What Constitutes a Supplementary Award of CIETAC Arbitration? – A Recent Interpretation by a Hong Kong Court

Steven Wei SU*

In an action brought before the Court of First Instance of High Court of Hong Kong Special Administrative Region ("Hong Kong") for enforcing a CIETAC arbitral award earlier this year, Justice John Saunders rejected a claim that three official letters issued by the Secretariat of CIETAC constituted a supplementary/additional arbitral award. Justice Saunders in this case provides an in-depth analysis from a common law perspective on what constitute a supplementary award under Article 48 of the CIETAC Arbitration Rules.

Background

In September 2009, a CIETAC arbitral award was issued on a dispute over a sale contract between PetroChina International Hong Kong Co. Ltd.("PetroChina") and Shandong Hongri Acron Chemical Joint Stock Co. Ltd. ("Shandong Hongri"). The award ruled, among other things, that Shandong Hongri should return the goods purchased from PetroChina and PetroChina should repay Shandong Hongri the purchase price together with some other payments within 30 days from the date of the award. However, the award specify neither the time that Shandong Hongri should return the goods to PetroChina and the quality of the goods to be returned, nor whether the return of goods constitutes a condition precedent to the repayment. When enforcing the award, the parties soon find themselves in the disputes on the performance order of their respective obligations and the quality of the goods to be returned.

In November 2009, upon written applications of PetroChina, the Secretariat of CIETAC issued two letters, respectively interpreted that the return of the goods should be performed immediately after the issuance of the award by virtue of Article 49(1) of the CIETAC Arbitration Rules, and the return of the goods in the state as they were received constituted a precondition to the repayment by PetroChina. Article 49(1) provides that "the parties must automatically execute the arbitral award within the time period specified in the award. If no time limit is specified in the award, the parties shall execute the arbitral award immediately." The letters were printed on CIETAC letterhead and fixed with the stamp of the Secretariat of CIETAC, but carrying no signature of any members of the three-arbitrator tribunal, despite they both stated that "the arbitral tribunal held…." The applications of PetroChina for clarifying the arbitral award, which directly resulted in these letters, were not

forwarded to Shandong Hongri. Upon a further request from PetroChina, CIETAC issued the third letter on 30 March 2010, which was forwarded to Shandong Hongri, stating that the previous two letters were "supplementary explanations to the arbitral award" and "form part of the said arbitral award". The third letter was signed by two arbitrators with the application letter from PetroChina attached.

Shandong Hongri filed an ex parte application to the Hong Kong court for and was then granted an order to enforce part of the award against PetroChina in November 2009. PetroChina then applied to the court for setting aside the order. In the following hearings, the legal nature of the three letters was revealed as one of the key issues. In March 2010, pursuant to 14A of the then Hong Kong Arbitration Ordinance, Shandong Hongri applied to the Hong Kong court for a trial of several preliminary issues including the effect of the three letters. The court considered, among other things, whether the three letters CIETAC issued are binding the parties as a supplementary award under Article 48 of the CIETAC Arbitration Rules. It is interesting to note that the court's ruling on the effect of the letters was made after it had decided that the obligation to return the goods by Shandong Hongri constituted a condition precedent to the repayment by PetroChina.

View of the Applicant

PetroChina, through its counsel, contended that the two letters issued in September 2009 constituted a proper supplementary award under Article 48 of the CIETAC Arbitration Rules. The legal bases underlying the contention were that the letters were issued on the letterhead of the CIETAC and, notwithstanding the first two letters were not signed by arbitrators, they were fixed with the stamp of CIETAC Secretariat. More importantly, the third letter, which was signed by two arbitrators and stamped by CIETAC, had made it clear that the two previous letters were "supplementary explanation" to the award and therefore constituted a part thereof. Article 48 provides that the tribunal, upon the request of a party, may make supplementary award within 30 days from the award issuance date or within a reasonable time, if on its own initiative, to issue supplementary award to deal with omitted claims or counter-claims.

Did the letters constitute an additional award?

Shandong Hongri, through its counsel, argued that none of the three letters constituted a supplementary award and therefore did not form part of the award, which was final and binding upon its delivery. The argument was advanced primarily on three bases, namely violation of the fundamental principle of law, noncompliance with Article 48 itself and contradiction to the natural justice.

Shandong Hongri first argued that upon the delivery of the final and binding arbitral award, the tribunal should have no jurisdiction to change it. Presuming that the contents of the letters were variation of the award, its counsel submitted that "upon the delivery of the arbitral award on 21 September 2009,

the tribunal became *functus officio,* and, in arbitral tribunals having no inherent jurisdiction to vary a final and binding award, the letters were of no effect." A variation of a final and binding award by the tribunal would violate the doctrine of *functus officio,* a fundamental principle of law. This submission was upheld by Justice Saunders, who ruled that "unless some appropriate provisions are found in the Arbitral Rules of CIETAC, then there is no basis on which the tribunal may supplement its award in the manner it has purported to in this case." He accepted completely the submission by reason of the doctrine of "*functus officio*" and held that "the three letters cannot form part of the letters.

Shandong Hongri opposed to the assertion that the letters were issued as supplementary award in accordance with Article 48 and therefore formed part of the award. Justice Saunders found that "Article 48 permits the arbitral tribunal, at the request of either party within 30 days of the award to issue an additional award 'on any claim of counterclaim which was advanced in the arbitration proceeding but omitted from the award'". He held that "there is no basis that clarification may be sought under Article 48" as "there is nothing in the evidence put before me by PetroChina to establish that the issue of which is dealt with by the three letters constitutes a claim or counterclaim advanced in the arbitration proceeding". In making the judgement, there were also other facts found relevant to ascertaining the legal nature of the letters. Justice Saunders found that all the letters were issued on the dates falling out of the time limit permitted by Article 48 for issuance of a supplementary award, given they were requested by PetroChina. Meanwhile, the first two letters failed to stipulate they are purported as such in its legal nature. By reference to this finding, he further confirmed his view that the letters were not a supplementary award, as they were so claimed by PetroChina or the Secretariat of CIETAC. However, the letters had the effect of referring to the parties to Article 49(1) of the Arbitration Rules, according to Justice Saunders, who apparently considered the provision when ruling on the performance order.

The submission of Shandong Hongri that the issuance of the three letters was in breach of the rule of natural justice was also upheld by Justice Saunders. The decision was based on the finding that the correspondences from PetroChina to CIETAC which directly resulted in the first two letters were not copied to Shandong Hongri, and the third correspondence which resulted in the third letter was not copied to it before these letters were issued. The Judge held that the failure of notice of the applications actually deprived of Shandong Hongri an equal opportunity of putting forward its argument on the issues dealt with in there and the opportunity of having their voices heard by the tribunal. The Judge commented from the common law point of view that "it is the fundamental proposition of natural justice of the decision maker may not make a decision after hearing from one side only, without giving the other side the opportunity to be heard." As such, the Judge refused to consider the three letters as the part of the award.

Observations

For the legal professionals practising both common law and PRC laws and the corporate counsels involved in handling cross-jurisdiction matters, the above ruling is highly instructive. The CIETAC arbitration proceeding was reviewed by a common law court who apparently hold different views on certain legal concepts, such as the theory of *functus officio*, natural justice, certain legal procedural justice etc with the Secretariat of CIETAC and some of the arbitrators. Thus, it would be unwise to use the difference to judge right or wrong or the creditability of CIETAC in international arbitration. However, it is undeniable that the certain parts of the arbitration proceeding were handled in a defective way, as the court had pointed out.

In general, the ruling has reminded the existence of some very delicate cross-jurisdiction issues like those demonstrated in this case and alarmed the need of exercising extra prudence in handling such issues. One should know that it is no longer the case where foreign investors must understand China, as more PRC companies are doing business globally where handling multiple jurisdictional elements becomes unavoidable. Companies must engage counsels who are not only knowledgeable about all the jurisdictions concerned, but also having significant hand-on experience in the relevant areas.

In specific, the ruling has highlighted a few issues for arbitration proceedings administered by the arbitral institutions in China. First, supplementary award must be issued strictly in accordance with the time limit as provided in the arbitration rules, especially when it is to respond to a request of a party. In addition, good practice requires that an expressive statement of the legal nature of the document be included expressly. One must also remember that, as provided in the current CIETAC Arbitration Rules, a supplementary award is exclusively for dealing with a claim or a counterclaim that is omitted from the original award. Secondly, if the arbitral award is expected to be recognized and enforced by a common law court, the tribunal and counsels of the parties shall ensure that the entire procedure of making the award has given each party equal opportunity to have their views be fully heard and considered. Thirdly, although not a direct result of the above ruling, the basic legal sense suggests that Article 48 of the current CIETAC Arbitration Rules may need to be reformed to narrow down the use of supplementary award. The judge did not make a thorough analysis on the difference between varying and making supplement to an award. Caution is needed when making supplementary award. Article 56 of the PRC Arbitration Law may have set a good model directing future revision of Article 48 or related practice. Article 56 provides that “the arbitral tribunal shall make an additional award, if there are any calculation or wording mistakes in an award, or if there is an omission in the award on the matter which has been decided by the tribunal.”

About the author:

Steven Wei SU is a senior partner of Guo Lian PRC Lawyers. His practice focuses on cross-border investment, transactions and operations. Mr. Su has significant experience in advising foreign investors and funds on the China-focused mergers and acquisitions, investment and transactions, onshore fund formation and placement, commercial dispute settlement, general corporate matters, etc.

Mr. Su can be contacted at ssu@guolian.com.cn
