

SYMPOSIUM ON GLOBAL LABS OF INTERNATIONAL COMMERCIAL
DISPUTE RESOLUTION

CONSERVATIVE INNOVATION: THE AMBIGUITIES OF THE CHINA INTERNATIONAL
COMMERCIAL COURT

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In the global development of new international commercial dispute resolution centers, the China International Commercial Court (CICC) represents a genuine innovation in China's legal history. The CICC aims to become a dispute resolution "one stop shop" (combining litigation, arbitration, and mediation) for Belt and Road Initiative (BRI) related disputes. Despite its name and ambition, however, the CICC operates more like a domestic court. The CICC's stringent jurisdictional requirements and conservative institutional design show that the CICC cannot serve its stated objective of attracting new investment opportunities or foreign parties to the Chinese forum.¹ These defects are not fatal but will have to be addressed for the CICC to reach its full potential of hybridization of litigation and arbitration both in and beyond China.

The BRI will encounter significant challenges given that the contracting parties are from diverse legal systems, and the countries along the BRI are at different stages of development. Most studies have focused on the need for, and merits of, the establishment of the CICC, noting that it is "potentially most innovative in providing multiple mechanisms for dispute resolution," considering its function as a "one-stop shop" dispute resolution platform.² While some may see the "one-stop shop" more as a branding exercise, many other international commercial courts have the same type of ambition.³ Commentators also highlight the challenges faced by the CICC in terms of its procedural limitations and general functioning.⁴ This essay analyzes whether the creation of the CICC will fulfil the dispute resolution functions required for the successful operation of the BRI by focusing on two key challenges it will face: the court's jurisdiction and the enforceability of its judgments.

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¹ Zhang Yongjian, *Towards a Fair, Efficient and Convenient Dispute Resolution Mechanism for B&R-related International Commercial Disputes: China's Practice and Innovation*, CICC RESOURCES (July 2, 2018).

² Matthew S. Eric, *The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative"*, 22 ASIL INSIGHTS (Aug. 31, 2018). See also Mark Feldman, *"One-Stop" Commercial Dispute Resolution Services: Implications for International Investment Law*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2 (Julien Chaisse et al. eds., 2020).

³ Susan Finder, *Comments on China's International Commercial Courts*, SPC MONITOR (July 9, 2018).

⁴ Wei Cai & Andrew Godwin, *Challenges and Opportunities for the China International Commercial Court*, 68 INT'L & COMP. L. Q. 837 (2019).

Jurisdictional Challenges

The CICC does not enjoy universal or broad subject-matter jurisdiction. On the contrary, its jurisdiction is narrowly crafted to cover disputes related to international commercial and civil matters. This does not include investor-state disputes or inter-state trade disputes.⁵ The CICC only has jurisdiction over the five main types of commercial and civil disputes that are provided for in the 2018 judicial interpretation issued by the Supreme People's Court (Judicial Interpretation on the CICC).⁶ The CICC may assume jurisdiction either based on the parties' consent or pursuant to a referral by the Higher People's Court with the approval of the Supreme People's Court (SPC).

Article 2(1) and Article 2(4) of the Judicial Interpretation on the CICC specify that the CICC's jurisdiction over disputes with a monetary value of over RMB 300 million is based on the written consent of the parties. This consent is only valid in the case of disputes that have an actual connection to China.⁷ Articles 2(2), 2(3) and 2(5) of the 2018 Judicial Interpretation on the CICC allow for alternative ways for the CICC to establish jurisdiction, for instance, through referral from higher courts, or at the behest of the SPC if the cases have significant national impact. However, at this stage, it is still unclear how the SPC will exercise this judicial discretion. As of late 2020, the CICC had only heard cases referred from the lower courts rather than on the basis of the consent of the parties. Moreover, none of the cases published on the CICC's official website have been BRI-related disputes.

It is also noteworthy that the CICC's jurisdiction is limited to international commercial disputes. According to Article 3 of the Judicial Interpretation on the CICC, a commercial case is international if it passes the "three-element test" in defining a "foreign element", that is, either the parties, subject matter, or factual circumstances has a connection with a foreign jurisdiction.⁸ The CICC is part of the SPC and before the creation of the CICC, parties were not allowed to choose the SPC to hear international commercial disputes. In this respect, the SPC referring matters to the CICC may prove attractive, especially if the parties are inclined to submit their disputes to a Chinese court, or if the cases are already under Chinese jurisdiction. If consent to the CICC's jurisdiction becomes a precondition for Chinese investment along the BRI, the CICC may quickly gain prominence.⁹ However, such a jurisdictional approach poses many difficulties in practice, as we illustrate below.

⁵ Justice Zhang Yongjian, *Towards a Fair, Efficient and Convenient Dispute Resolution Mechanism for B&R-Related International Commercial Disputes: China's Practice and Innovation*, CICC RES. ARTICLES (July 2, 2018).

⁶ Namely, cases in which the parties have chosen the jurisdiction of the SPC with an amount in dispute of at least 300 million Chinese yuan; cases which are subject to the jurisdiction of the higher People's courts that nonetheless considers the cases should be tried by the SPC; cases that have a "significant nationwide impact"; cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards; and, finally, any other international commercial cases that the SPC considers "appropriate" to be tried by the International Commercial Court. See *Zuigao renmin fayuan guanyu sheli guoji shangshi fating ruogan wenti de guiding* (最高人民法院关于设立国际商事法庭若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court] issued by the Supreme People's court, June 25, 2018 and effective July 1, 2018, (hereinafter Judicial Interpretation on the CICC), art. 2.

⁷ The origin of this rule is Article 34 of Chinese Civil Procedure Law, which stipulates that the court chosen by the parties must have an actual connection with the dispute. See *Zhonghua renmin gongheguo minshi susongfa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China], promulgated by the Standing Committee of the National People's Congress on Apr. 9, 1991 and revised on Jun. 27, 2017, (hereinafter CPL), art. 34.

⁸ *Judicial Interpretation on the CICC*, *supra* note 7, art. 3. See also Zhengxin Huo, *Two Steps Forward, One Step Back: A Commentary on the Judicial Interpretation on the Private International Law Act of China*, 43 HONG KONG L.J. 692 (2013).

⁹ It is arguable whether consent to the CICC's jurisdiction will become a precondition for BRI projects as many BRI cases are not investment cases, they are construction disputes. Whether the CICC has the capacity to handle a high volume of cases also depends on local law

In the first scenario, consider two companies, Company A, a Pakistani company, and Company B, a Chinese company, who are willing to draft an infrastructure contract to provide water and sanitation services in Pakistan. Company B is funded by the Silk Road Fund, so the project is a typical BRI project. The first difficulty relates to drafting an effective dispute resolution clause that opts for the CICC as the dispute resolution forum given the unclear jurisdictional threshold of “amount in dispute of at least RMB 300 million” in the Judicial Interpretation on the CICC. There is not always a clear correlation between the total value of a contract and the amount in dispute. In fact, no lawyer can predict the “size of the dispute” when drafting an effective dispute resolution clause. In addition, even cases exceeding RMB 300 million may face problems in reaching the CICC, as the plaintiff may amend the claim. As a matter of practice, the cases that are most likely to come to the CICC are disputes involving state-owned or state-linked enterprises, which are the only Chinese entities involved in large transnational projects. Notwithstanding the lack of explicit language to this effect, the CICC is essentially designed to adjudicate projects that involve substantial state interests and which invariably involve state-controlled entities.

In the second scenario, assume that Company A is the Pakistani supplier under the water and sanitation services contract for thirty years, and subsequently receives sizable investments from Chinese Company B. Due to local pressure, the water tariff is frozen and a dispute arises between the parties. Both Company B and the Silk Road Fund have potential claims against Company A. Instead of costly litigation, Company A and Company B may seek mediation in a neutral forum. Unfortunately, however, the CICC, as a “one-stop shop,” only works with Chinese mediation institutions. Company A may consider the CICC to be non-neutral, and would be unlikely to agree to submit the dispute before the CICC. In the end, the parties may prefer alternative dispute resolution institutions over the CICC, as several international arbitral institutions are positioning themselves to attract BRI-related disputes.

In the third scenario, consider two companies, Company C and Company D. Both companies are wholly owned by a Pakistani corporation. These two companies are registered in China and have their principal business there. If these two companies want to conclude a contract in China and conduct business in China directly related to the BRI, they cannot submit their case to the CICC because they do not meet the requirements under the “foreign element” test. Under Chinese Company Law,¹⁰ foreign-invested enterprises are considered to be domestic entities since they are registered in China and the contract was concluded and performed in China. It is questionable why the CICC would adopt such a rigid test, which is moreover contrary to the general practice in other Chinese courts, whereby following two judicial interpretation documents issued by the SPC in 2012 and 2015,¹¹ the meaning of “foreign” has been expanded to those civil or commercial relationships that have a substantial connection with a foreign jurisdiction, even if they do not technically satisfy the three-element test.¹²

and the bargaining power of the parties. *See generally* Susan Finder, *Some Comments on the China International Commercial Court Rules*, SPC MONITOR (Feb. 11, 2019).

¹⁰ Zhonghua renmin gongheguo gongsifa (中华人民共和国公司法) [Company Law of the People’s Republic of China] (2013 Amendment), promulgated by the Standing Committee of National People’s Congress on Dec. 28, 2012 and effective on Jan. 1, 2013, arts. 2 and 191.

¹¹ Art 1 of Interpretation I of the Supreme People’s Court on Issues Concerning the Application of the Law on Choice of Law for Foreign-Related Civil Relationships (SPC Interpretation No 24 of 2012) (promulgated by the Supreme People’s Court, Dec. 28, 2012; effective on Jan. 7, 2013), Art. 522 of Judicial Interpretation by the Supreme People’s Court on the Civil Procedure Law of the People’s Republic of China (SPC Interpretation No. 5 of 2015) (adopted by the Supreme People’s Court, Dec. 18, 2014; effective on Feb. 4, 2015).

¹² Zhengxin Guo & Man Yip, *Comparing the International Commercial Courts of China with the Singapore International Commercial Court*, 68 INT’L & COMP. L.Q. 916 (2019).

The above analysis demonstrates that it is difficult to establish jurisdiction under the CICC for disputes related to the BRI. In fact, the CICC is mainly designed to protect investments of Chinese state-owned enterprises (SOEs) in BRI projects.

The Problems of Transnational Enforcement

The enforceability of court judgements in a foreign jurisdiction is a major issue for all courts. There is no international treaty on the recognition and enforcement of foreign court judgments comparable to the New York Convention for the recognition of foreign arbitral awards. This means that if a Chinese party prevails against a foreign party in the CICC, the Chinese party would likely have trouble getting the Chinese court judgment recognized and enforced by a court outside China. This is not the situation when the disputes are resolved by arbitration institutions under the CICC, as the enforcement of arbitral awards is guaranteed under the New York Convention.

At the international level, China has signed but not ratified the Hague Convention on Choice of Court Agreements. The enforcement of court judgments is based on bilateral judicial assistance treaties in civil and commercial matters under conditions of reciprocity. As of August 2018, China has signed thirty-nine bilateral treaties on judicial assistance in civil and commercial cases, thirty-seven of which have already come into effect.¹³ In practice, this covers only a small number of the BRI countries and regions. To improve enforceability, China may consider ratifying the Hague Convention in the future. Reciprocity, however, is unlikely to provide a reliable basis for seeking enforcement of CICC judgments abroad, since the issue of reciprocity would be determined solely by the court in the foreign jurisdiction. This uncertainty may hinder the development of the CICC, as parties will not be able to predict with confidence whether a foreign jurisdiction will recognize a CICC judgment.

At the local level, the enforceability of the CICC's judgments is guaranteed by Article 15 of the Judicial Interpretation on the CICC, which stipulates that all judgments and orders made by the CICC are legally binding. There is no appeals system under the CICC, as it is part of the SPC, the highest court in China, so the judgments are final. In this respect, the CICC is not without attraction, especially when the defendant is a Chinese SOE with assets located primarily in China. If the dispute is resolved by mediation the CICC can, at the parties' request, convert the mediation agreement into a court order to facilitate its enforcement.¹⁴ Considering the CICC's fundamental objective to be a "one-stop shop" for dispute resolution for BRI related disputes, the enforcement issue relating to SOEs in China could be a pragmatic or even instrumental means to facilitate the wider acceptance of the use of the CICC in BRI disputes.

Other Viability Issues: Judicial Change and Legal Culture in China

Much is still unclear about how the CICC will function. Article 9 of the Judicial Interpretation on the CICC provides the rules of evidence. Evidence can be submitted before the CICC in English and without translation upon the parties' consent, a rule that is laudable at first sight as it aims to reduce translation costs for the parties. However, the proceedings will be conducted in Chinese, and hence English-language evidence will need to be translated, introducing some degree of uncertainty.¹⁵ In addition, parties to the proceedings are not permitted to appoint foreign lawyers, which might be preferable to litigants of foreign nationalities (and when the applicable law is foreign law as agreed by the parties).

¹³ LUO Dongchuan, *Consultation, Cooperation and Common Development — Keynote Speech at the First Seminar of the International Commercial Expert Committee*, CICC (Aug. 26, 2018).

¹⁴ *Judicial Interpretation on the CICC*, *supra* note 7, arts. 11-13.

¹⁵ CPL, *supra* note 8, arts. 11 and 262.

On a different but related matter, it is noteworthy that only Chinese citizens can serve as judges on the CICC,¹⁶ even if the applicable law is foreign law, and only Chinese-admitted lawyers can act as legal representatives. To “internationalize” itself (both within China and beyond throughout the BRI), the CICC has established an expert committee as an institutional innovation within a rigid and traditional legal system. While the practical value of this committee remains to be seen, the CICC faces the challenge of not being able to attract leading international experts and not using sufficiently flexible rules of representation for foreign lawyers.

Furthermore, CICC judges are surprisingly only appointed to the court on a part-time basis. They will continue to have ongoing responsibilities in the SPC and will be simultaneously burdened with cases in other fora.¹⁷

Conclusion

The CICC has not yet altered significantly the international landscape of commercial dispute resolution in the region. At best, the CICC multiplies and diversifies the dispute resolution forums in China and in the broader context of the BRI. Given the CICC’s substantial jurisdictional and enforcement limitations, the extent to which it will be able to meet the specific demands stemming from the BRI remains doubtful. Whether the parties will choose the CICC to resolve their disputes is subject to many considerations, such as the size of investment, whether the litigants have substantial assets in China, the governing law, and the CICC’s attitude towards SOEs when disputes arise. Further steps and reforms will be needed to achieve the potential of hybridization of litigation and arbitration in China and beyond.

¹⁶ Zhonghua renmingongheguo faguanfa (中华人民共和国法官法) [Judges Law of the People’s Republic of China], promulgated by the Standing Committee of the National People’s Congress on Feb. 28, 1995 and revised Apr. 23, 2019, art. 12(1).

¹⁷ See Susan Finder, *China International Commercial Court Starts Operating*, SPC MONITOR (Jan. 14, 2019) (identifying Judge Zhang Yongjian as having three simultaneous administrative roles, as the Deputy Chief Judge of the First Circuit Court of the SPC, head of the SPC Fourth Civil Division and head of the First CICC).