# International Commercial Court in China: Innovations, Misunderstandings and Clarifications

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On 29 June 2018, the Supreme People's Court of China (the "**SPC**") launched its First International Commercial Court in Shenzhen, Guangdong, and Second International Commercial Court in Xi'an, Shaanxi (the "**Courts**"). Correspondingly, the Regulations of the Supreme People's Court on Certain Issues Concerning the Establishment of International Commercial Courts (the "**Regulation**") has just taken effect on 1 July, 2018. This is considered an effort by the SPC to provide effective judicial protection for the "Belt and Road" initiative, and to reform China's international dispute resolution system. In this article, I will introduce the basic mechanisms of the Courts, and then clarify certain misunderstandings which I believe are already circulating within the international community of law practitioners.

1. **Courts**

The Courts are permanent branches of the SPC. The judges of the Courts are appointed by the SPC from experienced judges familiar with practices in international commerce and investment and having language capacity to work with both Chinese and English. Currently, the SPC has appointed eight judges, including Wang Chuang, Zhu Li, Sun Xiangzhuang, Du Jun, Shen Hongyu, Zhang Yongjian, Xi Xiangyang, and Gao Xiaoli. A tribunal hearing a specific case will consist of three or more judges.

The Courts will only hear international civil and commercial disputes between equal parties. In other words, they will NOT hear state-state trade or investment disputes or investor-state disputes. According to Article 3 of the Regulation, disputes are "international" where one or both of the parties are foreign, where one or both parties regularly reside outside the territory of the PRC, where the subject matter is located outside the territory of the PRC, and where legal facts that create, change or eliminate commercial relations occur outside the territory of the PRC.

Specifically, the Courts will focus on four types of international commercial disputes: first, a dispute where the parties agree to litigate in the SPC according to Article 34 of the Chinese Civil Procedural Law and the amount in dispute exceeds RMB 300 million; second, a dispute which originally should be litigated in a high court but was submitted to the SPC because the high court believes it should be heard by the SPC and the SPC approves; third, disputes that have an impact nationwide; fourth, disputes where one parties applies for interim measures in assistance for arbitration, setting aside and enforcement of arbitral awards according to Article 14 of the Regulation.

1. **Clarifying Misunderstandings**

1. **Determining the Jurisdiction of the Courts**

The jurisdiction part of the Regulation is mainly drafted with a focus of the jurisdictional relationship between the Courts as part of the SPC and the lower courts. Under the Civil Procedure Law, the SPC already has the right to hear any litigation case, as long as it believes to be necessary, which is within the jurisdiction of a lower court. However, the relationship between arbitration and litigation and between domestic and foreign courts and arbitral institutions are much more complicated. The Regulation does not cover this issue.

For instance, let's say an international sales contract between a Chinese company and a Russian one with the total value of RMB 1 billion designates one of the Courts as the forum, but when a dispute arises the amount in dispute is only RMB 200 million, would the Courts still have jurisdiction? If not, will the lower Chinese courts have jurisdiction? Or will the clause be deemed not applicable at all for this dispute? What if the plaintiff adds a new claim or the defendant makes a counter-claim, thus making the amount in dispute exceed RMB 300 million? Further, let's say the same contract provides that when the amount in dispute is under RMB 300 million, arbitration under SIAC Rules; when the amount in dispute exceeds RMB 30 million, litigation in one of the Courts. Will this clause be valid? How does it work in practice?

2. **Involvement of Foreign Institutions**

**Misunderstanding**: Article 11 of the Regulation provides that the Courts will work with international mediation and arbitration institutions to form a one-stop dispute resolution mechanism. Some believe foreign institutions will get involved and will be able to operate within China.

**Clarification**: The wording of "international" in this article refers to both Chinese institutions with experiences and reputation in international dispute resolution and foreign institutions. One good example for Chinese international arbitral institution is the CIETAC.

Major obstacles have to be cleared before foreign institutions could actually get involved. Opening up the market for these foreign institutions may happen in the future but it will unlikely be decided by the SPC. Hence, in the near future, institutions that actively work with the Courts will likely be Chinese institutions with an international focus.

3. **Interim Measures in Assistance of Foreign Arbitration**

**Misunderstanding**: Parties to foreign arbitration proceedings may apply to the Courts for interim measures.

**Clarification:** This misunderstanding stems from Article 14 of the Regulation, which appear to mean that the parties, when choosing an international arbitration institution to resolve their disputes, may apply to the Courts for interim measures, whether before or during the arbitration proceeding.

However, Article 14 does not have that effect. The arbitration proceedings in this Article only refer to those conducted under Article 11 of the Regulation, i.e. arbitration proceedings as part of the Platform. The parties to foreign arbitration proceedings involving a Chinese party still cannot apply to Chinese courts for interim measures and cannot have the tribunal's interim measure orders enforced in China.

4. **International Commercial Law Expert Committee ("Expert Committee")**

Experts will be mainly foreign nationals, especially those from "Belt and Road" countries with an international reputation and recognition. They may act as mediators if the parties choose so and will also help to ascertain and interpret foreign substantive laws as well as customary international rules.

According to Article 9 of the PRC Law on Judges, judges of Chinese courts must be Chinese nationals, so it is impossible for foreign nationals to be judges of the Courts. The Expert Committee is established so that foreign experts can play an active role, despite the restriction on becoming judges. The number of experts sitting in the Expert Committee might be around 30 so as to balance efficiency and diversity. The appointment, tenure, management and remuneration of experts will be provided in more detailed rules to follow. But it's safe to say that when an expert is requested to work on a specific case, such as ascertaining foreign law, issuing expert opinions, or conducting as mediators, then very likely there will be payments.

5. **Procedural Language of the Courts**

**Misunderstanding**: The procedural languages for case before the Courts can be English or other foreign languages.

**Clarification**: This common misunderstanding stem from Article 4, which require judges of the Courts to be able to use English as working language, and Article 9, which provides that, if agreed by the other party, a party may submit evidence materials in English without the need of translating into Chinese.

**However, the Regulation never mentions that procedures before the Courts can be in English or parties can argue their cases in English. In fact, these are not possible under the current legal framework.** Article 262 of the Civil Procedure Law in China provides that trials of cases involving foreign elements must be in "language commonly used in the PRC", meaning Chinese, including languages native to the 55 recognized ethnic minorities in China. Article 6 of the Law on the Organization of Courts also includes a similar requirement. These laws are superior to the Regulation and cannot be modified by the SPC through judicial interpretations. Within the existing legal framework, the SPC is exploring ways to make it more convenient and cost-efficient for parties, hence the flexibility on submitting evidence materials in English.

6. **6. Publication of Dissenting Opinions**

Article 5 of the Regulation provides that a judgment of the Courts is reached by majority decision, and the dissenting opinion, if any, may be incorporated into the judgment. This is also an innovative measure of the SPC.

There have already been attempts (for instance, the Guangzhou Maritime Court) to promote the publication of dissenting opinions in judgments in China. However, this practice has never been widely adopted by other courts or made into a mandatory rule. Article 5 of the Regulation should NOT be viewed as an attempt to promote this practice nationally.

Internationally, in common law countries such as the United States, publication of dissenting opinion is a customary practice, but in civil law countries such as France, it is different, where each judgment is seen as the collective decision of the tribunal. In theory, China tends to recognize the practice of civil law countries. One possible major concern of the SPC is that, if the reasoning of each individual judge is known by the parties, then judges may face pressures, threats or reprisals from parties or even from higher-ups.