JUN HE BULLETIN

JUNHE

2013 年 6 月 18 日

Dispute Resolution

Chinese Court Refuses to Enforce an Arbitral Award Rendered by Post-Separation CIETAC Branch --- Thoughts and Suggestions for Drafting Arbitration Agreement

On May 7, 2013, the Intermediate People's Court of Suzhou in Jiangsu province (hereinafter the "**Suzhou Intermediate Court**") made a ruling of non-enforcement of the arbitral award[1] rendered by the Shanghai Sub-Commission of China International Economic and Trade Arbitration Commission (announcing its separation from the China International Economic and Trade Arbitration Commission (hereinafter the "**CIETAC**") in 2011 and establishing itself as an independent arbitration institution named hereinafter the "**SHIAC**"). Prior to the Suzhou Intermediate Court's ruling, the Intermediate People's Court of Shenzhen in Guangdong province (hereinafter the "**Shenzhen Cour**t") made a ruling on November 20 2012 with regard to the dispute over the jurisdiction of South China Sub-Commission of CIETAC (announcing its separation from CIETAC in 2011 as well and establishing itself as an independent arbitration institution named hereinafter the "**SCIA**"), confirming the validity of the parties' arbitration agreement submitting disputes to SCIA and recognizing SCIA's jurisdiction over the case.

The fact that local Chinese courts have made opposite rulings on the same issue after the independence of the former branches from CIETAC raises the issue of uncertainty of arbitration jurisdiction and the validity of relevant arbitration clauses. In particular, one issue is whether the SHIAC or SCIA still has jurisdiction after their separation from CIETAC over the cases where the parties have agreed on the CIETAC Sub-Commissions' jurisdiction before their announcements of separation. In practice, there are more and more cases where the parties apply to local court for cancellation or non-enforcement of an arbitral award on the basis of the afore-mentioned reasons. Therefore, it is worthwhile to further analyze and research this issue so that the parties can take necessary and timely measures to control risk and prevent a crisis before it emerges.

Case Brief

In the case decided by the Suzhou Intermediate Court[2], Suzhou CSI and LDK Solar signed the contract of supplying polycrystalline silicon chips in 2008, in which they "agreed to submit the case to CIETAC (place of arbitration: Shanghai, China) to arbitrate the case under the then-valid arbitration rules of that arbitration commission at the time of case filing." In July 2010, the former Shanghai Sub-Commission of CIETAC (i.e. the SHIAC after the independence) accepted the filing of the contractual dispute between the two parties according to CIETAC's 2005 Arbitration Rules, and made the award of CIETAC Huzi No.452 (2012) (hereinafter the "SHIAC Award") on December 7, 2012. Meanwhile, the SHIAC announced its separation from CIETAC in April 2011, acquired the Registration Certificate of Arbitration Commission from the Shanghai Justice Bureau in December 2011, and published its Arbitration Rules and Panel of Arbitrators. Since Suzhou CSI refused to enforce the SHIAC Award, LDK Solar applied to the Suzhou Intermediate Court for compulsory enforcement of the SHIAC Award in February 2013. Suzhou CSI then made the defense of SHIAC's lack of arbitration jurisdiction against Suzhou CSI's application for compulsory enforcement.

In the Civil Order, the Suzhou Intermediate Court held that "an arbitration institution's jurisdiction stems from the consensus of the parties." In the present case, CIETAC was selected by the two parties as the arbitration institution to solve their disputes. SHIAC was an integral part of CIETAC before it announced its separation from CIETAC and thus had the jurisdiction over the case. However, SHIAC registered as an independent arbitration institution at the end of 2011, and was no longer a part of CIETAC. Thus SHIAC is not the arbitration institution originally chosen by the two parties any more, and has no power to carry out its jurisdiction over the case after its separation from CIETAC unless the parties confirmed to choose SHIAC to solve their disputes. The Suzhou Intermediate Court held that SHIAC has contravened the true will of the parties by failing to explain to the parties about the circumstance of its change of registration as an independent arbitration institution and to inform the parties of their right to confirm or re-select an arbitration institution. Therefore the Suzhou Intermediate Court ruled that SHIAC had no right to continue to hear and render an award over this case after its separation from CIETAC, and the application for compulsory enforcement of the SHIAC Award was thus rejected.

Case Analysis

In this case, the Suzhou Intermediate Court did not comment or judge the dispute over the validity of SHIAC and SCIA's separation from CIETAC. However, it recognized the principle of party autonomy as the basis for the validity of the arbitration agreement. Although we cannot completely rule out the suspicion of local protectionism in the decision of non-enforcement of SHIAC Award by the local court, the Suzhou Intermediate Court's confirmation that "an arbitration institution's jurisdiction stems from the consensus of the parties" hits the mark of the modern concept of arbitration and conforms to the basic principles of arbitration. The principle of party authority is the cornerstone of modern arbitration,

[1] The Intermediate People's Court of Suzhou, Jiangsu made the "Civil Order" Suzhongshangzhongshenzi No. 0004 (2013) on May 7, 2013 (hereinafter the "**Civil Order**").

[2] The Applicant of the case: Suzhou Canadian Solar Inc. (hereinafter referred to "**Suzhou CSI**"), the Respondent of the case: LDK Solar Co., Ltd (hereinafter referred to "**LDK Solar**").

and every and all issues in arbitration may be decided by the consensus of the parties, including selecting the method of dispute resolution (arbitration or litigation), the type of arbitration (institutional arbitration or ad hoc arbitration), the arbitration institution, the arbitration rules, the arbitration language, the place of arbitration, the appointment of arbitrators, the governing law etc. One of the critical reasons explaining why arbitration is widely used internationally and domestically is that the true, willing and free choices of the parties are fully respected in arbitration. At the time when the SHIAC accepted this case, the SHIAC was still a part of CIETAC and thus had the power to accept this arbitration case. However, during the arbitration proceeding, SHIAC announced its independence and separation from CIETAC. As a result, on the one hand, the parties are entitled to be informed of this change of the arbitration institution and to be offered chances to confirm or re-select its arbitration institution; and on the other hand, SHIAC is obliged to inform the parties of this change in a timely manner and inquire the parties whether they want to choose SHIAC for arbitration. Otherwise, it is in violation of the principle of party autonomy for SHIAC to continue to hear and render an award on this case without the parties' confirmation. Therefore, the Suzhou Intermediate Court justified itself by ruling that SHIAC had no power to continue to hear the case and render an award.

However, before Suzhou Intermediate Court rendered the Civil Order, the Shenzhen Court, on November 20 2012, made a conflicting decision on a similar arbitration clause providing for SCIA (i.e. the former South China Sub-Commission of CIETAC). The Shenzhen Court held that SCIA is an independent arbitration institution, and pursuant to the arbitration agreement between the parties in 2006 submitting the dispute to the former South China Sub-Commission of CIETAC, SCIA has the power to accept the arbitration case and to render an award after its independence in September 2012. The Shenzhen Court held that SCIA had jurisdiction over the case.

The Suzhou Intermediate Court and the Shenzhen Court made two contrary decisions on the same type of arbitration clause and under the same circumstance of case filing, which will inevitably cause uncertainty to the validity and the enforcement of this type of arbitration clause. The published announcements by the local government and local offices of justice administration and other authorities in Shanghai and Shenzhen indicated that the local courts support that SHIAC and SCIA, as independent arbitration institutions, have jurisdiction over the arbitration cases submitted by the parties to Shanghai Sub-Commission and South China Sub-Commission of CIETAC before their separation from CIETAC. However, the courts in the provinces other than Shanghai or Guangdong may have different opinions and attitudes towards these types of cases and the jurisdiction issue of SHIAC and SCIA after their announcement of independence. As a result, it is likely that the courts in other provinces may render civil orders different from those of the courts in Shanghai and Shenzhen. Pursuant to the relevant provisions of the judicial interpretations, the intermediate people's courts located in the province of the domicile of the party against whom the enforcement of an arbitral is sought or in the province where the assets against which the enforcement is sought, have jurisdiction over the cases where the parties apply for the enforcement of an arbitral award[3]. If the domicile of the party against whom the enforcement is sought or the assets against which the enforcement is sought are located in the provinces other than Shanghai or Guangdong, it is still likely that the court in these provinces may make the same ruling as that of the Suzhou Intermediate Court, holding that the SHIAC or SCIA has no jurisdiction over these types of arbitration cases and rejecting the enforcement of the arbitral award thereon by the reasons of local protectionism or the defects in the arbitration procedure etc.

Recommendations

Based on the aforesaid analysis, we suggest that the parties take various measures to control the risk with regard to different types of the contract, the arbitration clauses and the nature of disputes so that the jurisdiction dispute between CIETAC and its separated branches will not negatively affect the settlement of parties' dispute and the enforcement of arbitral award. Our specific recommendations are as follows:

<u>New Arbitration Agreement:</u>

On the one hand, SHIAC and SCIA have announced their separation from CIETAC, published Arbitration Rules and Panel of Arbitrators of their own. On the other hand, CIETAC has made announcements on several occasions withdrawing its authorization to SHIAC and SCIA to arbitrate and has re-established its Shanghai Sub-Commission and South China Sub-Commission respectively in Shanghai and Shenzhen. As a result, there are currently two arbitration institutions in Shanghai both named CIETAC Shanghai Sub-Commission, and the same situation in Shenzhen, i.e. there are two arbitration institutions in Shenzhen with the name of CIETAC South China Sub-Commission[4]. Under this circumstance, if the parties continue to use the wording of CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission in their arbitration clauses, it will result in confusion and uncertainty in the acceptance of case filing and in the future enforcement of arbitral awards, adding further risks of setting-aside or non-enforcement of the arbitral awards, similar with the Civil Order made by the Suzhou Intermediate Court.

Therefore, as to new contracts, for the purpose to avoid risks caused by the factors of uncertainty, we recommend as follows:

- Avoid using the wording of "CIETAC Sub-Commission" in drafting the arbitration clause, such as "submit to CIETAC Shanghai Sub-Commission for arbitration" or "submit to CIETAC South China Sub-Commission for arbitration" lest emerge the aforesaid confusion and risk;
- Where the parties are willing to submit to CIETAC for arbitration, then clearly specify to submit to CIETAC Beijing headquarters for arbitration. Where the parties wish to submit to the independent SHIAC or SCIA for arbitration, the new organization's name used after the independence should be specified in the arbitration agreement in order to distinguish it from CIETAC and CIETAC Sub-Commissions.
- Consider choosing other arbitration institutions, such as Hong Kong International Arbitration Center, ICC Court of Arbitration, American Arbitration Association or Australian Centre for International Commercial Arbitration for arbitration, on the basis of the circumstances of the specific case and of the negotiation between the parties.

<u>Where an Existing Arbitration Agreement Specifies CIETAC or one of its Sub-Commissions</u>

There are two scenarios under this circumstance: (a) the arbitration agreements providing for arbitration at CIETAC Beijing Headquarters, CIETAC Tianjin Sub-Commission or CIETAC Southwest/Chongqing Sub-Commission; (b) the arbitration agreements providing for arbitration at CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission, or arbitration at CIETAC Shanghai or CIETAC Shenzhen.

The arbitration agreement under the first scenario will not create disputes and can continue to be used, because there is no jurisdiction dispute or independence issue among CIETAC Beijing Headquarters, CIETAC Tianjin Sub-Commission or CIETAC Southwest/Chongqing Sub-Commission. Thus, there is no need for the parties to worry about the negative effect caused by jurisdiction fight.

[3] See Article 29, the Interpretation of the Supreme People's Court on Some Issues concerning the Application of the Arbitration Law of the People's Republic of China.

[4] Although SHIAC has changed its name into "Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center" and CIETAC Shanghai has become its former name, SHIAC emphasizes that it will continue to accept the arbitration cases where the parties agreed to submit to CIETAC Shanghai; Similarly, although SCIA has changed its name into "South-China International Economic and Trade Arbitration Commission/Shenzhen Court of International Arbitration" and CIETAC South-China has become its former name, SHIAC maintains that it will continue to accept the arbitration cases where the parties agreed to submit to CIETAC South-China or CIETAC Shenzhen as well.

Under the second scenario, where the arbitration agreement provides that the disputes should be referred to CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission for arbitration, our recommendations are as follows:

- Modify and clarify the relevant arbitration clause as soon as possible before the actual dispute occurs. Do not delay the modification of the arbitration agreement when the dispute occurs, because usually it is impossible for the parties to reach any agreement once there is dispute, not mention the modification of the arbitration agreement;
- Certain items need to be clarified in modifying the arbitration agreement: (a) arbitration institution: clearly specify CIETAC Beijing Headquarters or other arbitration institutions or SHIAC or SCIA for arbitration; (b) arbitration procedure: apply CIETAC's 2012 Rules or CIETAC's 2005 Rules or the Arbitration Rules of other arbitration institutions or the Arbitration Rules established by SHIAC or SCIA; and (c) Panel of Arbitrators: adopt CIETAC's Panel of Arbitrators or the Panel of Arbitrators of other arbitration institutions or the Panel of SHIAC or SCIA.

The Situation where Dispute Already Occurred

This refers to the circumstance where the parties agreed to submit their dispute to CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission in their arbitration agreement, and the dispute already occurred. We discuss the two different scenarios under this circumstance:

The first scenario is that, the arbitration clause provides for arbitration at CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission and the dispute already occurred, and the parties have already submitted to the SHIAC or SCIA for arbitration and the case is under substantive proceeding. Under this scenario, the parties should clearly raise this issue during the arbitration procedure and should not act in an ambiguous or undecided manner. If the Claimant is willing to continue the procedure at SHIAC or SCIA, it should confirm SHIAC or SCIA as the arbitration institution in writing and invite the Respondent to confirm in writing as well. Generally speaking, since the case is already in substantive stage, the Respondent usually would not challenge the jurisdiction of the arbitral tribunal or the arbitration institution at this stage and the case generally could move on. Furthermore, according to the Civil Order made by Suzhou Intermediate Court, we can foresee that SHIAC and SCIA will invite the parties to confirm in writing that they are aware of and agree on SHIAC or SCIA's jurisdiction upon the acceptance of the case or during the arbitration proceedings, in case the non-enforcement issue occurs again in the future due to the same reason.

However, if the Claimant chooses to submit to CIETAC for arbitration instead of continuing arbitration at SHIAC or SCIA, the Claimant may apply to withdraw its request for arbitration, and then re-file the case with CIETAC's newly established Shanghai Sub-Commission or Shenzhen/South China Sub-Commission. If the respondent disagrees, it would not obstruct the Claimant to withdraw the case. However where the Respondent has already filed a counterclaim, upon Respondent's confirmation of SHIAC or SCIA's jurisdiction over the counterclaim, the case will continue to be heard by SHIAC or SCIA. However, under this circumstance, since Claimant and Respondent have chosen different arbitration institutions, i.e. Claimant wants to go for CIETAC arbitration while Respondent prefers to continue arbitration at SHIAC or SCIA, it is inevitable that the two sides will have to fight for jurisdiction, and the case will not go into substantive hearing due to the other party's challenge of jurisdiction until the competent court, upon the parties' application, makes decision on the jurisdiction issue.

The other scenario is that the arbitration clause provides for arbitration at CIETAC Shanghai Sub-Commission or CIETAC South China Sub-Commission and the dispute already occurred, but the two parties have submitted to neither CIETAC nor SHIAC or SCIA for arbitration and the parties cannot reach agreement on the arbitration institution. This is a dilemma, because whichever arbitration institution the Claimant files for arbitration, the other party may challenge it. Under the present circumstances, it is possible that both SHIAC/SCIA and the newly established CIETAC Shanghai Sub-Commission or CIETAC South China/Shenzhen Sub-Commission may accept the case on the prima facie basis. However, it is very likely that the parties will have to face the challenge of arbitration jurisdiction by the other party right after the acceptance of the case, which may be a process where the parties have to spend a long time and lots of effort in the fight over arbitration jurisdiction.

At present, the Chinese Supreme People's Court, has not made any final and definite decision upon the jurisdiction of CIETAC former branches and the issue of independence of the arbitration institutions. Thus, the parties may have to encounter risks no matter to which arbitration institution the party has referred their dispute. Therefore it is strongly recommended that the parties seek professional advice from lawyers and manage to solve the jurisdiction problem through careful analyzing all aspects of the dispute on a case-by-case basis, including bringing the jurisdiction dispute to the competent court and then submitting the case to the arbitration institution with jurisdiction as decided by the court in its civil ruling.

Christine Kang	Partner	Tel：8610 8519 2161	Email：kangy@junhe.com
Stanley Wan	Associate	Tel：8610 8519 2170	Email：wanxing@junhe.com
Mark Chu	Associate	Tel：8610 8519 2415	Email：zhuxw@junhe.com

君合研究简讯

JUNHE

2013 年 6 月 18 日

争议解决法律热点问题

法院不予执行贸仲上海分会独立后作出的仲裁裁决
----起草仲裁协议的思考和建议

2013 年 5 月 7 日，江苏省苏州市中级人民法院（以下简称“**苏州中院**”）裁定不予执行中国国际经济贸易仲裁委员会（以下简称“**贸仲**”）上海分会（已经于 2011 年宣布脱离贸仲，成为独立的仲裁机构，以下简称“**上海国仲**”）作出的仲裁裁决[1]。此前，2012 年 11 月 20 日广东省深圳市中级人民法院就其受理的贸仲深圳分会（也已经于 2011 年宣布脱离贸仲，成为独立的仲裁机构，以下简称“**深圳国仲**”）管辖权纠纷作出裁定，确认了当事人将争议提交给深圳国仲的仲裁协议有效，深圳国仲对该案有管辖权。

地方法院针对同一事由作出的截然相反的法院裁定，增加了原贸仲分会独立后仲裁管辖权以及相关仲裁条款效力的不确定性。特别是原贸仲分会宣布独立之前当事人约定了由原贸仲分会仲裁，独立后的上海国仲和深圳国仲是否依然对此类案件享有管辖权的问题，在实践中不断出现一方当事人以此为由向地方法院申请撤销或不予执行仲裁裁决的情形。因此，有必要对此问题进一步分析研究，以便当事人及时采取必要措施、控制风险、防患于未然。

案情简介

在苏州中院的案件[2]中，阿特斯公司与塞维公司于 2008 年签订了多晶硅片供应合同，合同约定：如有争议，双方“同意提交中国国际经济贸易仲裁委员会（仲裁地点：中国上海）按申请仲裁时该仲裁委员会有效的仲裁规则进行仲裁”。2010 年 7 月，原贸仲上海分会（即独立之前的上海国仲）依照 2005 版贸仲仲裁规则受理了双方的合同争议，并于 2012 年 12 月 7 日作出[2012]中国贸仲沪字第 452 号裁决书（以下简称“**上海国仲仲裁裁决**”）。在此期间，上海国仲于 2011 年 4 月宣布从贸仲独立，并于当年 12 月从上海市司法局取得《仲裁委员会登记证》，自行制定了《仲裁规则》和《仲裁员名册》。因阿斯特公司拒不执行上海国仲仲裁裁决，2013 年 2 月，塞维公司向苏州中院申请强制执行该仲裁裁决，而阿特斯公司则以上海国仲无管辖权等理由提出不予执行抗辩。

在该《民事裁定书》中，苏州中院认定：“仲裁机构管辖案件的权限源于当事人的合意选择。”本案中双方当事人选定贸仲为解决争议的仲裁机构，上海国仲在宣布独立前与贸仲是一个整体，因此对本案享有管辖权。然而上海国仲于 2011 年底登记成为独立的仲裁机构，不再与贸仲为同一整体，因此也不再是双方当事人原先合意的仲裁机构，在当事人未重新选择的情况下，上海国仲对案件无管辖权。法院认为，由于上海国仲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，上海国仲在独立后无权对该案继续审理并作出裁决，裁定不予执行上述上海国仲仲裁裁决。

案件分析

本案中，苏州中院并没有对贸仲与上海国仲和深圳国仲之间有关仲裁机构独立是否有效的争论发表评论或作出判断，而是直接从当事人意思自治原则出发来确认仲裁协议的效力。虽然我们不能完全排除当地法院不予执行的决定有地方保护之嫌，但法院确认“仲裁机构管辖案件的权限源于当事人的合意选择”的判断，切中现代仲裁理念的精髓，完全符合仲裁的基本原则。现代仲裁的基石就是当事人意思自治，仲裁中的一切事项都可以由当事人合意来选择，包括选择争议解决的方式（仲裁或诉讼）、采用哪种仲裁方式（机构仲裁还是临时仲裁）、选择哪个仲裁机构、适用哪套仲裁规则、使用何种仲裁语言、选择仲裁地点、指定哪个或哪些仲裁员、适用哪个国家的实体法律审理案件等等。仲裁之所以能够在国际和国内得到广泛的运用，其重要的原因之一就是此种争议解决方式尊重当事人的真实意愿和自由选择。上海国仲在受理本案时仍然是贸仲的一部分，因此其有权受理该仲裁案，但在案件审理过程中上海国仲宣布独立，成为与贸仲不相关的独立仲裁机构，对此仲裁机构的变更，当事人有权知悉并对仲裁机构进行确认或者重新选择。而上海国仲应当及时告知当事人该情况、并请当事人确认其是否愿意继续由上海国仲审理此案，否则在未经当事人确认的情况下自行继续审理本案并作出裁决，则有悖于仲裁中的当事人意思自治原则，法院因此裁定上海国仲无权继续审理该案并作出裁决是不无道理的。

然而，在上述苏州中院的《民事裁定书》作出之前，2012 年 11 月 20 日，针对深圳国仲（原贸仲华南分会）的同一类型的仲裁条款，广东省深圳市中级人民法院作出截然相反的《民事裁定书》，认定：深圳国仲是独立的仲裁机构，根据当事人 2006 年约定将争议提交贸仲深圳分会的仲裁协议，深圳国仲有权在其独立后即 2012 年 9 月受理该仲裁案并作出裁决，深圳国仲对该案有管辖权。

同样的仲裁条款、同样的受案情形，但深圳中院和苏州中院的裁定却截然相反。法院的判决势必给此类仲裁条款的有效性和执行力增加了不确定的因素。从深圳和上海地方政府和当地司法行政等机关就原贸仲分会独立的公开发文显示，广东和上海的法院支持深圳国仲、上海国仲作为独立的仲裁机构，对当事人在其独立之前约定贸仲华南、上海分会仲裁的案件，仍然分别享有管辖权。但是，上海、广东以外地方法院对此类案件以及独立后的上海国仲和深圳国仲的管辖权问题，则有可能存在不同的立场和态度，并最终作出不同的决定。根据有关司法解释，申请执行仲裁裁决案件由被执行人住所地或被执行的财产所在地的中级人民法院管辖[3]。如果被执行人住所地或财产所在地在上海、广东以外，出于地方保护以及仲裁程序本身存在的瑕疵等原因，受理法院很有可能和苏州中院一样，认为上海国仲、深圳国仲对案件无管辖权，因而裁定不予执行。

---

1 江苏省苏州市中级人民法院 2013 年 5 月 7 日作出的（2013）苏中商仲审字第 0004 号《民事裁定书》（以下简称“**《民事裁定书》**”）。

2 该案的申请人：苏州阿特斯阳光电力科技有限公司（以下简称“**阿特斯公司**”），该案的被申请人：江西塞维 LDK 太阳能高科技有限公司（以下简称“**赛维公司**”）。

3 见《最高人民法院关于适用〈中华人民共和国仲裁法〉若干问题的解释》第 29 条。

律师建议

鉴于以上的情况分析，我们认为针对不同类型的合同、仲裁条款以及争议情况，当事人应当采取不同的行动控制风险，以确保一旦发生争议双方可以及时高效地解决争议，而不至于因为贸仲与上海国仲和深圳国仲之间的管辖权问题而影响当事人及时解决争议或执行仲裁裁决。具体建议如下：

新合同：

由于上海国仲和深圳国仲已经独立，且制定了自己的仲裁规则、仲裁员名册；而贸仲也多次公开声明表示已收回对上海国仲和深圳国仲的仲裁授权，并且贸仲总会也分别在上海和深圳重新设立了其贸仲上海分会和贸仲华南分会，因此，实践中上海市有两个贸仲上海分会，深圳市也有两个贸仲华南分会[4]。在这种情形下，如果当事人继续在其仲裁条款中使用贸仲上海分会或贸仲华南分会的字样，必然导致在案件受理和将来仲裁裁决的执行中的混淆和不确定，并进而产生仲裁裁决有可能被撤销或不予执行的风险，正如上述苏州中院的《民事裁定书》所认定的。

因此，对于新的合同，为了避免上述不确定因素产生的风险，我们的建议是：

■ 尽量避免仲裁条款中出现“贸仲分会”字样，如“提交贸仲上海分会仲裁”或者“提交贸仲华南分会仲裁”，以免产生上述混淆和风险；

■ 如果当事人愿意选择贸仲仲裁，则尽量约定选择贸仲北京总会；如果当事人希望在独立后的上海国仲或深圳国仲仲裁，则应当在仲裁协议中写明该机构独立后启用的新的机构名称，以将其与贸仲和贸仲新设立的上海分会和华南分会区分开来；

■ 根据案件的具体情况以及双方磋商的情形选择其他仲裁机构，包括香港国际仲裁中心、国际商会仲裁院、美国仲裁协会或者澳大利亚国际仲裁中心都是有效的选择。

已签订由贸仲仲裁的仲裁协议

这里应当区分两种情形：（一）仲裁协议约定在贸仲北京总会仲裁、或者在贸仲天津分会仲裁或者贸仲西南分会/重庆仲裁；（二）仲裁协议约定在贸仲上海分会或贸仲华南分会仲裁、或者约定在贸仲上海仲裁或贸仲深圳仲裁。

第一种情形的仲裁条款，不会产生争议，可以继续使用。因为贸仲北京总会以及其天津分会和西南/重庆分会不存在独立以及管辖权的问题， 因此当事人无需担心管辖权之争会给此类仲裁条款带来任何影响。

第二种情形，即如果仲裁协议中已经约定贸仲上海分会或华南分会为仲裁机构，我们的建议：

■ 在实际争议发生前，尽快修改和明确相关的仲裁条款。尽量不要等到争议发生再去修改仲裁条款，因为一旦将来发生争议，双方很可能根本无法对任何事项达成合意，修改仲裁条款更是不可能了；

■ 仲裁协议的修改需要明确如下事项：（1）仲裁机构：写明提交贸仲北京总会仲裁，或提交上海国仲或深圳国仲仲裁；（2）仲裁程序：适用贸仲 2012 版仲裁规则或 2005 版仲裁规则，或上海国仲或深圳国仲重新制定的仲裁规则； 以及（3）仲裁员名册：采用贸仲的仲裁员名册，或上海国仲或深圳国仲重新编制的仲裁员名册等。

已发生争议的情形

这是指仲裁条款约定贸仲上海分会或贸仲华南分会仲裁，且争议已经产生。这时可以区分两种情形处理：

第一种情形是：仲裁条款约定贸仲上海分会或贸仲华南分会仲裁且争议已经产生，并且双方当事人已经将争议提交给上海国仲或深圳国仲，案件在实质审理过程中。在这种情形下，当事人应当在仲裁程序中明确地提出此问题，而不能采取含糊和不置可否的态度。申请人如果愿意在上海国仲或深圳国仲继续审理，则其应当书面确认该仲裁机构并邀请被申请人也书面确认仲裁机构。通常情况下，由于案件已经进入实质审理阶段，被申请人通常不会在此阶段对仲裁庭和仲裁机构的管辖权再提出异议，案件通常可以继续审理下去。而且，经过苏州中院的裁定后，我们预计上海国仲和深圳国仲对此类仲裁案件，会在受理案件时或仲裁程序中，请双方当事人签署书面文件确认其知悉并同意上海国仲和深圳国仲的管辖权，以免在将来的执行中因同一原因再发生不予执行的问题。

如果申请人选择去贸仲而不是继续在上海国仲或深圳国仲仲裁，申请人可以申请撤销仲裁申请，并转而向贸仲新设立的上海或深圳/华南分会提起仲裁。被申请人如持有不同意见，并不影响申请人撤回其仲裁申请，但是，如果被申请人已经提起反请求，则反请求在被申请人确认仲裁机构后，应当可以在上海国仲或深圳国仲继续审理。然而在这种情形下，由于申请人与被申请人选择了不同的仲裁机构（申请人愿意去贸仲仲裁，而被申请人则要在独立后的仲裁机构仲裁），双方将不可避免地陷入仲裁管辖权之战，即双方必须首先去法院解决仲裁机构的管辖权问题，否则两个仲裁机构可能都会因为另一方当事人提出管辖权异议而无法进入案件实体审理。

另一种情形是：仲裁条款约定贸仲上海分会或贸仲华南分会仲裁且争议已经产生，但当事人还没有提交贸仲或独立后的上海国仲或深圳国仲，而且双方也无法就仲裁机构达成任何一致意见。这的确是两难的选择，因为无论申请人选择任何一家去启动仲裁，另一方都有可能提出相反的意见。而在目前的情形下，估计上海国仲/深圳国仲或者贸仲总会新设立的贸仲上海分会或贸仲华南/深圳分会都有可能根据表面证据先受理案件。但案件受理后，当事人马上面对的问题就是对方的管辖权异议，而双方可能将为此花费较长的时间和较大的精力去打这场管辖权之战。

目前最高人民法院对贸仲分会管辖权以及仲裁机构独立的问题尚都没有最终明确的决定，导致当事人无论将争议提交任何一个仲裁机构都可能面临潜在风险。因此，当事人需要在专业人士的协助下，针对案件情况具体分析，综合各方面的因素解决管辖权的难题，包括将管辖权争议提交有管辖权的法院进行确认，待法院作出相应的民事裁定书后，再按照法院的裁定到有管辖权的仲裁机构进行仲裁。

[4] 虽然上海国仲已经正式更名为“上海国际经济贸易仲裁委员会/上海国际仲裁中心”，而贸仲上海分会成为其曾用名，但其仍然继续受理当事人仲裁条款中约定贸仲上海分会仲裁的案件。同样，深圳国仲已经正式更名为“华南国际经济贸易仲裁委员会/深圳国际仲裁院”，贸仲华南/深圳分会为其曾用名，但其也仍然继续受理当事人仲裁条款约定贸仲华南/深圳分会仲裁的案件。

康 义 合伙人 Tel：8610 8519 2161 Email：kangy@junhe.com
万 兴 律 师 Tel：8610 8519 2170 Email：wanxing@junhe.com
朱宪武 律 师 Tel：8610 8519 2415 Email：zhuxw@junhe.com