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# **The China International Commercial Court (CICC): A New Chapter for Resolving International Commercial Disputes in China**

Jingzhou Tao and Mariana Zhong\*

## **Introduction**

Of all the national judicial efforts devoted to the promotion and construction of China's Belt and Road Initiative (BRI), the creation and establishment of China's International Commercial Court (CICC) by China's Supreme People's Court (SPC), China's apex court to hear commercial disputes, is undoubtedly a milestone measure that will eventually upgrade and integrate China's dispute resolution mechanisms<sup>1</sup> for international commercial disputes.

The CICC<sup>2</sup> has certain distinctive features in its conduct of international litigation cases compared with ordinary Chinese trial practices, and provides

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1 For the purpose of this article, China refers to the Mainland and does not include Hong Kong and Macau, special administrative regions of China, which are under separate bodies of legal and judicial systems.

2 See <http://cicc.court.gov.cn>.

the parties to international commercial disputes with another interesting option that, if accepted and trusted by those parties, could attract more international/foreign users, especially those under the BRI, to resolve their disputes in China.

This paper will first discuss the background of the CICC's establishment, followed by demonstrating the distinctive features of the CICC by comparing it with other international commercial courts and with the prevailing legal and judicial practices in China, and finally conclude with the authors' comments on the prospects of and existing issues with the CICC.

## Background

### *Necessity and purposes for establishing the CICC*

The idea of setting up an international commercial court in China was contemplated and has evolved under particular economic and social backdrops: China has already become the world's second-largest economy<sup>3</sup> and the largest nation in foreign trade.<sup>4</sup> As of 2013, since the conception and announcement of the BRI, the Chinese Government has been investing heavily in BRI projects, which has led to the conclusion of numerous international trading agreements and construction project contracts between Chinese companies and foreign companies/states of other BRI countries.<sup>5</sup>

Briefly speaking, the BRI is often viewed as China's contemporary national and strategic economic development plan in seeking new driving forces via promoting foreign trade and outbound investment with neighbouring countries. The concept of the Belt and Road was based on China's ancient land and maritime silk road routes, that is, the land route connecting China to Europe through Central Asia and

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3 The socialist market economy of the People's Republic of China is the world's second-largest economy by nominal gross domestic product (GDP) and the world's largest economy by purchasing power parity. Until 2015, China was the world's fastest-growing major economy, with growth rates averaging ten per cent over 30 years [https://en.wikipedia.org/wiki/Economy\\_of\\_China](https://en.wikipedia.org/wiki/Economy_of_China).

4 China surpassed the United States as the world's largest trading nation. China became the world's largest trading nation in 2013, overtaking the US in what Beijing described as 'a landmark milestone' for the country, Angela Monaghan, 'China surpasses US as world's largest trading nation' *The Guardian* (London, 10 January 2014) [www.theguardian.com/business/2014/jan/10/china-surpasses-us-world-largest-trading-nation](http://www.theguardian.com/business/2014/jan/10/china-surpasses-us-world-largest-trading-nation).

5 By August 2018, 103 countries and international organisations had signed 118 cooperation agreements with China on the BRI, Lu Yanan, 'China's merchandise trade with Belt and Road countries tops \$5 trillion in 5 years' (31 August 2018) <http://en.people.cn/n3/2018/0831/c90000-9496013.html>.

the Middle East, and the sea route linking China to Southeast Asia and East Africa. These two routes encompass around 65 countries in modern times. Under the BRI, China outsources multi-billions of United States dollars in contracting with neighbouring countries to build major infrastructure, such as ports, terminals, highways, railways, oil and gas pipelines, and power plants. The BRI, on the one hand, greatly diverted the excessive production capacity in China to neighbouring countries where goods and infrastructure construction are in great need, and on the other hand, were said to benefit the host countries by improving the local people's quality of life, providing job opportunities and driving local economic growth. The BRI is said to be the largest wave of sovereign-dominated outbound investment in modern times.<sup>6</sup>

The prosperity of trade and investments has potentially and inevitably led to more cross-border disputes<sup>7</sup> between investors and states, between states or between investors. China has an inherent desire to become the centre for resolving BRI commercial and investment disputes,<sup>8</sup> which is a somewhat ambitious and challenging task that calls for both 'software' and 'hardware' construction, and the development of its dispute resolution system. For instance, over the past five years, despite the significant increase of the number of international commercial disputes, Chinese courts' handling of these cases has encountered problems, such as the lengthy time involved in the serving process (on foreign parties in particular), difficulties in the court-initiated investigation of facts and in particular, of evidence relating to a party's financial status, as well as in the parties' collection of evidence abroad.

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6 See "One Belt, One Road" is the largest overseas investment initiated by a single country in history' *Sina Finance* (9 May 2017) (in Chinese, '一带一路'是史上单个国家最大规模海外投资), with the Chinese text available at <http://finance.sina.com.cn/stock/usstock/c/2017-05-09/doc-ifeyecfp9413094.shtml?cre=sinapc&mod=g>.

7 In the five years between 2013 and 2017 (ie, the BRI period), the various levels of People's Courts in China handled over 200,000 foreign-related civil and commercial cases, which doubled the caseload in the previous five years. See SPC, Head of the SPC Answered Reporters' Questions on the 'Opinion regarding Establishing One Belt One Road International Commercial Dispute Resolution Mechanism and Institution', promulgated on 28 June 2018 (in Chinese, '最高人民法院负责人就"关于建立"一带一路"国际商事争端解决机制和机构的意见'答记者问'), Chinese text officially available at [www.court.gov.cn/zixun-xiangqing-104392.html](http://www.court.gov.cn/zixun-xiangqing-104392.html); an English translation is not publicly available at the time of writing.

8 Eg, over the past three years, a series of judicial interpretations were issued by the SPC in answering the state's call for judicial support to its BRI. China also set up multiple arbitration centres in the context of the BRI, eg, the Wuhan Arbitration Commission was the first to set up China One Belt One Road Initiative (OBOR) Arbitration Center. The Beijing Arbitration Commission also focused on the transnational arbitration centre buildings.

To answer the government's call for 'serving' the BRI and to create a platform and means of dispute resolution that is, and can be seen as, more neutral, internationalised, credible, efficient and transparent, with sufficient and available expertise for resolving complex and high-stake international commercial disputes, the SPC contemplated and designed the CICC as a dispute resolution mechanism installed within the SPC.<sup>9</sup>

The idea of building the CICC also conforms to, and follows, the global trend, where countries such as the Netherlands, Kazakhstan, Dubai and Singapore have already established such international commercial courts or financial centres.<sup>10</sup>

*The landscape for resolving international commercial disputes in China before the CICC*

Before the CICC, there was no specialised court with the mandate to handle international/foreign-related commercial disputes within the Chinese court system. Foreign parties were often reluctant to accept a Chinese court's jurisdiction in their dispute resolution clause, mainly due to their lack of confidence in the local judicial system and unfamiliarity with the Chinese judicial environment and process.<sup>11</sup>

As a result, foreign parties would often choose arbitration, traditionally in Stockholm, Geneva or Paris, and more recently, Singapore or Hong Kong, if acceptable to their Chinese counterparty, or, as a compromise alternative, arbitration in China under the auspices of Chinese arbitration institutions, such as the China International Economic Trade and Arbitration Commission (CIETAC) or Beijing Arbitration Commission (BAC). Foreign arbitration institutions, however, are still unable to administer arbitration in China as the People's Republic of China (PRC) Arbitration Law only recognises arbitration institutions as those established and registered in

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9 CICC Provisions, Art 1.

10 Netherlands Commercial Court (Netherlands) [www.rechtspraak.nl/English/NCC/Pages/default.aspx](http://www.rechtspraak.nl/English/NCC/Pages/default.aspx); Astana International Financial Centre Court (Kazakhstan) <https://aifc.kz/structure/aifc-court>; Dubai International Financial Centre Courts (Dubai) [www.difccourts.ae](http://www.difccourts.ae); and Singapore International Commercial Court (Singapore) [www.sicc.gov.sg](http://www.sicc.gov.sg)

11 Based on the authors' observation and experience.

China,<sup>12</sup> and ad hoc arbitration is still not allowed to be conducted in China except under very limited circumstances.<sup>13</sup>

Chinese parties, when dealing with international commercial disputes, often prefer to resolve the disputes in China, both for cost concerns and because of their familiarity with the local legal system.<sup>14</sup> Their compromise alternative would be arbitration in Hong Kong or Singapore,<sup>15</sup> and the least desirable – but still frequently seen – arbitration under the rules of international arbitration institutions, such as the International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA).

Arbitration in Hong Kong or Singapore has become a compromise means of resolving international commercial disputes for both foreign and Chinese parties.<sup>16</sup> Enforcement is rarely an issue for arbitral awards issued in both seats, as Hong Kong awards are enforceable in Mainland China based on a bilateral enforcement arrangement,<sup>17</sup> and Singaporean awards are enforceable in China based on the 1958 New York Convention.

### *The concept and materialisation of the CICC*

#### CONCEPTION OF THE IDEA

The idea of the CICC was first publicly expressed in January 2018 with the Opinion regarding Establishing One Belt One Road International Commercial Dispute Resolution Mechanism and Institution (the ‘Opinion’).<sup>18</sup> The Opinion set forth three guidelines: (1) the SPC will establish the international commercial court; (2) the SPC will lead the constitution of an

<sup>12</sup> Art 10, PRC Arbitration Law.

<sup>13</sup> According to Art 10 of China’s Arbitration Law and the CPL, foreign arbitration institutions are also not allowed to conduct international commercial arbitration in China. Pursuant to Art 9(3) of the SPC’s Opinions on Providing Judicial Safeguards for the Construction of Pilot Free Trade Zones (FTZ), promulgated on 30 December 2016, ad hoc arbitration agreements could be deemed as valid on the condition that: (1) both the enterprises are registered in FTZ; and (2) the agreement provides for a specific place in Chinese Mainland, specific arbitration rules and specific arbitrators.

<sup>14</sup> Based on the authors’ observation and experience.

<sup>15</sup> Based on the authors’ observation and experience.

<sup>16</sup> Based on the authors’ observation and experience.

<sup>17</sup> See SPC, Arrangements of the Supreme People’s Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, promulgated on 24 January 2000 and effective as from 1 February 2000 (in Chinese, ‘最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排’), Chinese text officially available at [www.court.gov.cn/shenpan-xiangqing-108.html](http://www.court.gov.cn/shenpan-xiangqing-108.html); bilingual version available at [en.pkulaw.cn](http://en.pkulaw.cn), subject to subscription to the database.

<sup>18</sup> See the Opinion regarding Establishing One Belt One Road International Commercial Dispute Resolution Mechanism and Institution, officially published in June 2018 (in Chinese, ‘关于建立‘一带一路’国际商事争端解决机制和机构的意见’), bilingual version available at [en.pkulaw.cn](http://en.pkulaw.cn), subject to subscription to the database.

expert committee of international commercial matters; and (3) a diversified dispute resolution mechanism shall be established that effectively connects litigation, arbitration and mediation, and forms a ‘one-stop’ dispute resolution centre that is convenient, efficient and cost-effective for users. The Opinion further stressed that the international commercial court to be established shall not only strive to achieve the goals of justice, high efficiency and convenience, but also must respect the principle of party autonomy and achieve a diversified and integral dispute resolution mechanism.

#### CODIFICATION: THE SPC’S CICC PROVISIONS AND ANCILLARY RULES

The Opinion sets out the official position for the establishment of the CICC. In a follow up, on 29 June 2018, the SPC promulgated the Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court<sup>19</sup> (the ‘CICC Provisions’), which essentially codified the general guidelines and requirements of the Opinion. The CICC Provisions in practice bear the effect of law in China as they were issued as a ‘judicial interpretation’ of the SPC.<sup>20</sup>

The CICC Provisions contain 19 articles in total dealing with the scope of the CICC’s jurisdiction, selection of judges, ascertainment of foreign law, collection of evidence generated abroad, ‘one-stop’ diversified solution for international commercial disputes, formation of international commercial expert committee, language and the formality of document filing, among other matters.<sup>21</sup>

Following issuance of the CICC Provisions, and as anticipated and called for by the legal community, the SPC issued three ancillary notices/rules on 5 December 2018 in order to implement the CICC Provisions and to provide clarification on uncertain issues (the ‘Ancillary Rules’). The Ancillary Rules are, namely: (1) the Notice of the General Office of the Supreme People’s Court on the Determination of the First Batch of International Commercial Arbitration and Mediation Institutions Incorporated into the ‘One-stop’ International Commercial Dispute Diversified Resolution Mechanism (the ‘One-stop Solution Notice’);<sup>22</sup> (2) Procedural Rules of the China International Commercial Court of the Supreme People’s Court

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19 Effective as of 1 July 2018. See <http://cicc.court.gov.cn/html/1/219/199/201/index.html>

20 Judicial interpretations are issued for the lower courts to follow in their adjudication process. Legislative law does not attach the effect of law to judicial interpretations; however, in practice, they are often observed and referred to by lower courts.

21 Cf ‘Distinctive features of the CICC’ below.

22 In Chinese, 《最高人民法院办公厅关于确定首批纳入‘一站式’国际商事纠纷多元化解决机制的国际商事仲裁及调解机构的通知》, effective as of 5 December 2018. Chinese version available at <http://cicc.court.gov.cn/html/1/218/149/192/1124.html>. There is no English version published at the time of writing.

(Trial) (the ‘Procedural Rules of CICC’);<sup>23</sup> and (3) Working Rules of the International Commercial Expert Committee (ICEC) of the Supreme People’s Court (Trial) (the ‘Working Rules of ICEC’).<sup>24</sup>

#### MATERIALISATION AND FORMAL ESTABLISHMENT OF THE CICC

On the same date of issuance of the CICC Provisions (29 June 2018), the SPC unveiled the First International Commercial Court and the Second International Commercial Court in Shenzhen and Xi’an, respectively, and announced the appointment of the first batch of eight judges from the SPC to serve as judges of the CICC.<sup>25</sup> All eight judges selected were judges of the SPC working in the chambers specialised for handling international commercial disputes.<sup>26</sup>

On 24 August 2018, the SPC announced the establishment of an ICEC, with 32 Chinese and foreign experts selected by the SPC for their expertise in international commercial arbitration, international investment arbitration, international construction projects and international trade,<sup>27</sup> among other areas.

### **Comparative study with other international commercial courts**

It has become a noticeable trend for countries to set up international commercial courts or similar institutions in order to deal with an increasing number of (and challenges in resolving) international commercial disputes, which often involve great complexity of merits, the high stake of a disputed amount and the broad influence of the final outcome. For instance, Dubai, Singapore and England set up international commercial courts in 2014, 2015 and 2016 respectively.<sup>28</sup>

23 In Chinese, 《最高人民法院国际商事法庭程序规则（试行）》, effective as of 5 December 2018. Chinese version available at <http://cicc.court.gov.cn/html/1/218/149/192/1122.html>. There is no English version published at the time of writing.

24 In Chinese, 《最高人民法院国际商事专家委员会工作规则（试行）》, effective as of 5 December 2018. Chinese version available at <http://cicc.court.gov.cn/html/1/218/149/192/1126.html>. There is no English version at the time of writing.

25 See <http://cicc.court.gov.cn/html/1/218/149/192/820.html>

26 On 7 December 2018, the SPC further announced appointment of seven more judges to the panel of the CICC, enlarging the trial body of the CICC to include 15 judges in total by the end of 2018.

27 See <http://cicc.court.gov.cn/html/1/218/149/192/949.html>

28 Singapore International Commercial Court ([www.sicc.gov.sg](http://www.sicc.gov.sg)). Dubai International Financial Centre Courts ([www.difccourts.ae](http://www.difccourts.ae)). Business and Property Courts of England and Wales ([www.gov.uk/courts-tribunals/the-business-and-property-courts](http://www.gov.uk/courts-tribunals/the-business-and-property-courts)).



Kazakhstan, the Netherlands and Belgium followed suit and passed relevant legislation in 2017.<sup>29</sup>

The CICC resembles its peers in many ways, in particular relating to the promotion of efficiency, party autonomy and internalisation of the dispute resolution process. Some noticeable differences between the CICC and other international commercial courts include the following:

- Similar institutions in Singapore, Dubai, France, Germany and Belgium all permit the use of English as the language of proceedings,<sup>30</sup> while the CICC is constrained by China's Civil Procedure Law (CPL) to use the Chinese language in trial activities, despite it permitting the submission of evidence originally in English without translation.<sup>31</sup>
- Similar institutions in both Singapore and Dubai allow foreign counsel representation during the proceedings.<sup>32</sup> By contrast, the CICC does not permit such representation; commentators said that this could be for the concern of protecting Chinese lawyers.<sup>33</sup>
- The CICC does not introduce an 'international judge' system and currently only has Chinese judges on its panel, while its peer in Singapore has gone further as to amend the constitution to allow the implementation of an 'international judge' system.<sup>34</sup> The Dubai International Financial Centre also selects judges from the international community and is not constrained by nationality; currently it has a panel of judges from Singapore, England, Australia, Malaysia and the United Arab Emirates.<sup>35</sup>
- Institutions in both Dubai and Singapore have entered into enforcement memorandums with other countries, which could lend great assistance to the enforcement of final judgments in the absence of relevant bilateral or multilateral treaties.<sup>36</sup> By comparison, the CICC has not entered into such memorandum to date with other countries due to its newborn

29 See Liao Yuyi, 'The Latest Development and Enlightenment of the Establishment of Extraterritorial International Commercial Court' (in Chinese, '域外国际商事法庭建设最新发展及启示'), published on 27 February 2018, with Chinese text available at, [www.ccpit.org/Contents/Channel\\_4132/2018/0223/967389/content\\_967389.htm](http://www.ccpit.org/Contents/Channel_4132/2018/0223/967389/content_967389.htm)

30 See, He Qisheng, 'On the Construction of the CICC', (in Chinese, '论中国国际商事法庭的构建'), published on 28 June 2018, Chinese text available at [www.yidianzixun.com/article/0JPaHuzI](http://www.yidianzixun.com/article/0JPaHuzI)

31 CICC Provisions, Art 9.

32 Cf *infra*, ft 30.

33 Cf *infra*, ft 30.

34 Cf *infra*, ft 30.

35 Cf *infra*, ft 30.

36 See, Shan Wenhua, 'Extraterritorial Experience of International Commercial Court's Construction and China's Contribution' (in Chinese, '国际商事法庭建设域外经验与中国贡献'), published on 15 August 2018, with Chinese text available at <http://cicc.court.gov.cn/html/1/218/62/164/1072.html?from=groupmessage>

status. The authors believe that the SPC will take action in this respect in the near future, especially with BRI countries.

- In the Singapore International Commercial Court, the parties could apply to use a set of evidence rules, such as the IBA Rules on Taking of Evidence in International Commercial Arbitration, to replace the evidence rules of the Court.<sup>37</sup> By contrast, it is not certain – and is most unlikely – that the CICC would permit such a request.
- Finally, many other similar institutions have set up appeal mechanism available to the parties (of which they can opt out),<sup>38</sup> while the CICC only implements one instance trial without an appeal process.<sup>39</sup>

The above comparative study shows that, despite the CICC's resolution to become a transparent, credible, internationalised dispute resolution platform for parties to international commercial disputes, it is still constrained in many ways by the existing PRC laws and could not achieve the same level of flexibility in its procedure as its peers in countries such as Singapore and Dubai.

## **Distinctive features of the CICC**

### *The integrated 'One-stop Solution Platform'*

A significant innovation of the CICC is its attempt to establish a convenient and effective 'One-stop Solution Platform' for international commercial disputes by linking the CICC with mediation and arbitration institutions, hence offering the parties multiple choices in resolving their disputes.

Pursuant to the CICC Provisions,<sup>40</sup> the CICC could operate seamlessly with 'international mediation/arbitration institutions' by, for instance:

- rendering a mediation ruling, which should have the effect of a civil judgment, if the parties submit their disputes for mediation by the ICEC or by an 'international mediation institution', and have reached a mediation agreement; or
- providing preservative measures for arbitrations conducted under the auspices of an 'international arbitration institution' upon request of the parties; or, setting aside or enforcing an arbitral award rendered by such an 'international arbitration institution'.

The CICC Provisions did not define 'international mediation/arbitration

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<sup>37</sup> See from the summary of guest speeches at the 3rd Social Science Arbitration Roundtable, with Chinese text available at <https://baijiahao.baidu.com/s?id=1601656050916779583&wfr=spider&for=pc>

<sup>38</sup> Cf infra, ft 36.

<sup>39</sup> CICC Provisions, Art 15.

<sup>40</sup> CICC Provisions, Arts 13 and 14.

institutions'. Some argue<sup>41</sup> that this means foreign institutions could also operate in China within such a platform.<sup>42</sup> However, this is not likely to be the case – at least not at this moment. The prevailing view<sup>43</sup> remains that 'international mediation/arbitration institutions' in China are confined to those prestigious Chinese mediation<sup>44</sup> and arbitration institutions that have significant experience in handling international commercial disputes. Such a prevailing view was confirmed by the SPC in the subsequent One-stop Solution Notice,<sup>45</sup> which preliminarily identified and incorporated the following Chinese arbitration/mediation institutions into the One-stop Solution Platform:<sup>46</sup>

1. China International Economic and Trade Arbitration Commission (CIETAC, 中国国际经济贸易仲裁委员会);
2. Shanghai International Economic and Trade Arbitration Commission, also known as the Shanghai International Arbitration Center (SHIAC, 上海国际经济贸易仲裁委员会/上海国际仲裁中心);
3. Shenzhen Court of International Arbitration (SCIA, 深圳国际仲裁院);
4. Beijing Arbitration Commission (BAC, 北京仲裁委员会);
5. China Maritime Arbitration Commission (CMAC, 中国海事仲裁委员会);
6. China Council for the Promotion of International Trade (CCPIT, 中国国际贸易促进委员会调解中心) Mediation Centre; and
7. Shanghai Commercial Mediation Centre (SCMC, 上海经贸商事调解中心).

China has more than 250 arbitration institutions established nationwide.<sup>47</sup> The first five Chinese institutions listed above, that is, CIETAC, SHIAC, SCIA, BAC and CMAC, are those that were established the earliest or have

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41 See Sun Wei, 'CICC: Innovation, Misunderstanding and Clarification', (in Chinese, '中国国际商事法庭: 创新、误解与澄清'), published on 11 July 2018, with Chinese text available at [https://mp.weixin.qq.com/s/QufZs6dIiwGVUJJ\\_YeMuWw](https://mp.weixin.qq.com/s/QufZs6dIiwGVUJJ_YeMuWw)

42 Until now, foreign institutions are not able to administer cases in China, despite the ICC, Singapore International Arbitration Centre (SIAC) and Hong Kong International Arbitration Centre (HKIAC) all having established liaison offices in the Shanghai Free Trade Zone, China.

43 Cf supra, ft 41.

44 Notable examples include the mediation centre established by the Beijing Arbitration Commission back in August 2011 and the mediation centre established by CIETAC most recently on 18 May 2018.

45 Cf see n 9 above.

46 It is anticipated that more Chinese institutions will be added to the platform as the CICC system develops.

47 See from the speech content of Wang Chengjie, who is the secretary general of CIETAC, in China's first arbitration documentary *Arbitration in China*.

handled the most foreign-related arbitration cases and accumulated the most advanced experience in these respects.<sup>48</sup>

Such a prevailing view about ‘international arbitration institutions’ also negates the potential confusion about whether the CICC could take preservative/interim measures for arbitrations seated abroad. Preservative/interim measures are made available only to arbitrations conducted by Chinese ‘international arbitration institutions’ incorporated within the One-stop Solution Platform. Chapter 7 of the Procedural Rules of the CICC<sup>49</sup> sets forth specific rules in such respect. Pursuant to Articles 34 and 35 of the Procedural Rules of the CICC, only those institutions incorporated into the One-stop Solution Platform could enjoy the benefit of securing preservative measures and set-aside review from the SPC directly, on the condition that the given case has a disputed amount of RMB 300m (equivalent of around US\$43,604,651) or more, or, the case is otherwise significantly influential. Other institutions falling outside the One-stop Solution Platform, regardless of the size of their case, are not eligible for such direct recourse to the CICC.

Under the current framework of the One-stop Solution Platform, parties have more choices, and are actually encouraged to submit their disputes for mediation first (by the CIEC or by the international mediation institutions included in the platform), failing which, be resolved by the CICC or arbitration by the international arbitration institutions included in the platform.

### *The ICEC*

As noted previously, although foreign experts cannot become CICC judges due to the limitation on the nationality of judges to Chinese judges as explained in more detail later in this article, they can participate in the CICC’s activities by joining the ICEC set up by the SPC.<sup>50</sup> Indeed, the idea of the ICEC and its broad selection of experts from countries along the Belt and Road, with varying legal backgrounds, geographical locations, fields of practice and so on, all reflect the intended diversity, neutrality and professionalism of the CICC.

Pursuant to the CICC Provisions and the Working Rules of ICEC,<sup>51</sup> the ICEC could, among others: (1) conduct mediation between the parties per the entrustment of the CICC and based on the parties’ consent, with the

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48 See from the top 30 of China arbitration agency rankings based on the target amount in 2016, published on 31 May 2017, with the Chinese text available at [www.sohu.com/a/144825793\\_663109](http://www.sohu.com/a/144825793_663109)

49 Cf see n 19 above.

50 Art 11 of the CICC Provisions.

51 Cf see n 24 above.

fees borne by the parties upon consultation or equally;<sup>52</sup> (2) help explain or clarify rules of international commercial transactions, and provide expert opinion on the content and application of foreign laws;<sup>53</sup> and (3) advise on issues relating to the development plan of the CICC, and comment on the SPC's contemplated judicial interpretations and/or policies.

The proper power of the ICEC lies in its conduct of mediation with the consent of the disputing parties because the mediation result can be converted into a CICC judgment and become enforceable.<sup>54</sup>

The first batch of experts were announced on 24 August 2018, consisting of 32 Chinese and foreign experts with an engagement term of four years.<sup>55</sup> Readers from the international arbitration community may find the names of many experts quite familiar.

Commentators believe that the ICEC may become an effective channel to convey messages from the international community to the SPC,<sup>56</sup> although the efficiency really depends on factors including how frequent the ICEC gathers and convenes, how deeply it is involved in specific cases and how much weight is eventually given to its opinions by the CICC.

The Chinese authorities attach great importance to and have a high regard for the ICEC mechanism. They believe that the ICEC is an important innovative mechanism in One Belt One Road collaboration,<sup>57</sup> has great significance in promoting the establishment of a diversified dispute

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52 Art 37 of the Procedural Rules of CICC.

53 Arts 8(4) and 12 of the CICC Provisions. See also, Art 31 of the Procedural Rules of the CICC.

54 Art 13 of the CICC Provisions.

55 They are George A Bermann, Sir William Blair, Gary Born, Nayla Comair-Obeid, Donald Francis Donovan, Susan Finder, Emmanuel Gaillard, Jin Huang, Albert Jan van den berg, Neil Kaplan, Gabrielle Kaufmann-Kohler, Vladimir I Kurilov, Lee Fu-tien, Jingdong Liu, Song Lu, Peter Malanczuk, Anna P Mantakou, Sundra Rajoo, Anselmo Reyes, Wenhua Shan, Sibao Shen, Jingxia Shi, Hi-Taek Shin, James Spigelman, Jingzhou Tao, David Unterhalter, Meng Wan, Guiguo Wang, Liming Wang, Philip Yang, Rimsky Yuen and Yuejiao Zhang. The bios and profiles of the experts are available at <http://cicc.court.gov.cn>

56 See, Fan Sishen, *Several comments of China International Commercial Court*, (in Chinese, ‘中国国际商事法庭若干评论’), published on 11 July, 2018, with Chinese text available at, [https://mp.weixin.qq.com/s/n\\_kYbGk590NIVQIBAchCng](https://mp.weixin.qq.com/s/n_kYbGk590NIVQIBAchCng)

57 ‘The establishment of the ICEC by the SPC is not only an important institutional innovation of the “One Belt One Road” international legal cooperation, but also an important platform for the exchange of legal systems and the rule of law civilization, and will provide more solid legal support and institutional guarantee for the parties to better participate in the construction of the “One Belt One Road”’ – Assistant Foreign Minister, Jun Zhang.

resolution mechanism<sup>58</sup> and is an integral part of the One-stop Solution Platform constructed by the SPC.<sup>59</sup>

### *Jurisdiction*

The CICC only hears international commercial disputes, excluding disputes between states or between investors and states. More specifically, pursuant to Article 2 of the CICC Provisions, the CICC holds jurisdiction over the following international commercial disputes:

1. first instance cases, per the parties' written agreement pursuant to Article 34 of China's CPL,<sup>60</sup> with a disputed amount of over RMB 300m (equivalent to approximately US\$43,604,651, per an exchange rate of US\$1 = RMB 6.88);<sup>61</sup>
2. first instance cases, under the jurisdiction of a Higher People's Court,<sup>62</sup> where the court sees the need to have the case adjudicated by the SPC and so orders;<sup>63</sup>
3. first instance cases, with nationwide significant impact – there is no legal definition of 'nationwide significant impact', which falls completely

58 'The establishment of the ICEC by SPC promotes the establishment of a diversified dispute resolution mechanism for combining litigation, mediation, and arbitration, and broadens the channels for parties to resolve disputes, and is of great significance for regulating the conduct of commercial transactions, facilitating the cross-border enforcement of commercial judgments and arbitral awards and promoting the international economic and trade cooperation' – Assistant Commerce Minister, Chenggang Li.

59 'The ICEC established by the SPC is an important part of the international commercial dispute settlement mechanism, an important operational link, and a major institutional innovation' – Expert of the ICEC, Jin H Huang.

60 *The Civil Procedure Law of the People's Republic of China* (2017 Revision), Art 34, 'Parties to a dispute over a contract or any other right or interest in property may, by a written agreement, choose the people's court at the place of domicile of the defendant, at the place where the contract is performed or signed, at the place of domicile of the plaintiff, at the place where the subject matter is located or at any other place actually connected to the dispute to have jurisdiction over the dispute, but the provisions of this Law regarding hierarchical jurisdiction and exclusive jurisdiction shall not be violated'.

61 This amount is calculated based on the average exchange rate of US dollars against RMB in September 2018 published in the website of China Foreign Exchange Trading Center [www.chinamoney.com.cn/chinese/bkccpr](http://www.chinamoney.com.cn/chinese/bkccpr)

62 Generally speaking, China has four levels of court: the Basic People's Court, the Intermediate People's Court, the Higher People's Court and the SPC. The first three levels of courts are installed within different levels of government and spread over the entire country, while the SPC oversees the entire court system and issues judicial documents, such as judicial interpretations, to instruct, guide and regulate the adjudicating activities of the lower courts.

63 *The Civil Procedure Law of the People's Republic of China* (2017 Revision), Art 20, 'The Supreme People's Court shall have jurisdiction over the following civil cases as a court of first instance: 1) Cases which have a major impact nationwide. 2) Cases which the Supreme People's Court deems shall be tried by itself'.

under the discretion of the SPC. In practice, if a case involves a high-profile figure, company or social event, is reported nationwide and has gained broad public attention, this would often be considered as having ‘nationwide significant impact’;

4. applications for arbitration-related preservative measures, enforcement or set-aside of an arbitral award, filed pursuant to Article 14 of the CICC Provisions;<sup>64</sup> and
5. other cases that the SPC considers should be taken under its the CICC’s jurisdiction.

The above article makes several breakthroughs in the SPC’s jurisdictions and effectively enlarges the number of cases that can be heard directly by the SPC (via the CICC).

For instance, prior to the establishment of the CICC by the CICC Provisions, pursuant to Article 22 of the CPL, the SPC had jurisdiction over first instance civil cases that either have significant nationwide impact (which resembles item 3 above) or that it considers should be heard by the SPC (which resembles item 5 above). However, the SPC rarely exercised jurisdiction over first instance cases in the past due to the already quite large number of appeal and retrial cases submitted to the SPC. The establishment of the CICC provides an opportunity and a platform for the SPC to enlarge its first instance adjudicating activities.

Furthermore, regarding item 1 above, previously, parties to a foreign-related dispute with a disputed amount above RMB 300m could only choose to submit their case to a Higher People’s Court.<sup>65</sup> The CICC Provisions make a breakthrough regarding such a limitation on parties’ choice of forum, and allow parties to such a dispute to submit it to the SPC (CICC) directly, eliminating the appeal procedure because the CICC’s judgment cannot be appealed.<sup>66</sup>

In addition, the CICC’s jurisdiction under item 4 above also lifts the previous limitation under the CPL that arbitration-related applications

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64 Art 14 enables a party of the ‘One-stop’ Solution Platform (comprised of CICC, mediation and arbitration) to apply to the CICC for preservative measures, to set aside or enforce an arbitral award issued under such mechanism.

65 See SPC, Notice Concerning Relevant Issues regarding Clarification of the Jurisdiction Level of the First Instance of Foreign-related Civil and Commercial Cases and Centralized Handling, promulgated on 7 December 2017 and effective as from 1 January 2018 (in Chinese, ‘最高人民法院关于明确第一审涉外民商事案件级别管辖标准以及归口办理有关问题的通知’), Chinese text officially available at [www.ewkfy.gov.cn/show.asp?id=2889](http://www.ewkfy.gov.cn/show.asp?id=2889); English translation is not publicly available at the time of writing.

66 Art 15 of the CICC Provisions.



in foreign-related cases should only be filed with an Intermediate People's Court.<sup>67</sup>

Interestingly, Article 3 of the CICC Provisions further defines 'international' commercial cases as those where: (1) a party or both parties are foreign or nationality-less persons; (2) a party or both parties' habitual residence is located overseas; (3) the subject matter in dispute is located overseas; or (4) the legal facts leading to the dispute occurred overseas. Such a definition of 'international' commercial cases resembles the definition of 'foreign-related' relations under Article 522 of the SPC's Interpretation of the CPL,<sup>68</sup> which means that the SPC considers them as essentially the same and thus has unified the legal meanings of 'foreign-related' and 'international' legal relations.

### *Trial panel and judges*

The judges of the CICC should be selected by the SPC from senior judges who have profound experience in adjudicating litigation work, are familiar with international treaties, international usage and practices in international trade and investment, and who could work proficiently in both Chinese and English languages.<sup>69</sup> A bench comprised of three or more judges shall hear a case together. Deliberations shall follow the majority rule and a dissenting opinion may be specified in the final judgment or ruling.<sup>70</sup>

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67 The Civil Procedure Law of the People's Republic of China (2017 Revision), Art 272: 'Where a party applies for a preservation measure, the international arbitral institution of the People's Republic of China shall submit the party's application to the intermediate people's court at the place of domicile of the respondent or at the place where the respondent's property is located'.

Art 273: 'Where an international arbitral institution of the People's Republic of China has rendered an award for a dispute, the parties shall not institute an action in a people court for the dispute. If a party fails to comply with the arbitration award, the opposing party may apply for enforcement of the award to the intermediate people's court at the place of domicile of the respondent or at the place where the respondent's property is located'.

68 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, Art 522: 'Under any of the following circumstances, the people's court may determine a case as a foreign-related civil case; (1) Either party or both parties are foreigners, stateless persons, foreign enterprises or organizations; (2) The habitual residence of either party or both parties is located outside the territory of the People's Republic of China; (3) The subject matter is outside the territory of the People's Republic of China; (4) The legal fact that leads to the establishment, change or termination of civil relationship occurs outside the territory of the People's Republic of China; (5) Any other circumstance under which a case may be determined as a foreign-related civil case'.

69 Art 4 of the CICC Provisions.

70 Art 5 of the CICC Provisions.



First, as the CICC Provisions cannot violate the PRC Law of Judges,<sup>71</sup> which provides in Article 9 that all judges of Chinese courts shall be Chinese citizens, a foreign citizen is not eligible to become a justice of the CICC. This, however, will not prevent foreign experts from getting involved in the CICC activities via the ICEC mechanism, where invited to.

Second, a notable breakthrough is that a minority dissenting opinion of the trial bench ‘may’ be specified in the adjudication decision, either in the form of a judgment or a ruling. Such a practice was not available previously in Chinese judicial proceedings. By making the minority dissenting opinion available to the parties, the CICC promotes the transparency of the dispute resolution process, encourages the professional independence of the judges and may, in reality, boost the international community’s confidence in China’s judicial system.

Finally, it appears from Article 4 of the CICC Provisions that the CICC judges could be selected from lower courts other than the SPC. Nonetheless, the first batch of eight judges and second batch of seven judges selected for the CICC were all current senior judges of the SPC.<sup>72</sup> This might be due to the fact that at the early stage of the CICC, it is more reassuring to the parties and the international community if the judges are selected from the highest rank of the Chinese judiciary in order to ensure the proper implementation of the CICC’s mandates and functions.

#### *Other derogation from the CPL of the PRC*

##### NO-APPEAL FINALITY

Judgments rendered by the CICC are final and not subject to appeal,<sup>73</sup> but the parties are not barred from seeking a retrial that is available to all ‘final and effective’ judgments in China.<sup>74</sup> Under the CPL, ‘retrial’ by the SPC is subject to the SPC’s consent and is only granted under extremely strict circumstances.<sup>75</sup>

Clearly, such a feature of the CICC seeks to strike a balance between the values of efficiency and speedy dispatch of justice.

71 Judges Law of the People’s Republic of China (2017 Amendment), promulgated on 1 September 2017 and effective as from 1 January 2018 (in Chinese, ‘中华人民共和国法官法’), Chinese text officially available at [www.npc.gov.cn/npc/xinwen/2017-09/12/content\\_2028694.htm](http://www.npc.gov.cn/npc/xinwen/2017-09/12/content_2028694.htm); bilingual version available at [en.pkulaw.cn](http://en.pkulaw.cn), subject to subscription to the database.

72 See <http://cicc.court.gov.cn/html/1/218/149/192/820.html>

73 Art 15 of the CICC Provisions.

74 Art 16 of the CICC Provisions.

75 The Civil Procedure Law of the People’s Republic of China (2017 Revision), Art 199, ‘a party which deems that an effective judgment or ruling is erroneous may file a petition for retrial with the people’s court at the next higher level; and if the parties on one side are numerous or the parties on both sides are citizens, the parties may file a petition for retrial with the original trial people’s court’. Pursuant to this article, if the party would like to file a petition for retrial on the effective judgments made by the SPC, he/she has to file a petition to the SPC and obtain its consent.

## RELAXED REQUIREMENTS ON THE FORMALITY AND LANGUAGE OF EVIDENCE

Previously, all evidence generated or collected abroad must be notarised by a local notary public, certified by the Chinese consulate in that country and translated by a certified Chinese translator into Chinese if it is to be relied upon in Chinese court proceedings. Such requirements are removed from CICC proceedings. Pursuant to Articles 9 and 10 of the CICC Provisions, evidence collected abroad, regardless whether it has been notarised or certified, shall all be examined in court, and where the parties so agree, evidence originally in English does not need to be translated into Chinese. Further, the CICC may adopt voice and video transmission, as well as other internet media to conduct its court investigation and examination of evidence.

Although evidence originally in English no longer needs to be translated into Chinese if the parties so agree,<sup>76</sup> this is in no way suggesting that the CICC could hear cases using English as the language of the proceeding. This is because Article 262 of the CPL explicitly requires that the People's Courts shall use the language and literature of the PRC when adjudicating foreign-related civil disputes.

The relaxed requirements are clearly designed to reduce the burden of the parties, save costs and promote efficiency of the proceeding.

## FLEXIBLE FILING OF SUBMISSIONS

Different from usual Chinese court practices where parties normally should file written submissions with the registrar/judge of the court in person, the CICC allows parties to make submissions online (via [www.cicc.court.gov.cn](http://www.cicc.court.gov.cn)) or through other flexible means, such as by email, post or other means as permitted by the court.<sup>77</sup>

*Enforcement*

The CICC Provisions not only empower the CICC jurisdiction to hear international commercial disputes, but also provide with an enforcement mechanism of the final judgments and rulings issued by the CICC. Pursuant to Article 17, parties could apply for enforcement directly with the CICC. This is, of course, limited to the circumstances where enforcement is sought in China. If enforcement is sought abroad, parties still need to see if there is a bilateral/multilateral treaty providing for recognition and enforcement of judicial judgments/rulings made in China in the jurisdiction(s) where they seek to enforce these. In this respect, China has already signed the Convention on Choice of Court Agreements, which, however, remains ineffective, pending approval by the Chinese legislature.<sup>78</sup>

<sup>76</sup> Art 9 of the CICC Provisions. Note that evidence in language(s) other than English still needs to be translated into Chinese.

<sup>77</sup> Art 5 of the Procedural Rules of the CICC.

<sup>78</sup> See 'China signed the Convention on Choice of Court Agreements', released on 12 September 2017 on the official website of Ministry of Foreign Affairs, with the Chinese text available at [www.fmprc.gov.cn/web/wjb\\_673085/zzjg\\_673183/tyfls\\_674667/xwlb\\_674669/t1492306.shtml](http://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/tyfls_674667/xwlb_674669/t1492306.shtml)

As noted previously, the contemplated ‘One-stop Solution Platform’ enables the CICC to enforce arbitral awards rendered by international arbitration institutions within the platform. For such an enforcement, the CICC automatically becomes the competent enforcing court,<sup>79</sup> and the parties no longer need to seek enforcement with the court of the place where the assets are located or where the party against whom enforcement is sought has its habitual residence, as originally required under the CPL.<sup>80</sup>

### Prospects and issues to be addressed

Whether the CICC will serve its full intended purpose and achieve all its contemplated goals remain to be seen. Some practitioners are not optimistic when it comes to international parties’ choice of forum – at least not at the early stage of the CICC – mainly due to the lack of enforcement mechanisms of the CICC’s final judgments in other countries.<sup>81</sup> In the meantime, some believe that caseload will not be an issue because once

79 Art 14 of the CICC Provisions.

80 The Civil Procedure Law of the People’s Republic of China (2017 Revision), Art 283: ‘Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a people’s court of the People’s Republic of China, a party shall apply directly to the intermediate people’s court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the people’s court shall process the application in accordance with an international treaty concluded or acceded to by the People’s Republic of China or under the principle of reciprocity’.

81 See Jerome A Cohen, ‘How Does Harvard Leading Authority See CICC’ (in Chinese, 哈佛泰斗怎么看中国国际商事法庭) published on 15 March 2018.

[https://mp.weixin.qq.com/s/Dx\\_rcbwphgD-ZB9giFcamg](https://mp.weixin.qq.com/s/Dx_rcbwphgD-ZB9giFcamg), ‘I think most of the contracts involving One Belt and One road, at least at the beginning, may choose Singapore arbitration, the Hong Kong International Arbitration Centre or some other neutral, prestigious institutions. The countries and districts where these institutions locate have a highly credible judicial system needed for enforcing decisions or interpreting relevant laws. I doubt whether domestic courts in China or elsewhere can play a big role, at least at the early stage of One Belt One Road.’

See also Fan Sishen, *Several Opinions on CICC* (in Chinese, ‘中国国际商事法庭若干评论’), published on 11 July 2018

[https://mp.weixin.qq.com/s/n\\_kYbGk590NIVQIBACHCng](https://mp.weixin.qq.com/s/n_kYbGk590NIVQIBACHCng), ‘Due to the small number of judges in CICC and limited jurisdiction, this may mean that the establishment of the CICC will not have a major impact on the overall trend of the ‘One Belt One Road’ dispute settlement. However, as a court equipped with the most knowledgeable judges of China in related fields specializes in international commercial trials, it will have a positive effect on the judicial capacity of Chinese judicial organs to handle international trade and investment cases... In my opinion, the establishment of the CICC will not affect how experienced international lawyers draft dispute resolution clauses for large-scale ‘One Belt One Road’ projects. Due to the existence of the New York Convention (and the corresponding arrangements between Hong Kong and the Mainland) and concerns about Chinese arbitration institutions, many international lawyers will still stipulate on offshore arbitration’.

the CICC determines which arbitration institutions are to be included in the One-stop Solution Platform, there will be a wave of arbitration-related cases filed with the platform simply for the benefit of obtaining the CICC's preservative measures available to the platform.<sup>82</sup>

However, many issues are still unclear at this early stage of the CICC creation. For example, whether (and when) to include foreign mediation/arbitration institutions (eg, ICC, Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC)) in the One-stop Solution Platform; the term of the CICC judges and whether the parties could be granted the right to select their judges based on published credentials and other public information relating to the judge's expertise, experience and position on certain legal issues; to what extent should case precedents be afforded binding effect so that there will be a higher level of transparency, consistency in the final outcomes and parties' expectations could thus be protected (which could reduce the caseload if a party, based on its review of similar precedents, determines that its case does not have merits); and last but not the least, whether a higher level of remuneration should be granted to judges of the CICC in order to motivate a higher level of professionalism, devotion, independence and impartiality.

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82 See, Leijiping, *the Supreme People's Court established the CICC: Judicial reforms ushered in new breakthroughs and challenges*, (in Chinese, '最高法院设立国际商事法庭-司法改革迎来新的突破和挑战'), published on 2 July 2018, with Chinese text available at [www.kwm.com/zh/cn/knowledge/insights/the-supreme-court-to-set-up-the-international-commercial-court-20180701](http://www.kwm.com/zh/cn/knowledge/insights/the-supreme-court-to-set-up-the-international-commercial-court-20180701)

