

# Practically useful or just politically driven?

## Establishment of the China International Commercial Courts

Guest contribution by Dr. Joachim Glatter

### China's strategic goals in the legal area

Since opening up to foreign trade and investment at the end of the 1970s, China has well understood that good laws – at least in the economic sphere – are key to attracting foreign investment and international trade. China's international ambitions (in particular the Belt and Road Initiative, or BRI) have given rise to two further strategic goals: to secure legal protection for China's (and Chinese companies') economic interests abroad, and to gain international significance in the realm of judicial institutions. On a political level, the Communist Party specifically backed these goals in a decision passed by the Fourth Plenum, held in October 2014. China has subsequently taken institutional steps to address the two typical forms of controversy in international business: investor-State disputes and cross-border commercial disputes.

### Investor-State disputes

Claims of foreign investors against their investment's host State can be based on either bilateral investment treaties (BITs) or multilateral treaties. In most of the BITs and treaties concluded or acceded by China, China ▶



has agreed to arbitration by the International Centre for the Settlement of Investment Disputes (ICSID) or arbitration under the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules. Recent years have seen the first real-world cases involving Chinese claimants or China as a respondent, illustrating that China – partly in its own interest – considers compliance with its dispute resolution obligations under BITs and treaties to be an important matter.

On an institutional front, in 2016 and 2017, two important Chinese arbitration institutions adopted rules enabling them to administer investor-State arbitration proceedings: the China International Economic and Trade Arbitration Commission (CIETAC) and the Shenzhen Court of International Arbitration (SCIA).

## Commercial disputes

### Arbitration

Traditionally, cross-border commercial contracts between Chinese and non-Chinese companies provide for dispute resolution by arbitration. Parties are free to choose between foreign or Chinese arbitration institutions. Major Chinese arbitration institutions heavily involved in international cases include CIETAC, SCIA and international arbitration commissions in Beijing and Shanghai.

### Litigation: establishment of the CICC

In the realm of litigation, on July 1, 2018, the Chinese Supreme People's Court (SPC) – again with appropriate political backing – established the China International

Commercial Courts (CICC) by adopting the corresponding provisions (CICC Provisions). According to official statements, these provisions are a strategic part of the BRI, aimed at providing an efficient dispute resolution mechanism. Coordinated by a division of the SPC, two CICC tribunals currently exist: one in Shenzhen, focusing on disputes along the maritime Road portion of the BRI as well as in the “Greater Bay” area; and one in Xi'an, in charge of disputes that arise in the Belt area.

### Broad scope of jurisdiction and special features

The scope of international commercial cases to be litigated by the CICC is broad, enabling the CICC (that is to say, the SPC) to exert influence in those legal areas it deems important. Apart from cases in which the parties have chosen the jurisdiction of the CICC (for this, the amount in dispute must exceed 300 million RMB), the CICC can also try disputes that have a nationwide impact or that the SPC simply considers appropriate.

Furthermore, the CICC is intended to be part of a seamless one-stop dispute settlement platform, integrating litigation, arbitration and mediation. A close network of selected mediation and arbitration institutions is to be knit together and receive support from the CICC, for example by means of interim measures (preservation of property and evidence) and enforcement of arbitral awards. It is currently still unclear whether foreign arbitration institutions can also be part of the network, as well as whether the CICC would support them by ordering interim measures (breaking with Chinese court practice to date).

Procedurally, it is remarkable that in CICC proceedings, evidence from outside China does not need to be no-

tarized and legalized – processes which in practice are often time-consuming and expensive.

### Weaknesses compared to arbitration

Litigating a cross-border dispute at the CICC has some disadvantages compared to arbitration, particularly from a foreign perspective. This is because the CICC Provisions (issued in the form of an Interpretation of the SPC) cannot deviate from higher-ranking Chinese laws, nor can they overcome international shortcomings.

### Foreign arbitrators/judges

All major international arbitration institutions, including those seated in China, permit the parties to choose arbitrators of any nationality. By contrast, all judges in China (including those at the CICC) must by law be Chinese nationals. Though the integrity of the CICC judges is not in question, an important trust-building element typical in the context of international arbitration is missing. Foreign experts in an International Commercial Expert Committee may only advise on foreign laws and act as mediators.

### No foreign lawyers

Furthermore, lawyers representing foreign clients in CICC proceedings must be Chinese lawyers. This is of course not required for proceedings at arbitration institutions outside of China – though clients must also hire Chinese lawyers for proceedings at Chinese arbitration institutions, at least when the matter in dispute is governed by Chinese law.



## Language

In accordance with Article 262 of the Civil Procedure Law, the procedural language of CICC litigation must be Chinese, though a foreign party can ask for translations at its own expense. This requirement remains unaltered by the regulations that require judges at the CICC to be able to use English as a working language and that permit a party to submit evidence in English without a Chinese translation, if agreed to by the opposing party. However, arbitration proceedings can be conducted in English if stipulated in the parties' arbitration agreement (a condition foreign parties should insist on in contractual negotiations).

## Enforcement

Enforcement of CICC judgments outside of China will often be more difficult than enforcement of arbitral awards made by an arbitration institution seated in China. Currently there is no multilateral treaty on the enforcement of court judgments that is comparable to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also ratified by China). Enforcement of CICC judgments abroad will largely depend on reciprocity and will, therefore, be less of a guarantee – though reciprocity prospects recently improved slightly as a result of Chinese courts having enforced judgments made by US and Singapore courts (likely in connection with the BRI policy).

## Conclusions

At least for the time being, the CICC may not be an efficient forum for resolution of international commercial

disputes, as companies and lawyers will most likely continue to prefer international arbitration for its more flexible and predictable legal framework.

It will also be difficult for Chinese arbitration institutions to gain international acceptance as an alternative forum for investor-State arbitrations.

However, from a political perspective, it is expected that China will request to include CIETAC or SCIA as forums for investor-State arbitrations in future new or revised BITs and multilateral treaties. Chinese companies may also try to insist on resolution of commercial disputes by the CICC. Whether such requests will be successful will depend in part on the Chinese party's negotiating power, and especially on the economic interests and requirements of the respective partner State or foreign company. ◀



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- 1 Fourth Plenary Session of the 18th Central Committee of the Communist Party of China. For detailed explanations see Susan Finder's "Supreme People's Court Monitor" issue dated March 11, 2018, <https://supremepoplescourtmirror.com/2018/03/11/update-on-chinas-international-commercial-court/> (last visited July 18, 2018)
- 1 Overview at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iialnnerMenu> (last visited July 18, 2018)
- 3 See e.g. the German-Chinese BIT effective November 11, 2005, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/736> (last visited July 18, 2018)
- 4 See e.g. the cases listed on the ICSID website
- 5 CIETAC International Investment Arbitration Rules (for Trial Implementation), Chinese and English on CIETAC's website
- 6 See Article 2.2 of the Arbitration Rules of the Shenzhen Court of International Arbitration and the Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules, effective December 1, 2016, Chinese and English on the website of the Shenzhen Court of International Arbitration
- 7 See Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions of the Leading Group for Deepening Overall Reform, promulgated on January 24, 2018, Chinese text under <https://www.yidaiyilu.gov.cn/xwzx/roll/45584.htm> (last visited July 18, 2018) and statement made by SPC representative at a press conference held on June 28, 2018 (published on the CICC website in Chinese and English, see <http://cicc.court.gov.cn/html/1/218/149/192/768.html> and <http://cicc.court.gov.cn/html/1/219/208/210/769.html>)
- 8 Provisions of the SPC on Several Issues Regarding the Establishment of the International Commercial Court, Fa Shi [2018] 11, Chinese and English on the CICC website under <http://cicc.court.gov.cn/html/1/218/149/192/810.html> and <http://cicc.court.gov.cn/html/1/219/199/201/817.html> respectively (last visited July 18, 2018)
- 9 See e.g. statements and comment in the article "China to fund rule of law for B&R disputes", Global Times, July 2, 2018, available under <http://www.globaltimes.cn/content/1109213.shtml?platform=hootsuite>, last visited July 12, 2018, and the interview given by SPC judge Gao Xiaoli on March 19, 2018 (published on the CICC website, <http://cicc.court.gov.cn/html/1/219/208/209/774.html> (last visited July 18, 2018))
- 10 Article 2 CICC Provisions
- 11 See Articles 11, 14 CICC Provisions
- 12 Article 9 CICC Provisions
- 13 For good overviews of disadvantages see Sun Wei, International Commercial Court in China: Innovations, misunderstandings and clarifications, Kluwer Arbitration Blog, July 4, 2018, and the summary of statements made by the SPC judge Gao Xiaoli provided by Susan Finder (Fn. 1 above)
- 14 Article 9 (1) of the Chinese Judges Law
- 15 Articles 8 (4), 11 and 12 CICC Provisions. Committee members can be viewed at the CICC website (<http://cicc.court.gov.cn/html/1/219/235/237/index.html>, last visited August 27, 2018)
- 16 Article 263 Civil Procedure Law
- 17 See Sun, Fn. 13 above
- 18 Article 4 CICC Provisions
- 19 Article 9 CICC Provisions
- 20 China has signed (but not yet ratified) the Hague Convention on Choice of Court Agreements concluded June 30, 2005, see <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (last visited on July 18, 2018), and is participating in the negotiation of the proposed new Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (see interview of SPC judge Gao Xiaoli, Fn. 9 above)