abuse of right in judicial review by local courts. It has safeguarded the authority and reputation of the arbitration system.

The Supreme Court issued the Notice on September 4, under which it intended to adopt the "level-by-level reporting system" for resolving the jurisdictional dispute among the three CIETAC institutions. It is the first time

that the Supreme Court has introduced the system for judicial review of domestic arbitration cases. It reflects the Supreme Court's high attention to the current situation at CIETAC. We believe that the act of the Supreme Court has the following positive implications:

1. To Set Up A Uniform Standard for Judicial Review

The "level-by-level reporting system" requires that courts at all levels shall report all CIETAC arbitration-related cases level by level to the Supreme Court. No decision will be made until the Supreme Court has given its opinion. This will effectively set up a uniform standard for judicial review for all courts, and safeguard the predictability of arbitration cases and provide clear guidance to the parties.

2. To Prevent Local Protectionism

In reality, local courts sometimes are asked to be responsible for protecting local economic development. When facing cases involving local start enterprises and major tax payers, the courts tend to consider factors beyond law. If a relevant party takes advantage of the CIETAC jurisdictional dispute to request a judicial review so as to ask the court to set aside an arbitral award against it, there is risk that a local court may abuse its right of judicial review and provide protection to local enterprises. The Supreme Court's "level-by-level reporting system" can effectively prevent local protectionism by local courts when reviewing CIETAC arbitration-related cases.

3. To Protect Lawful Rights of *Bona Fide* Parties

In the CIETAC jurisdictional chaos, those *bona fide* parties in the arbitration proceedings are the ultimate victims.

*Bona fide* parties will invest huge amount of manpower, money and time in arbitration proceedings. If a hard-earned winning award can be easily set aside by the court merely on the basis of the jurisdictional dispute among the CIETAC institutions, it will be extremely unfair to the winning party. This will encourage the practice of bad faith. If such cases happen frequently, it will have adverse effect on the healthy development of China's arbitration system. The "level-by-level reporting system" will make up to a large extent for the lack of judicial remedy available to the parties, maintain the authority and stability of arbitration and protect the legitimate rights of bona fide parties.

### III The Implementation of the System

We expect that the Supreme Court will very soon issue a case-specific reply under the Notice, in which it will provide clear guidance to the courts on how to deal with cases involving the CIETC jurisdictional dispute. We speculate that the Supreme Court in the reply yet to be issued may give its opinion on certain important issues, including the following:

1. The Supreme Court will review the CIETAC-related issues from a higher and broader perspective, will give ample consideration to the need of local governments in developing local legal environment, and will see the whole picture from the viewpoint of development. It will consider the legal status of the CIETAC institutions under the guidance of law and on the basis of the fact, and will pay respect to the history of the institutions. It is unlikely that the Supreme Court would deny the legitimate and independent status of SHIAC and SCIA.
2. Having for a long time always supported CIETAC, CIETAC Shanghai and CIETAC South China, the Supreme Court will not

easily deny the legal effect of arbitral awards rendered by the CIETAC institutions. On judicial review of CIETAC-related cases, the Supreme Court will strictly follow the provisions in the Arbitration Law, the Civil Procedural Law and other laws of China, and will focus the review on procedural "due process" violations in arbitration proceedings. It will not merely look to the jurisdictional dispute among CIETAC institutions when determining the validity of a CIETAC-related award.

3. The Supreme Court will focus on the basic principle of "party autonomy" in arbitration when reviewing the issue relating to the division of jurisdiction among CIETAC institutions. On cases in which one party objecting to the jurisdiction of a particular CIETAC institution, the Supreme Court would review the existing CIETAC-related arbitration agreements, and will give clear guidance to the lower courts on how to partition respective jurisdiction among CIETAC, SHIAC and SCIA on the basis of parties' intention when entering into the arbitration agreements.

We hope that the Supreme Court will issue simple and clear guidelines which will be easy to understand and implement by the lower courts, and which can also be used as guidance by the parties who have existing CIETAC-related arbitration agreements and those who are considering entering into new CIETAC-related arbitration agreements.

The new Notice by the Supreme Court will effectively contain the inconsistent practices by the local courts, and will gradually clarify the respective jurisdiction of CIETAC, SHIAC and SCIA.

Recently, the three CIETAC institutions have all shifted their focus to strategic expansion. On October 22, 2013, SHIAC established its China (Shanghai) Pilot Free Trade Zone Court of

Arbitration. Before that, SCIA also officially opened its new court of arbitration in Qianhai Shenzhen-Hong Kong Modern Cooperation Zone on September 22, 2013. On the other hand, CIETAC held the unveiling ceremony of its new Hong Kong Arbitration Center on September 24, 2013. We hope that CIETAC,

SHIAC and SCIA will each become more competitive by providing more professional and internationalized arbitration services of high quality to the parties, and will jointly promote the orderly development of China's arbitration system.

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