Kluwer Arbitration Blog

China's International Commercial Court: A Strong Competitor to Arbitration?

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In June 2018, China launched its first and second International Commercial Courts (the "**CICC**"). The advent of them represents a prolonged attempt of China to upgrade its judicial system by transplanting the advanced international practices to, according to the Supreme Court of China (the "**SPC**"), "provide services and protection for the "Belt-and-Road" construction (the "**BAR**")".

International commercial courts are certainly no novelty to the international dispute resolution ("**DR**") community. Numerous ones have emerged during the past decade with the goal of enhancing the attractiveness of their host countries in the purview of the intense competition on international DR market as one of their main pursuits. However, such aim was rarely mentioned when establishing the CICC. The idea of building a mechanism and corresponding institution for solving disputes in servicing the BAR was first put forward in January 2018 by a CPC Central Committee Opinion. This Opinion set the tone for the CICC by emphasizing its ability to serve, instead of its attractiveness for international parties. The corresponding purpose is stipulated in the Recital of the Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court (the "**Provisions**"), which can be summarized as, firstly, to better manage international commercial cases, secondly, to create a better judicial environment for transnational players, and lastly, to facilitate the BAR construction. Although an avenue through which parties can voluntarily submit their disputes to the CICC is created, and some of the reforms made by the Provisions are indeed unprecedented, the CICC's attraction for international cases may remain limited. I explain in this post why the CICC might only be a good "starting point" for China in the cause of being recognized as an attractive place for BAR disputes and could not, for the time being, replace international arbitration as the mainstream avenue.

1. Difficulties posed by the CICC's jurisdictional approach

According to article 2(1) of the Provisions, parties can submit the first instance international commercial cases with actual connection with China and with an amount in dispute of at least 300 million RMB to the CICC by a jurisdiction agreement. Obviously, such approach leaves limited room for consensual jurisdiction and in practice, poses several difficulties for lawyers intending to select the CICC as the DR forum.

The first difficulty would be how to draft an effective DR clause to select the CICC. There is not always a positive correlation between the total value of a contract and the amount in dispute arising

out of such contact. In other words, one cannot predict the "size" of the dispute when drafting a DR clause. Selecting the CICC in a jurisdiction agreement would produce too much uncertainty regardless of the "size" of the contract.

A "safe" way to select the CICC would be to adopt a "non-exclusive" choice of court clause stipulating that disputes over 300 million RMB will be submitted to the CICC and other disputes would be submitted to an arbitral tribunal or other Chinese courts. Nevertheless, the amount in dispute is not always fixed during a proceeding, as Mr. Wei Sun pointed out in his earlier post on this Blog. Cases where the amount in dispute exceed 300 million RMB after the acceptance of other courts either by the change of the claims by the claimant or filing counter-claims by the defendant, might have trouble reaching the CICC. Moreover, one cannot assume that cases with smaller amount in dispute are necessarily easier. Last, it is the truism that the Higher Court or the SPC could transfer tricky cases with the amount in dispute less than 300 million RMB to the CICC if they agree or decide to. Nevertheless, party autonomy would be completely deprived. Setting this quantifiable threshold might lessen the CICC's workload at the first appearance, but the practical difficulties posed by this may result in parties not selecting the CICC at all.

It is also noted that only cases with actual connection with China can be submitted to the CICC. Here the stubborn Chinese judicial tradition, i.e., Article 34 of the Civil Procedure Law, comes into play. Article 34 enumerates several locations which parties can choose via a written jurisdictional agreement to enable the court of such locations exercising jurisdiction over their disputes. It specifically emphasizes that for a consensual venue to be valid, such venue must have actual connection with the dispute. Thus, the CICC would be difficult to satisfy the demands of parties seeking a neutral forum for BAR disputes.

Taking the other four types of jurisdiction of the CICC into consideration (i. cases transferred from the first instance Higher Court; ii. cases with significant nationwide impact; iii. cases involving application for preservation measure in arbitration and setting aside or enforcement of international commercial arbitration awards; and iv. cases designated by the SPC when it deems appropriate), essentially, they operate only as an internal allocation of jurisdiction inside of the Chinese court system. In other words, with the restriction on the consensual jurisdiction, the CICC might only facilitate the resolution of cases which are already under the Chinese jurisdiction. Moreover, in terms of the CICC's judicial assistance for the enforcement of preservation measures and awards of international arbitration, parties would, in a way, be encouraged to use arbitration proceedings for BAR disputes.

There are significant differences between the CICC and other international commercial courts. The Singapore International Commercial Court (the "**SICC**") requires only a written jurisdiction agreement for an action to be heard by it even where the dispute has no actual connection with Singapore. Similar approach is adopted by the Dubai International Financial Centre Courts (the "**DIFCC**"). As for the CICC, one may argue that the arrangement with regard to consensual jurisdiction would only enable international parties willing to bring cases to Chinese courts to have their disputes resolved by a more professional bench, instead of vying for jurisdiction with international institutions.

2. Difficulties posed by the Chinese upper laws

Building an international commercial court is never an isolated event. In the absence of a full-scale revision of the current laws, setting some special procedures for the CICC would not be able to

eliminate parties' concerns towards the Chinese judicial system.

A fully-internationalized commercial court requires the participation of reputable foreign judges and highly-professional international lawyers. However, according to Article 9 of the Chinese Judges Law, foreign experts are prohibited from sitting as judges on the CICC, because a judge must possess Chinese nationality. And only Chinese-admitted lawyers can act as legal representatives according to the Chinese Civil Procedure Law, even when the applicable law is foreign law. With its limited room for institutional innovation, the CICC created an internal International Commercial Expert Committee. Parties can use this Committee as the mediator after a case is accepted by the CICC. This approach does, somehow, inexplicably remove the meditation function from the collegial panel, while improving the enforceability of the mediation agreement by allowing the CICC to issue a conciliation statement or a judgment based on the mediation agreement upon parties' request. The practical value of this Committee remains to be seen. However, it is obvious that this limited approach can by no means possess the same attractiveness compares to other courts with benches comprising leading international experts and flexible rules of representation for foreign lawyers, such as the SICC and the DIFCC, not to mention, to the international arbitration.

Moreover, the Chinese Civil Procedure Law does not provide any compulsive requirement for evidence disclosure before the start of hearings. The possibility of facing surprising evidence might be one of the biggest obstacles preventing a lawyer with common law background from trusting the Chinese judicial proceedings. The Provisions could have learnt from the SICC practices and opened a small window by allowing parties to exclude the application of the Chinese evidential rules and thereby grant more autonomy for parties to manage the proceeding. Regrettably, this issue remains unsolved.

In light of the preceding discussions, foreign lawyers' reluctance in selecting Chinese courts as DR forum and their "medieval" impression of the Chinese judicial system can hardly be converted by the establishment of the CICC. Despite that, the CICC did achieve what it set out to achieve by helping transfer international commercial cases to the hands of a more professional and internationalized bench and creating a much more flexible and efficient procedure for those cases. The CICC may not be able to compete with international arbitration at this moment, but who is to say it will not be a good starting point?

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