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CHINA'S INTERNATIONAL COMMERCIAL COURT: A FLAWED SYSTEM FOR DISPUTE RESOLUTION

AUTHORED BY - RIJUL SETH

INTRODUCTION

The world today is a global marketplace where millions of transactions take place in each corner of the world. Often times, these transactions become a source of dispute among parties and to deal with these disputes, many countries, such as Singapore, Dubai, etc., have set up international commercial courts. Over the past few decades, developing countries like China have shown tremendous economic growth, to the point where they are almost at par with developed nations like the United States. However, to assert their dominance as a global economic power and ensure a conducive environment for trade to take place, they have had to take a few measures. One such measure by China was to set up the Chinese International Commercial Court. This paper will analyze the history and scope of the Chinese International Court, which has become a viable option to adjudicate international disputes. Further, this paper will also compare China's International Commercial Court with Singapore's International Commercial Court to point out the flaws existing in the procedural system of the former.

SCOPE

China, in its bid to become an economic superpower, understood the need for an institution that helps settle international disputes of both commercial and civil nature. Hence, The Supreme People's Court of the People's Republic of China, in its attempt to make China a viable destination for international commercial disputes settlement, set up two new International Commercial Courts. The two courts were set up in the cities of Xi'an and Shenzhen. It is pertinent to note that the inception of these courts was part of China's belt & road initiative, which was initiated by President Xi Jinping to enhance China's international trade.¹ Now, it is important to note that this court has a very broad jurisdiction. The court can claim jurisdiction in five situations, namely: (1) "first instance international commercial cases that have a significant nationwide impact"; (2) "first

¹ Michael Stash, 'The New Silk Road: The Chinese Supreme People's Court's "International Commercial Court" and Opportunities for Alternative Dispute Resolution' (2019) 35 Ohio St J on Disp Resol 109.

instance international commercial cases which are subject to the higher people's courts who nonetheless consider that the cases should be tried by the Supreme People's court for which permission has been obtained"; (3) first instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People's court in accordance with Article 34 of the Civil Procedure Law with an amount of at least 300,000,000 RMB (Chinese yuan) being the matter of dispute; (4) cases involving applications for preservation measures in arbitration, or for setting aside or enforcing international commercial arbitration awards according to Article 14 of the Civil Code; and (5) other international commercial cases that the Supreme People's Court considers appropriate for the International Commercial Court.²

It is imperative to note here that, CICC's jurisdiction is limited to commercial and civil disputes that are provided for in the judicial interpretation issued by Supreme People's Court (Judicial Interpretation on the CICC), 2018, while the CICC enjoys broad jurisdiction over five types of commercial and civil disputes as mentioned above, however, it is pertinent to note that it does not have jurisdiction over investor state disputes or state trade disputes.³ This lack of jurisdiction above the state is another problem for international parties who want to sue the state, as the CICC is part of the BRI initiative, it is primarily concerned with disputes related to it. However, while other international courts allow suing the state, this aspect of the CICC makes it a less desirable destination for dispute settlement as this exclusion of the state from the CICC jurisdiction is evident of the protectionist nature of the CICC towards the Chinese government and its subsidiaries. Now, in order to completely understand the functioning of the International Commercial Court, it is important to understand what the Supreme People's Court considers to be an 'international' commercial case. For this, they have set up four parameters that are: (1) a case in which "one or both parties are foreigners, stateless persons, foreign enterprises or other organizations;" (2) "one or both parties have their habitual residency outside the territory of the People's Republic of China;" (3) "a case with legal facts that create, change, or terminate the commercial relationship which have taken place outside of the territory of the People's Republic of China;" and (4) if "the subject matter in dispute is outside the territory of the People's Republic

² A Brief Introduction of China International Commercial Court, China International Commercial Court (June 28, 2018) <http://cicc.court.gov.cn/html/1/219/193/195/index.html>.

³ Chaisse J and Qian X, "Conservative Innovation: The Ambiguities of the China International Commercial Court" (2021) 115 AJIL Unbound 17.

of China."⁴ A distinct and somewhat concerning aspect of the International Commercial Court is that there are no international judges on the bench- the entire bench of 12 judges is filled with judges from China. This is a starkly different from other International Commercial courts, which ensure that there is a significant representation of international judges. For example, the Singapore International Commercial Court has sixteen international judges while Qatar international court has ten.⁵ This is a matter of grave concern for the Chinese judiciary if they aspire to be a sought-after place for dispute resolution then they must amend their regulation to accommodate foreign judges. The reason for this is that because foreign judges help establish credibility and impartiality of International Commercial Courts, as there is always a concern that domestic judges might favor the interest of domestic parties and their judgement in international matters may be biased. Furthermore, there is a lot of ambiguity with regards to the jurisdiction. For example, it is unclear whether or not entities can opt out of jurisdiction in selection of forum clauses or even whether entities must state in their contract a desire to opt the jurisdiction of Chinese International Commercial Court.⁶

It is also important to note that it has been observed on multiple occasions that the International Commercial Court has arbitrarily used its broad jurisdiction to adjudicate on cases that would not normally be within its jurisdiction. For example, one of the cases accepted by the First Chinese International Commercial Court was of unjust enrichment between two Chinese companies- Asia Optical Company and Fuji Film Company. Another case was regarding shareholder profit distribution of Red Bull Vitamin Energy Company & Inter Bio Pharmaceuticals holding company shareholding profit distribution. When we look at the two cases we find that both the cases are largely related to internal corporate disputes, the international court has not given any reasoning for exercising jurisdiction over such matters that could have been handled by domestic courts & tribunals, instead it has only clarified that it gets the power to do so under Articles 20 & 38 of the Civil Procedure Law of the People's Republic of China, as well as Article 2 of the provisions of Supreme People's court on several issues regarding the establishment of the International

⁴ A Brief Introduction of China International Commercial Court, China International Commercial Court (June 28, 2018) <http://cicc.court.gov.cn/html/1/219/193/195/index.html>.

⁵ Tirkey, Aarshi. "The Inconvenient truth about China's International Commercial Courts". <https://www.orfonline.org/expert-speak/inconvenient-truth-china-international-commercial-courts/>.

⁶ 4 Matthew S. Erie, The China International Commercial Court. Prospects for Dispute Resolution for the "Belt and Road Initiative," 22 AM. SOC'Y INT'L L. INSIGHTS 11 (2018), <https://www.asil.org/insights/volume/22/issue/11>.

Commercial Court.⁷ Now, Article 20 of the Civil Procedure Law of the People's Republic of China states that "a higher people's courts shall have jurisdiction as the court of first instance over civil cases that have major impacts on the areas of its jurisdiction."⁸ Additionally, Article 38 of the Civil Procedure Law of the People's Republic of China states that "if a party rejects to the jurisdiction of his case after the case was accepted by a people's court, the party shall raise the rejection during the period for submitting briefs. The people's court shall examine such objection. If the objection is tenable, the people's court shall rule, that the case be transferred to the people's court that does have jurisdiction over the case; if the rejection is untenable, the people's court shall overrule the objection."⁹ Accepting jurisdiction over internal disputes under the guise of these articles show the overreaching jurisdiction of China's International Commercial Court. this further causes skepticism among foreign parties, who would prefer more party autonomy. Another important aspect to note is that Article 262 of Civil Procedure Law governing the International Commercial Court require the workings of the court to be conducted in mandarin as opposed to English.¹⁰ This significantly reduces the accessibility of international parties, as it makes it difficult for international parties to properly participate and understand court proceedings.

Another hurdle for international parties choosing the jurisdiction of China International Commercial Court is that it only allows lawyers who have a license to practice in China to represent parties in the court.¹¹ This effectively means that for a foreign party to fight a case in CICC it would have to appoint Chinese lawyers and law firms. This creates huge gap as if the applicable law is foreign and only Chinese lawyers can be adopted by parties, then there is a high possibility that those lawyers are not well acquainted with the applicable foreign. For example, in a dispute the applicable law is French and CICC is the place chosen for dispute settlement, then only a lawyer who is licensed in China would be allowed to represent parties, now while this

⁷ Michael Stash, 'The New Silk Road: The Chinese Supreme People's Court's "International Commercial Court" and Opportunities for Alternative Dispute Resolution' (2019) 35 Ohio St J on Disp Resol 109

⁸ WEI LUO, THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 41 (2006).

⁹ WEI LUO, THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 41 (2006).

¹⁰ Civil Procedure Law (2017 Amendment) (adopted by the Standing Committee of National People's Congress, 27 June 2017; effective on 1 July 2013) arts 17–20 <http://lawinfochina.com/display.aspx?id=23601&lib=law&SearchKeyword=Civil%20Procedure%20Law&SearchCKeyword=>

¹¹ Turkey, Aarshi. "The Inconvenient truth about China's International Commercial Courts". <https://www.orfonline.org/expert-speak/inconvenient-truth-china-international-commercial-courts/>.

lawyer might be well acquainted with Chinese law, it would not be prudent to assume that they have the same level of legal understanding with the French law or any other countries.

Furthermore, as mentioned earlier all the proceedings in the CICC can only take place in Mandarin. However, Article 9 of the Judicial interpretation on the CICC provides rules of evidence. A reading of article 4 with Article 9 states that evidence can be submitted to the CICC in English and without translation upon the consent of the parties.¹² Now, even though this move reduces the cost incurred by parties to translate evidence, but there exists an anomaly since only Mandarin can be used in CICC, all English language evidence would have to be translated in Mandarin while presenting it in front of the CICC. This has created a sense of uncertainty with regards to submission of evidence among the legal fraternity. Apart from this, questions have also been raised with regards to the fact that CICC has been established as a permanent adjudicative body under the Supreme People's Court (SPC).¹³ This effectively means that it is subordinate to the SPC, this has led to concerns regarding the independence, autonomy & freedom from political influence commanded by the government. Further, as mentioned earlier Article 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, this can occur either through a reference from higher courts or at the behest of the SPC provided the cases have significant national impact.¹⁴ However, as mentioned earlier there are no straitjacket guidelines as to how the SPC will allow the CICC to exercise jurisdiction in some case while refusing its recognition in others. Furthermore, as of 2020 the CICC has only heard cases referred to it by lower courts than on the basis of consent of parties another peculiar fact is that none of these case adjudicated upon by the CICC have been BRI related disputes.¹⁵ This shows that international parties as envisaged by the SPC do not consider CICC an ideal place for dispute resolution.

Another problem that China faces is enforceability of CICC judgements in foreign jurisdiction.

¹² Huo Z and Yip M, "COMPARING THE INTERNATIONAL COMMERCIAL COURTS OF CHINA WITH THE SINGAPORE INTERNATIONAL COMMERCIAL COURT" (2019) 68 International & Comparative Law Quarterly 903

¹³ Chaisse J and Qian X, "Conservative Innovation: The Ambiguities of the China International Commercial Court" (2021) 115 AJIL Unbound 17

¹⁴ Chaisse J and Qian X, "Conservative Innovation: The Ambiguities of the China International Commercial Court" (2021) 115 AJIL Unbound 17

¹⁵ Turkey, Aarshi. "The Inconvenient truth about China's International Commercial Courts". <https://www.orfonline.org/expert-speak/inconvenient-truth-china-international-commercial-courts/>.

Enforceability of court judgements in foreign jurisdictions depends upon judicial assistance treaties, now one of the main treaties in this regard is the Hague Convention on choice of court agreement, it is important to note here that while China has signed the convention it has not yet ratified it. Further, the individual treatise with regards to foreign jurisdiction that China has signed cover only a small number of BRI countries.¹⁶ This poses a serious problem for parties who have filed a case in CICC and want to enforce its ruling on a subject matter outside the jurisdiction of China, as even if China rules in their favor there is no guarantee as to whether the country in which the subject matter exists will heed to the directions of CICC. However, CICC is a viable option only when the subject matter is in China, the reason for this is two pronged. Firstly, CICC has no appeals system as it is part of SPC, hence, all its judgements are deemed final and binding. Secondly, the fundamental objective of CICC was to establish itself as a one stop shop for BRI related disputes.¹⁷ Hence, if the parties are in dispute over the subject matter which is under Chinese jurisdiction, then CICC would be a highly viable option as it would provide speedy and conclusive judgements with regards to the dispute. Now, another aspect of the CICC that's needs some attention is the fact that the judges appointed to the CICC bench are appointed on a part time basis, which primarily means that they will be serving on the bench of both SPC and CICC.¹⁸ This rule will put a lot of burden on CICC judges and will lead to delay in decision making. Hence, if CICC is realistically aiming to be a dominating force in international commercial litigation, then it needs to ensure seamless and speedy decision making. Which can only happen if the judges appointed to the CICC are solely dedicated to that court and not juggle between CICC and SPC.

A COMPARITIVE ANALYSIS OF THE CHINESE

INTERNATIONAL COMMERCIAL COURT & SINGAPORE

INTERNATIONAL COMMERCIAL COURT

Now, in order to further analyze the positives and negatives of Chinese International Commercial Court, we will compare it with the Singapore International Commercial Court (SICC). The reason

¹⁶ Luo Dongchuan, Consultation, Cooperation and Common Development- keynote speech at the First Seminar of the International Commercial Expert Committee. <http://cicc.court.gov.cn/html/1/219/199/203/1063.html>.

¹⁷ Chaisse J and Qian X, "Conservative Innovation: The Ambiguities of the China International Commercial Court" (2021) 115 AJIL Unbound 17

¹⁸ Turkey, Aarshi. "The Inconvenient truth about China's International Commercial Courts". <https://www.orfonline.org/expert-speak/inconvenient-truth-china-international-commercial-courts/>.

for choosing SICC as the ideal court for a comparative analysis is that SICC is an Asian Commercial Court that is situated within the geographical area covered by BRI. This creates a sense of commonality among the two courts. Firstly, an important distinction between the two international courts is that the objective of establishing SICC was to establish Singapore's dominance as a global dispute resolution center while the objective of CICC was to primarily deal with BRI related disputes.¹⁹ It is also important to note that CICC from its inception has resisted overt internationalization of its system by way of only appointing Chinese judges & by only allowing lawyers licensed in China to represent parties on the other hand the framework for SICC is lauded for being flexible, SICC allows more party autonomy and internationalization of the system, this can be seen from the fact that SICC allows for the inclusion of foreign judges on its bench and further unlike CICC where the language of the court is Mandarin, SICC recognizes English as its primary language for usage.²⁰ Moreover, when we compare the jurisdictional framework of the two international commercial courts, we find that the jurisdiction of the CICC is quite limited as compared to SICC, since for a case to be presented in front of the CICC, it is required to have an actual connection with China.²¹ This condition restricts the number of cases that can be brought up in front of the CICC and hence, inevitably becomes a hindrance in China's path to become a dominant force in international dispute resolution.

Moreover, unlike SICC the CICC's jurisdictional framework doesn't allow for party to confer jurisdiction on CICC via a jurisdiction agreement and there is no explanation from the SPC regarding the same.²² Moreover, as stated earlier for a dispute to be presented in front of CICC it must be above the 300 Million RMB mark, it is safe to assume that cases involving such amounts will have a certain level of involvement from the government and given China's political history there is a possibility that the decisions of CICC will be biased to favor the state-linked entities. Another glaring issue with the CICC is that what constitutes 'commercial' has not been defined in the Judicial Interpretation for CICC. However, at the CICC press conference held on 28 June

¹⁹ Huo Z and Yip M, "COMPARING THE INTERNATIONAL COMMERCIAL COURTS OF CHINA WITH THE SINGAPORE INTERNATIONAL COMMERCIAL COURT" (2019) 68 International & Comparative Law Quarterly 903

²⁰ Zhengxin Huo & Man Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 Int'l & Comp LQ 903.

²¹ Huo Z and Yip M, "COMPARING THE INTERNATIONAL COMMERCIAL COURTS OF CHINA WITH THE SINGAPORE INTERNATIONAL COMMERCIAL COURT" (2019) 68 International & Comparative Law Quarterly 903.

²² Zhengxin Huo & Man Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 Int'l & Comp LQ 903

2018, Justice Liu Guixiang, a senior judge of the SPC, commented that CICC docket will comprise of civil & commercial disputes between equal subjects. He further clarified that cases pertaining to disputes between countries concerning investment or trade issues & disputes between the host country and investors concerning investment issuer are excluded from the definition.²³ This gives ‘commercial’ a very broad meaning barred only by these two exceptions. However, such a broad distinction leaves room for a lot of uncertainty, which is not conducive for the growth of CICC. However, in contrast, the meaning of ‘commercial’ is clear defined for SICC in order 110 rule 1(2)(b) of the Rules of court which states that a claim is ‘commercial’ if it arises from a commercial relationship, relates to an *in personam* intellectual property dispute; or the parties have expressly agreed that the subject matter is so.²⁴ Further the definition of ‘international’ under SICC is multilateral while the definition of ‘international’ under CICC is forum centered. This can be observed after reading Order 110 Rule of Rules of Court of Appeal. The relevant part of the court of rules which defines ‘international’ under the SICC is as follows Order 110, rule 1(2)(a) of the Rules of Court provides that a claim is ‘international’ if

- (i) the parties to the claim have their places of business in different States;
- (ii) none of the parties to the claim have their places of business in Singapore;
- (iii) at least one of the parties to the claim has its place of business in a different State from
 - (A) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed; or
 - (B) the State with which the subject matter of the dispute is most closely connected; or
- (iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State.²⁵

Now, when we analyze the order, it can be observed that unlike Judicial interpretation for CICC rules it does not require the dispute to have a direct connection with Singapore for it be eligible to be presented before the SICC. Now, while the CICC’s no appeal policy, as explained earlier, is desirable among commercial parties who want speedy & conclusive dispute settlement. However, this feature of the CICC may cause worry among foreign parties with regards to the

²³ The State Council Information Office held a press conference on the Opinion on the Establishment of “The Belt and Road” International Commercial Dispute Settlement Mechanism and Institutions’ (China International Commercial Court, 28 June 2018) <<http://cicc.court.gov.cn/html/1/219/208/210/769.html>>.

²⁴ Rules of Court Order 110, Rule 1(2)(b)(i).

²⁵ Rules of Court Order 110, Rule 1(2)(a)

redressal against biased or unfair judgement. Furthermore, the deprivation of the parties right to appeal can present a constitutional challenge as well, as under Chinese law the right to appeal is guaranteed.²⁶ Now, on the other hand Singapore has set up a court of appeal to address any appeal arising from a SICC judgement. Now it is pertinent to note that that SICC allows parties to waive, limit or vary their right to appeal via a written agreement.²⁷ This a laudable approach by SICC as it further increases party autonomy by giving parties the right to determine the delay in obtaining finality of outcome. It also pertinent to note that with regards to submission of evidence the SICC allows parties to apply for disapplication of all or some of the Singapore rules of evidence & for the application of other rules of evidence, including rules of evidence that may not constitute part of foreign law.²⁸ This is in contrast with CICC which requires the parties to translate evidence given in English to Mandarin.

The critical analysis of both the SICC and CICC has allowed us to shed light on the restrictive and controlling nature of CICC. When we compare the two forums it is clearly visible that SICC is comfortable in giving up a certain level of forum control unlike the CICC. It can also be observed that CICC does not accept or welcome foreign participation to as large an extent as the SICC. Further, the procedural framework within the CICC's litigation system is not well structured, an illustration of this stems from the fact that proceedings in court are conducted in Mandarin while at the same time it allows for evidence to be submitted in English without the need for it to be translated in Mandarin. This creates a paradox leading to a lot of confusion and ambiguity. Hence, if China realistically aims to become a global one stop shop for dispute redressal it needs to become a more subject matter-oriented forum that gives parties a certain level of autonomy in dispute resolution. Further, it should not limit itself only to matters directly relating to China, also it should allow the appointment of foreign judges and use of foreign language in its proceedings to elevate its status as reliable, just, and convenient forum for dispute resolution.

²⁶ Article 10, Civil Procedure Law (2017 Amendment) (adopted by the Standing Committee of National People's Congress, 27 June 2017; effective on 1 July 2013) arts 17–20.; Article 11, Law of the People's Republic of China on the Organization of the People's Courts (2006 Amendment) (promulgated by the Standing Committee of National People's Congress, 31 October 2006)

²⁷ See Singapore International Commercial Court Practice Directions, para 139 <[https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions---amended-version-\(final\)77b73133f22f6eceb9b0ff0000fcc945.pdf](https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions---amended-version-(final)77b73133f22f6eceb9b0ff0000fcc945.pdf)>

²⁸ Rules of Court, Order 110, rule 23.

CONCLUSION

It can be seen from the observations made above that the Chinese International Commercial Court is a step in the right direction by the Chinese Government to make China a dispute resolution hub, its modern mechanisms and objective to become a one stop shop for dispute resolution is quite laudable. However, CICC needs to make certain amendments to its existing system of function such as increase in party autonomy, inclusion of foreign judges, as well as subject matter centric jurisdiction. It also needs to amend its rules and regulations to provide conclusive and non-ambiguous meaning to the definition of 'international' & 'commercial'. However, regardless of its shortcomings, the CICC has the potential to be a global hub for dispute resolution provided it expands scope beyond the Border and Road initiative and allows parties to choose CICC's jurisdiction to settle dispute. Additionally, it needs to internationalize its framework to make it more independent, reliable, and inclusive. Hence, in conclusion, while the effort by the SPC to establish an international court is laudable, it is evident from its many inconsistencies and loopholes which have been discussed above that the framework for the Workings of CICC was drafted in haste & without keeping in mind a global outlook and therefore, needs to be revamped in order for it to become a reliable and just forum for dispute resolution.

