# COMPARING THE INTERNATIONAL COMMERCIAL COURTS OF CHINA WITH THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

ZHENGXIN HUO* AND MAN YIP**

**Abstract** The article critically reviews the litigation framework of the Chinese International Commercial Court ('CICC') using a comparative approach, taking as a benchmark the Singapore International Commercial Court ('SICC')—another Asian international commercial court situated within the Belt and Road Initiative ('BRI') geography. It argues that the CICC, despite being lauded as a visionary step toward an innovative, efficient and trustworthy dispute resolution system, does not live up to those grand claims on closer scrutiny. The discussion shows that the CICC is in many respects insular and conservative when compared with the SICC. The distinctions between the two litigation frameworks may be explained by the differences in objectives. Whereas the SICC was created to compete for international judicial business and bolster Singapore as a leading dispute resolution hub, the CICC is presently designed to provide a legal safeguard in BRI disputes with Chinese elements. This article also identifies major challenges confronting the CICC and sets out proposals for change.

**Keywords**: private international law, international commercial courts, Belt and Road Initiative, China, Singapore, comparative law, dispute resolution.

## I. INTRODUCTION

On 29 June 2018, the Supreme People's Court of China ('SPC') established two international commercial courts designed to hear international commercial disputes, in particular those arising in connection with the Belt and Road Initiative ('BRI').[1] Their creation was the means through which the SPC implemented the political decision of the Communist Party of China ('CPC') to provide a judicial safeguard for the BRI, which China is driving forward

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[1] X Mu, 'China Inaugurates Two Int'l Commercial Courts' (Xinhua Net, 29 June 2018) <http://www.xinhuanet.com/english/2018-06/29/c_137290628.htm>.

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ambitiously.[2] A day before the inauguration of the First International Commercial Court in Shenzhen and the Second International Commercial Court in Xi'an, the SPC issued a judicial interpretation document to legitimise the creation of the Chinese International Commercial Court ('CICC'). Under the title 'Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court' (the 'Judicial Interpretation on CICC'), this document contains a one-sentence preamble and 18 articles, setting out the framework, jurisdiction, judicial panel and numerous procedural rules of the CICC.[3] On the same day, eight judges from the SPC were appointed to the CICC panel.[4] In the following months, the SPC took more concrete measures to ensure that the CICC would start operating by the end of 2018, including the establishment of the CICC's International Commercial Expert Committee and the appointment of the first batch of experts in August,[5] the promulgation of a series of documents to crystallise the operation rules of the CICC in November,[6] and the appointment of seven additional judges in December.[7] On 29 December 2018, two days before the turn of the year, the CICC announced that it had accepted a number of cases.[8] The veil on the much-anticipated CICC was finally lifted.

Although the world has witnessed the emergence and proliferation of international commercial courts in the past decade or so,[9] the CICC has

[2] See Y Zhang, 'Institutional Innovation of China's International Commercial Courts' (China Court Net, 14 July 2018) <https://www.chinacourt.org/article/detail/2018/07/id/3393157.shtml>.

[3] Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court (Court Explanation No 11 of 2018) (promulgated by the Supreme People's Court, 27 June 2018; effective as on 1 July 2018) <http://www.court.gov.cn/zixun-xiangqing-104602.html>.

[4] Bulletin of the Supreme People's Court on the Appointment of the Judges of the International Commercial Court (SPC Order No 168 of 2018) (promulgated by the Supreme People's Court, 28 June 2018) <http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&gid=320334>.

[5] Bulletin of the Supreme People's Court on the Appointment of the Judges of the International Commercial Court (SPC Order No 225 of 2018) (promulgated by the Supreme People's Court, 24 August 2018) <https://pkulaw.cn/fulltext_form.aspx?Gid=320676&Db=chl>. See also 'The Decision on Appointment of the First Group of Members for the International Commercial Expert Committee' (China International Commercial Court, 24 August 2018) <http://cicc.court.gov.cn/html/1/219/235/245/index.html>.

[6] These documents include: 'Procedural Rules for the CICC (For Trial Implementation)', 'Working Rules of the International Commercial Expert Committee of the SPC (For trial implementation)', 'Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the One-stop Diversified International Commercial Dispute Resolution Mechanism' <http://cicc.court.gov.cn/html/1/219/208/210/index.html>.

[7] The Second Group of Judges of the China International Commercial Court were Appointed by the Supreme People's Court <http://cicc.court.gov.cn/html/1/219/208/210/1134.html>.

[8] The China International Commercial Court of the Supreme People's Court of China has accepted a Number of Cases concerning International Commercial Disputes <http://cicc.court.gov.cn/html/1/219/208/210/1152.html>.

[9] See DP Horigan, 'From Abu Dhabi to Singapore: The Rise of International Commercial Courts' (2015) 3 International Journal of Humanities and Management Sciences 78; W Steel, 'Judicial Specialization in a Generalist Jurisdiction: Is Commercial Specialization within the

attracted worldwide attention against the background of China's rapid rise to world power. The international legal community has posed a multitude of questions relating to the design of the CICC's jurisdictional framework, its procedural rules and the composition of its judicial panel.[10] An overarching issue is the degree of 'internationalisation' within the CICC's framework. From an external perspective, this relates to the permissible degree of foreign participation in CICC proceedings in terms of counsel, judges, experts, litigants, dispute resolution institutions,[11] and the like. From an internal perspective, it concerns China's willingness to forgo forum control and adopt international norms established by pre-existing models of international commercial courts.

This article, drawing on the Chinese legal and political contexts, seeks to answer these questions in greater depth than in the existing literature. Our analysis is anchored in a comparative approach, using the Singapore International Commercial Court (SICC)—another Asian international commercial court situated within the BRI geography—as a benchmark, to advance our understanding of the objective, operation and limitations of the CICC. Our key observation is that although the CICC has been lauded as a visionary step toward establishing an innovative, efficient, and trustworthy dispute resolution system,[12] closer scrutiny shows that it has so far not lived up to those claims. Our article shows that the CICC is in many respects insular and conservative, and these shortcomings are apparent when it is compared with the SICC. We argue that the distinctions between the two litigation frameworks may be explained by their different objectives. Although the SICC was created in the context of worldwide competition for international 'judicial business' and with the aim of bolstering Singapore's position as a leading dispute resolution hub, the CICC is presently designed solely to provide a forum for the resolution of BRI disputes with Chinese elements. A pertinent question is whether the CICC can and should be more than that, and what lessons it may draw going forward from the design and experience of the SICC.

The discussion is in four main parts, with a primary focus on analysing the CICC model through detailed comparison with the SICC. In Part II, by way of

High Court Justified' (2015) 46 Victoria University of Wellington Law Review 307; G Antonopoulou and E Themeli, 'The Domino Effect of International Commercial Courts in Europe – Who's Next?' (Conflict of Laws.net, 20 February 2018) <http://conflictoflaws.net/2018/the-domino-effect-of-international-commercial-courts-in-europe-whos-next/>.

[10] See, eg, W Sun, 'International Commercial Court in China: Innovations, Misunderstandings and Clarifications' (Kluwer Arbitration Blog, 4 July 2018) <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/>; 'With An Eye on Belt and Road Disputes, China Establishes New International Commercial Courts' (Herbert Smith Freehills, 4 July 2018) <https://www.herbertsmithfreehills.com/latest-thinking/with-an-eye-on-belt-and-road-disputes-china-establishes-new-international-commercial>.

[11] For example, the arbitration centres and mediation centres.

[12] Editorial of People's Court Daily, 'Providing Service for the Belt & Road Initiative, Demonstrating China's Judicial Civilization' (China Court Net, 29 June 2018) <https://www.chinacourt.org/article/detail/2018/06/id/3375859.shtml>.

background, we examine the political and legal contexts in which the CICC and the SICC were established and what their background stories tell us about their respective objectives. Parts III and IV turn to a comparison of the jurisdictional rules and salient procedural features of the CICC and SICC. The analysis points out that limitations to the CICC litigation framework have arisen from its legitimisation through the issuance of a judicial interpretation document. Part V, by reference to the SICC experience, identifies two main challenges confronting the CICC. It further sets out our suggestions on how to improve the CICC framework. In our conclusion, based on our comparative study, we set out emerging themes in international commercial courts in general and look to the future of dispute resolution.

## II. BACKGROUND: THE CREATION OF THE CICC AND SICC

### *A. The Creation of the CICC*

The CICC was established at a remarkable juncture in modern Chinese political history—the era of rejuvenation and consolidation. The Communist Party of China (CPC) proclaimed in 2018 that 'socialism with Chinese characteristics has entered a new era' when President Xi Jinping (Xi) was designated as the 'core' of the CPC's Central Committee.[13] Xi's consolidation of power has ushered in a series of significant changes in China's domestic and international policies. Accordingly, any meaningful analysis of the CICC must begin with a review of its origins from a macro legal-political perspective.

After Xi's ascent to power in 2012, he coined the phrase 'Chinese dream of national rejuvenation', to underline the overarching theme of his plans for China as its paramount leader.[14] Domestically, he has implemented wide-ranging changes termed 'comprehensive deepening reforms'. Internationally, he proposed a Silk Road Economic Belt and a twenty-first-century Maritime Silk Road, now collectively referred to as the BRI.[15] The BRI envisions the construction of new roads, railway, power plants, pipelines, ports, airports and telecommunications links, so as to foster trade, investment and financial cooperation that would boost infrastructure development and economic growth between China and more than 60 countries in Asia, Europe, the Middle East and North Africa. There is no doubt that Xi views the BRI as the signature foreign policy theme of his tenure as leader and the practical embodiment of his 'Chinese Dream'. His personal authority, therefore, has a lot riding on its success.

[13] Z Li, 'Socialism with Chinese Characteristics Has Entered a New Era: A Comprehensive Analysis' (2018) 10 QiuShi Journal 102 <http://english.qstheory.cn/2018-02/11/c_1122395888.htm>.

[14] See Y Zhao, '"Chinese Dream" is Xi's Vision' (China Daily, March 2013) <http://www.chinadaily.com.cn/china/2013npc/2013-03/18/content_16315025.htm>.

[15] TW Lim, 'Introduction' in Lim *et al.* (eds), *China's One Belt One Road Initiative* (Imperial College 2016) 3.

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The BRI, if successful to the degree envisioned by the Chinese government, is likely to transform the global economic landscape and propel development in many countries. The tantalising opportunities of the BRI notwithstanding, the path ahead is not straightforward. The difficulties and risks of this project cannot be understated, and foreign scepticism remains unabated.[16] Crucially, the BRI will encounter formidable legal challenges with many international dimensions. It will comprise commercial dealings between parties from diverse legal systems and traditions. Moreover, the countries within the BRI geography are at different stages of development, and a number continue to struggle with corruption, instability and lack of transparency in their political and legal systems.[17]

Given these differences and domestic issues in the BRI countries, the resolution of disputes in conventional national courts is unlikely to be an attractive option to business parties.[18] Nor would it safeguard the development trajectory of the BRI as a tool for achieving Xi's 'Chinese Dream', as different countries are likely to have different interests that might result in court outcomes inconsistent with that vision. Further, it would seem optimal to establish an efficient, neutral, and reliable dispute resolution mechanism to address the inevitable transnational disputes that will arise from the BRI.

Xi was aware of these legal challenges from the outset. Following the conclusion of the Fourth Plenary Session held by the 18th CPC Central Committee in October 2014, a Communiqué was published to set out the broad strategy for overcoming the anticipated obstacles. One paragraph in the Communiqué—with the heading 'Strengthening foreign-related legal work'—sets out the strategic vision for overcoming anticipated legal challenges.[19] However, the legal methods that would be implemented to achieve that vision were unclear at that preliminary stage.

Three years later, on 23 January 2018, at a meeting of the CPC's Central Leading Group for Comprehensively Continuing Reform presided over

[16] See, eg, D Bulloch, 'After A Brief Silence, Skeptics of China's Belt and Road Initiative Are Speaking Up Again' *(Forbes*, 18 April 2018) <https://www.forbes.com/sites/douglasbulloch/2018/04/18/china-belt-road-initiative-obor-silk-road/#3a3107954daa>. cf AA Cumba & KJ Yao, 'Commentary: China's Belt and Road Initiative is Paved With Risks, Red Herrings and Rent-Seeking Behaviour' (Channel NewsAsia, 8 July 2018) <https://www.channelnewsasia.com/news/commentary/china-belt-road-initiative-risk-red-herring-rent-seeking-10475036>; L Lim, 'Growing Doubts over China's Belt and Road Projects in Southeast Asia' (Channel Newsasia, 13 August 2018) <https://www.channelnewsasia.com/news/asia/belt-and-road-growing-doubts-projects-southeast-asia-10612242>.

[17] See 'Corruption Perceptions Index 2017', (Transparency International, 21 February 2018), <https://www.transparency.org/news/feature/corruption_perceptions_index_2017>.

[18] The increase in commercial dealings between parties from different jurisdictions will give rise to complex private international law issues: see generally P Sooksripaisarnkit and S Ramani Garimella (eds), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018).

[19] 'Communiqué of the 18th Central CPC held the Fourth Plenary Session' (People's Daily Online, 23 October 2014) <http://cpc.people.com.cn/n/2014/1023/c64094-25896724.html>.

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by Xi,[20] a document entitled 'Opinions on Establishing International Commercial Dispute Mechanism and Institution of the Belt and Road Initiative' was passed. This document revealed the legal method for achieving the CPC's aims of safeguarding China's 'sovereignty, security, and development interests'. It laid out the preliminary design of a BRI dispute resolution mechanism to be created by China. The critical paragraph states that:[21]

> The Supreme People's Court should launch international commercial courts and be responsible for setting up a committee of international commercial experts to support the establishment of a one-stop dispute resolution center for Belt and Road related disputes. Such a center should comprise a range of dispute resolution mechanisms, effectively linking litigation, mediation and arbitration so as to offer reliable and efficient legal services to the parties participating in the Belt and Road Initiative.

Three key points are clear from the above paragraph. First, the CPC's plan was to create an 'international commercial court'—a label highlighting that its docket would comprise international commercial cases and its design would differ from a conventional Chinese court. Second, the intended dispute resolution mechanism would be a 'one-stop' centre offering a range of dispute resolution services. The design is strategic: the aim is to consolidate Chinese control over dispute resolution processes. Third, the SPC was to take charge of the project, with assistance from a committee of international commercial experts.

What followed was a full-scale and speedy execution of the mission by the SPC. Less than three months later, on 9 March 2018, when delivering the annual work report to the National People's Congress (NPC), Zhou Qiang, the President and Chief Justice of the SPC, declared that the SPC was expeditiously implementing the political decision of the CPC and that the international commercial courts would be launched later in the year.[22]

To fully appreciate the salient features of the CICC and their limits (as discussed in Part III), a preliminary issue regarding the CICC's legitimacy and legitimisation process must first be addressed. The CICC was established pursuant to a judicial interpretation document issued by the SPC—the Judicial

[20] The Central Leading Group for Comprehensively Continuing Reform was established at the 3rd Plenary Session of the 18th Central Committee in November 2013. In March 2018, the leading group was converted into a committee—the Central Comprehensively Deepening Reforms Commission. See 'CPC Releases Plan on Deepening Reform of Party and State Institutions' (Xinhua Net, 21 March 2018) <http://www.xinhuanet.com/english/2018-03/21/c_137055471.htm>.

[21] 'Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions issued by the General Office of the Communist Party Central Committee and the General Office of the State Council' (Xinhua Net, 27 June 2018) <http://www.xinhuanet.com/2018-06/27/c_1123046194.htm>.

[22] 'Report on the Work of the Supreme People's Court' (Xinhua Net, 10 March 2018) <http://www.xinhuanet.com/politics/2018-03/10/c_1122514997.htm>.

Interpretation on CICC. Unlike the creation of international commercial courts in other jurisdictions,[23] there was no constitutional amendment or any other legislative action to legitimise the creation of the Chinese specialist courts. This imposes serious constraints on the innovations that may be made within the CICC framework.

By way of background, in the Chinese legal system, 'judicial interpretation' refers to a general interpretation document issued by the SPC on the implementation of legislation in judicial practice, which in effect results in the creation of new rules in a systematic and comprehensive manner.[24] Judicial interpretations are playing an increasingly prominent role within the Chinese legal system.[25] Although the SPC, when exercising this function, would seem to usurp the role of the legislature (comprising the NPC and its Standing Committee), most Chinese scholars acknowledge the merits of and need for the SPC's activism in this regard, to address the institutional defects in the Chinese legislative system.[26] By way of background, the NPC is in session for only about two weeks each year, which is a woefully short period of time for remedying statutory gaps and inadequacies.[27] Although the Standing Committee enjoys legislative authority when the NPC is not in session, its capacity is severely limited, as it comprises retired senior officials instead of legal professionals. Consequently, a large number of Chinese statutes are difficult to apply by reason either of vague language or being simply outdated.[28] In such circumstances, the SPC has, through issuance of judicial interpretations, helpfully stepped in to fill a lacuna left by the Chinese legislature. It is thus unsurprising that the NPC and its Standing Committee are not only aware of the SPC's *ultra vires* interpretations, but are the willing beneficiaries of them.[29]

This interplay between the Chinese judiciary and the legislature in law-making may also explain why the CPC appointed the SPC, instead of the legislature, to take the lead in establishing the BRI dispute resolution mechanism. First, it is more efficient for the SPC to issue a judicial

[23] For the SICC, see discussion below at Part IV. The DIFCC was created through a synthesis of Federal and Dubai laws, see: 'Legal Framework', DIFC Courts <https://www.difccourts.ae/about-courts/legal-framework/>. The Netherlands Commercial Court is to be introduced by the forthcoming Netherlands Commercial Court Act, see: 'A First Guide to Commercial Litigation in the Netherlands' <https://netherlands-commercial-court.com/>.

[24] 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) art 32 <http://www.lawinfochina.com/display.aspx?lib=law&id=5623&CGid> [*LOPC*]; AH Chen, *An Introduction to the Legal System of the People's Republic of China* (3rd edn, LexisNexis 2004) 124–6.

[25] M Yuan, 'A Commentary on the Legitimacy of Judicial Interpretation of the SPC' (2003) 20 Studies in Law & Business 3.

[26] See Z Huo, 'Two Steps Forward, One Step Back: A Commentary on the Judicial Interpretation on the Private International Law Act of China' (2013) 43 HKLJ 685, 710.

[27] W Li, 'Judicial Interpretation in China' (1997) 5 Willamette Journal of International Law & Dispute Resolution 87, 104.

[28] Huo (n 26) 710.

[29] ibid 711.

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interpretation, as compared with the cumbersome legislative process undertaken by the NPC or its Standing Committee.[30] Secondly, the SPC—composed primarily of legal professionals—has the capacity and expertise to accomplish the task. Given the urgent need to institute legal safeguards for the implementation of the BRI, the CPC decided to adopt the most convenient solution.

However, the convenience comes at a cost. The legitimacy of the CICC is not beyond question, as judicial interpretation documents are ranked below national legislative acts in terms of legal force. This raises the question of whether it was appropriate to create a wholly new dispute resolution mechanism through something less than a primary legislative act. Further, the process by which the CICC has come into being has consequences for its design and future development. The lower hierarchical order of a judicial interpretation as compared to a national legislative act dictates that the former can only 'interpret' but not contravene or exceed the latter. In other words, the Judicial Interpretation on CICC is constrained by existing Chinese legislation. As we show in greater detail in Parts III and IV, the CICC is insular and conservative in many respects, and these limitations are attributable to its constitutional origins.

### *B. The Creation of the SICC*

We now turn to consider the SICC, which was launched on 5 January 2015, about three and a half years ahead of the CICC. The idea of creating a Singaporean international commercial court was mooted by the Chief Justice of Singapore in 2013, the same year China announced the BRI. The BRI was still an amorphous concept at the time the SICC Committee Report (a feasibility study) was released.[31] For this reason, the report made no mention of the BRI or the disputes that might arise from it.

The reasons for establishing the SICC may be examined from three perspectives.[32] First and foremost, from the perspective of national interests, the value of the legal services sector in Singapore had grown by 71.5 per cent from 2008 to 2013.[33] Investing in the dispute resolution services sub-sector would thus be a natural and logical step for Singapore to take. Viewed against the wider background of legal developments in Singapore, the

[30] See Legislation Law of the People's Republic of China (2015 Amendment)] (promulgated by the Standing Committee of the National People's Congress, 15 March 2015, effective on 15 March 2015) arts 40 and 41 <http://lawinfochina.com/display.aspx?id=19023&lib=law&EncodingName=big5>.

[31] The SICC Committee Report was published in November 2013.

[32] M Yip, 'The Singapore International Commercial Court – The Future of Litigation?' (2019) Erasmus Law Review (forthcoming).

[33] Z Hamzah, 'Positioning Singapore as Asia's Legal Capital' (*The Straits Times*, 16 January 2015) <https://www.straitstimes.com/opinion/positioning-singapore-as-asias-legal-capital>. It was also reported that the growth rate of Singapore's legal sector outstripped that of the overall economy.

creation of the SICC followed shortly after the launch of the Singapore International Mediation Centre and its training arm, the Singapore International Mediation Institute, in 2014. It is also notable that by 2015, the Singapore International Arbitration Centre was thriving and a brand name to be reckoned with.[34] After launching the SICC, Singapore continued to foster its branding as the premier dispute resolution hub—it enacted the Singapore Mediation Act in 2017, and the Singapore Convention on Mediation was due to be signed in Singapore in August 2019. The SICC is thus part of Singapore's efforts to augment the menu of dispute resolution services it offers to the international business community. Importantly, the SICC aims neither to supplant arbitration nor to replace traditional litigation. Indeed, the Chief Justice drew his inspiration for the SICC from his observation of the London legal landscape—the thriving arbitration business alongside the successful London Commercial Court. He saw that there was 'room for the co-existence and development of these two systems of dispute resolution'.[35]

Second, according to the SICC Committee Report, the SICC was created in response to the perceived need for 'a neutral and well-regarded dispute resolution hub in the region', as a result of the continued growth of cross-border trade and commercial activities in Asia.[36] By now, it is clear that the BRI will only fuel the regional need for a trustworthy dispute resolution mechanism. At the same time, how will the creation of the CICC affect Singapore's ambitions to become the Asian hub for dispute resolution? Are the CICC and the SICC (functioning alongside other Singaporean dispute resolution services such as arbitration and mediation) likely to become competitors or collaborators?

Finally, the popularity of international commercial arbitration has meant that the development of commercial law has been hidden from view, which is not ideal for a world disrupted by globalisation and by rapidly developing technologies. One of the aims of the SICC is to incentivise commercial parties to choose litigation, so that coherent and transparent development of commercial law may take place.[37] This public interest perspective is perfectly aligned with the national interest perspective—the SICC marks Singapore's leadership in driving forward the development of commercial law,[38] and thus in turn renders it more attractive as a venue for commercial dispute resolution.

[34] See 'SIAC Announces Record Case Numbers for 2015' (Singapore International Arbitration Centre, 25 February 2016) <http://www.siac.org.sg/images/stories/press_release/SIAC%20Announces%20Record%20Case%20Numbers%20for%202015_25%20February%202016.pdf>.

[35] S Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution' (19 January 2015) <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf>.

[36] *Report of the Singapore International Commercial Court Committee* (Ministry of Law, 29 November 2013) <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf> [*The SICC Committee Report*].

[37] ibid.

[38] The Singapore Court of Appeal has on various occasions declined to follow recent English developments on the basis that the latter introduce uncertainty. These departures may be viewed as efforts to make Singapore law more attractive than English law as the governing law of commercial

Importantly, unlike the CICC, the SICC was established pursuant to a suite of legislative amendments.[39] Highlighting the key legislative amendments illustrates how the SICC was created through comprehensive legal changes to ensure its function as a game changer in dispute resolution. First, the Constitution of the Republic of Singapore was amended to enable the appointment of foreign judges onto the SICC panel. Second, to constitute the SICC as a division of the Singapore High Court[40] and to enable the enactment of SICC jurisdictional rules and procedures, the Supreme Court of Judicature Act (SCJA) was amended.[41] Third, new provisions were introduced to the subsidiary legislation to the SCJA—the Rules of Court[42] that govern procedural matters for civil proceedings—to set out an innovative and distinctly SICC jurisdictional and procedural framework.

### C. *Reflections*

Our review of the reasons for the establishment of the CICC and the SICC highlight a key distinction between the two litigation models. The CICC was created to ensure the consolidation of Chinese control in dispute resolution, and thus safeguard Xi's signature foreign policy theme and the 'Chinese Dream' against unexpected legal risks. In contrast, the SICC was created to compete for international dispute resolution business, to advance Singapore's economic interests and strengthen its influence in the region.

Interestingly, these distinct objectives have led to one commonality and various differences in the design of the CICC and the SICC. Both the CICC and the SICC were established to further the vision of a 'one-stop shop' for dispute resolution. The CICC was designed to offer a comprehensive range of dispute resolution services, so that BRI disputes could be resolved through the CICC 'one-stop shop', which in turn would ensure Chinese control over the processes and somewhat greater certainty in the outcomes. Although the SICC was only designed to offer litigation services and judicial support for international arbitration, it is part of Singapore's multi-pronged strategy to promote the nation as a dispute resolution hub. However, the different objectives of the CICC and SICC translate into crucial differences in the designs of the two litigation frameworks. As will become apparent in Parts III and IV, the CICC is more insular and conservative in design, generally resistant to overt internationalisation of its framework or direct foreign influence. The SICC framework, however, is characterised by the core tenets

transactions. If Singapore law is the governing law of the contract, parties will likely choose to resolve their disputes in Singapore.

[39] See 'Legislative Changes Tabled to Establish the Singapore International Commercial Court and to Update the Regulatory Framework for the Legal Profession' (Ministry of Law, 7 October 2014) <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/SICC-and-legal-profession-regulatory-framework-update.html>.

[40] Supreme Court of Judicature Act (Cap 322, 2007) section 18A [*SCJA*].

[41] ibid sections 18B–18M.

[42] R5, 2014.

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of flexibility, party autonomy, and internationalisation—features chosen to attract commercial parties to litigate in Singapore, especially those who might not otherwise choose conventional domestic court litigation.

Further, the process of the creation and legitimisation of the CICC has severely limited its capacity for innovation. The SICC, in sharp contrast, was brought into being through comprehensive legislative changes that enabled remarkable innovations to be introduced within its litigation framework. The question is whether the process of creating and legitimising the CICC is a mere technical defect or a deliberate legal constraint introduced to guard against rapid changes in the future.

## III. JURISDICTION

### *A. The CICC's In Personam Jurisdiction and Subject-Matter Jurisdiction*

The Judicial Interpretation on CICC established it as a permanent adjudication organ of the SPC. The CICC has jurisdiction over five types of cases:[43]

(i) First instance international commercial cases in which the parties have chosen the jurisdiction of the SPC pursuant to Article 34 of the Civil Procedure Law, and in which the amount in dispute exceeds RMB300 million;
(ii) First instance international commercial cases which, although subject to the jurisdiction of the Higher People's Courts, the Higher People's Courts consider more appropriate to be tried by the CICC, and for which permission for transfer has been obtained from the SPC;
(iii) First instance international commercial cases that have a significant nationwide impact in China;
(iv) Cases involving applications for preservation measures in arbitration and for the setting aside or enforcement of international commercial arbitration awards within the CICC one-stop shop; and
(v) Any other international commercial cases that the SPC considers appropriate to be tried by the CICC.

The CICC's *in personam* jurisdiction is bound up with its subject-matter jurisdiction, which we examine later in this section. For now, we focus on the consensual and non-consensual bases on which the CICC may take jurisdiction.

#### *1. Consensual jurisdiction*

Subject to the fulfilment of other requirements, parties may by written agreement submit an international commercial dispute to the CICC. Insofar

[43] Judicial Interpretation on CICC (n 3) arts 1 and 2.

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as the CICC is a constituent part of the SPC, parties are now permitted to choose the SPC to hear their international commercial disputes. This is a significant development in Chinese law and judicial practice.

Before the creation of the CICC, although the Civil Procedure Law ('CPL') allowed litigants to choose a Chinese court by agreement, their choice was subject to various limitations. One such limitation is that party choice of a Chinese court must be consistent with the CPL provisions on tier jurisdiction.[44] Under these tier jurisdictional rules, first instance commercial cases, including international cases, are usually heard by the Basic People's Courts. 'Important' first instance international cases fall within the jurisdiction of the Intermediate People's Courts. In exceptional cases, Higher People's Courts may hear first instance international cases, provided that these cases would have significant impact in the jurisdiction where they arose.[45] As a matter of law, the SPC may exercise its trial jurisdiction in two situations: (1) if the dispute has significant nationwide impact in China; and (2) if the SPC deems that the dispute falls within its jurisdiction.[46]

In practice, however, since its establishment in 1949, the SPC has never heard a first instance commercial case, let alone an international one. In fact, the SPC has on numerous occasions affirmed the principle that first instance international commercial cases should be heard by the lower People's Courts.[47] According to an official document issued by the SPC in 2017, the rules of tier jurisdiction over international commercial cases allocate first instance cases, based on the amount in dispute, to the Basic People's Courts, Intermediate People's Courts or Higher People's Courts.[48] These rules do not provide for the allocation of a first instance international commercial case to the SPC. Hence, before the creation of the CICC, parties were not allowed to choose the SPC to hear their international commercial disputes.

The Judicial Interpretation on CICC has therefore changed the practice by permitting parties to choose the SPC (specifically, the CICC) to hear their international commercial disputes pursuant to Article 34 of the CPL without being bound by the rules of tier jurisdiction, provided that the amount in dispute exceeds RMB300 million. Given that SPC judges are perceived to be more qualified than those in lower People's Courts, and 15 SPC judges have

[44] 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=>[CPL]. [45] ibid arts 17, 18 and 19. [46] ibid art 20.

[47] See, eg, Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements (Court Explanation No 5 (2002) of the Interpretations of the SPC) (adopted by the Supreme People's Court, 25 February 2002; effective on 1 March 2002) <http://www.lawinfochina.com/display.aspx?lib=law&id=2295&CGid=>.

[48] Notification of the Supreme People's Court on Clarifying the Standards of Tier Jurisdiction over First Instance Foreign-related Civil and Commercial Cases (SPC Order No. 359 of 2017) (adopted by the Supreme People's Court, 7 December 2017; effective on 1 March 2018) <https://www.pkulaw.cn/fulltext_form.aspx?Gid=320460&Db=chl>.

been appointed to the CICC to date, resolving international commercial cases before the CICC is not without its attractions, especially if the parties are inclined to have their claims heard in a Chinese court.[49]

However, a written jurisdiction agreement in favour of the CICC is not by itself sufficient to confer jurisdiction on the CICC. The CICC does not have jurisdiction over cases with no *actual* connection to China. Under the Judicial Interpretation on CICC, the CICC can hear first instance international commercial cases in which the parties have submitted to the jurisdiction of the SPC pursuant to Article 34 of the CPL. Article 34 requires, *inter alia*, that the court chosen by the parties has an *actual connection* with the dispute, that is: (a) it is the court at the place of the defendant's domicile; (b) it is the court at the place where the contract was performed; (c) it is the court at the place where the contract was signed; (d) it is the court at the place of the plaintiff's domicile; or (e) it is the court at the place where the subject matter of the claim is located.[50]

A little more needs to be said about the requirement that the quantum in dispute must exceed RMB300 million. Clearly, this serves as a filter mechanism: only major disputes will be resolved by the CICC. From a purely pragmatic view, it may be said that CICC's resources should not be spent on resolving minor disputes that can be effectively resolved in lower Chinese courts, by national courts in other jurisdictions, by arbitration or even by mediation. After all, the CICC is a constituent part of the SPC that does not in practice hear first instance claims. In line with the practice of the SPC, CICC is designed to hear cases of some (economic) significance.

### 2. *Non-consensual jurisdiction*

In addition to consensual jurisdiction, the CICC may hear a first instance international commercial case in three other situations in which the consent of the parties is irrelevant.[51] The first is when it is a dispute that would have been heard by a Higher People's Court at the provincial level, but which has been referred to the CICC by that Higher People's Court with the approval of the SPC. This involves the exercise of the power to internally allocate jurisdiction between two Chinese courts.

The second is when the case is an international commercial matter that has a significant nationwide impact in China. Such cases may be filed with the CICC directly without the need for a written jurisdiction agreement or satisfying the requirement that the quantum in dispute exceeds RMB300 million. If such cases are first filed with other Chinese courts, they would presumably have to be transferred to the CICC upon the SPC's determination that they have

[49] Typically, these would be Chinese litigants.
[50] To be clear, 'place' under art 34 of CPL in an international context means 'country'.
[51] CPL (n 44) art 38.

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significant nationwide impact in China. However, it is unclear at this stage what kind and degree of impact would constitute such 'significant nationwide impact'.[52]

The third situation involves any other international commercial cases that the SPC deems fit for the CICC to hear. Currently, no rules or criteria have been prescribed to guide the SPC's exercise of this discretion. In the CICC's initial years, a crucial source of its caseload is likely to come from the exercise of its non-consensual jurisdiction, and therefore the rules should be clear and certain. At the very least, without forfeiting flexibility entirely, the SPC should issue official guidelines setting out the relevant criteria for or illustrations of what are considered cases with 'significant nationwide impact' in China and what cases the SPC might consider appropriate for the CICC to hear.

Nevertheless, from the perspective of forum control, the wide ambit of discretion that is entailed in the jurisdictional rules enables the SPC to fully control the caseload of the CICC. This is likely to be welcomed by the Higher People's Courts, which may prefer to let the CICC handle complex, difficult or sensitive international commercial cases, to avoid having to come to a mistaken or controversial decision in a case with wide-ranging ramifications.

### 3. *Subject-matter jurisdiction: international commercial disputes*

The CICC's subject-matter jurisdiction is limited to international commercial disputes—it does not have the general civil jurisdiction the SPC does. Pursuant to Article 3 of the Judicial Interpretation on CICC, a claim is 'international' in nature if (1) either or both parties are foreign nationals, enterprises, organisations, stateless persons, or have habitual residence outside China; (2) the subject matter of the dispute is outside China; or (3) the events that created, changed or terminated the commercial relationship at issue occurred outside China.[53]

The definition of 'international' under Article 3 embodies the 'three-element test', which is the traditional approach used by the SPC to define 'foreign' for the purpose of its general jurisdiction. Under the 'three-element test', if one of the elements—that is, the parties, subject matter or factual position—has a connection with a foreign jurisdiction, the case will be classified as one involving foreign elements.[54] It should be noted that although the 'three-element test' has been endorsed by the SPC for ordinary domestic courts' application since the 1980s, its inherent rigidity has produced unjust results in practice, prompting reform by the SPC through its issuance of judicial interpretation documents in 2012 and 2015. These two documents inserted a catch-all clause in addition to the original definition, to introduce a measure

[52] Z Tang *et al.*, *Conflict of Laws in the People's Republic of China* (Edward Elgar 2016) 53.
[53] Judicial Interpretation on CICC (n 3) art 3.
[54] Huo (n 26) 692.

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of flexibility to the test.[55] The meaning of 'foreign' has since been expanded to qualify as 'foreign' those civil or commercial relationships which, although they do not technically satisfy the 'three-element test', have substantive connections with a foreign jurisdiction.[56] It is thus puzzling that the Judicial Interpretation on CICC adopted the outdated 'three-element test', as opposed to the liberalised 'three-element test' currently applied by other Chinese courts. This is a step backwards for Chinese judicial practice.

To illustrate the rigidity of the outdated test, consider two companies, each wholly owned by a Singapore corporation, that are incorporated and registered in China, and have established their principal places of business there. If these two Chinese incorporated companies conclude a contract with each other in China to conduct business within the territory of China that is directly related to the BRI, according to the rules they cannot submit their contractual disputes to the CICC for a number of reasons. First, even though wholly owned by Singapore corporations, the parties to the contractual dispute are considered Chinese entities. Chinese law determines the nationality of a company based on the place of incorporation (registration).[57] Second, the parties' habitual residences are in China. The Chinese Private International Law Act provides that the habitual residence of a company is its principal place of business.[58] Third, notwithstanding that the contract relates to the BRI, it was concluded and performed in the territory of China. As such, the parties, the subject matter and the facts do not involve an 'international' element as defined under Article 3 of the Judicial Interpretation on CICC. Hence, we believe that the word 'international', as defined in the Judicial Interpretation on CICC, is too rigid for effective application.

As to the meaning of 'commercial', it is not defined in the Judicial Interpretation on CICC. At the CICC press conference held on 28 June 2018, Justice Liu Guixiang, a senior judge of the SPC, commented that the CICC's docket will comprise civil and commercial disputes between equal subjects. He went on to stress that two categories of case are excluded: (1) disputes

[55] Interpretation I of the Supreme People's Court on Issues Concerning the Application of the Law on Choice of Law for Foreign-Related Civil Relationships (SPC Interpretation No 24 of 2012) (promulgated by the Supreme People's Court, 28 December 2012; effective on 7 January 2013) art 1 <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=192329> [*Judicial Interpretation I*]; Judicial Interpretation by the Supreme People's Court on the Civil Procedure Law of the People's Republic of China (SPC Interpretation No. 5 of 2015) (adopted by the Supreme People's Court, 18 December 2014; effective on 4 February 2015) art 522 <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=242703> [*Judicial Interpretation on CPL*].

[56] Huo (n 26) 693.

[57] These two companies are the legal persons of mainland China, as Chinese law applies the criterion of the place of incorporation (registration) to determine the nationality of a legal person. Company Law of the People's Republic of China (2013 Amendment)] (adopted by the Standing Committee of National People's Congress, 28 December 2012; effective on 1 January 2013) arts 2 and 191 <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=183386>.

[58] Law on Choice of Law for Foreign-Related Civil Relationships (adopted by the Standing Committee of National People's Congress, 28 October 2010; effective 1 April 2011), art 14 < http://www.npc.gov.cn/wxzl/gongbao/2010-12/09/content_1614035.htm> [Private International Law Act].

between countries concerning investment or trade issues; and (2) disputes between the host country and investors concerning investment issues, which are to be resolved via the existing international dispute settlement mechanisms.[59] Hence, the meaning of 'commercial' is intended to be very broad, seemingly restricted only by the exclusion of these matters.[60] But such informal guidance is insufficient. Potential users of the CICC need certainty. For example, will the CICC consider any dispute arising between private parties not falling within the excluded categories and not concerning criminal/constitutional law issues as conclusively 'commercial', without the need for further investigation? In this connection, would a dispute over company property where the shareholders are husband and wife embroiled in foreign divorce proceedings be considered a 'commercial' dispute? The answers are unclear.

### *B. The SICC's In Personam Jurisdiction and Subject-Matter Jurisdiction*

There is already an extensive literature describing the SICC's jurisdictional framework,[61] so the treatment of these issues here will be succinct and focused on comparison with the CICC. According to section 18D of the SCJA, the SICC has jurisdiction to hear two kinds of matters. First, it may hear international and commercial cases that fall within the original civil jurisdiction of the Singapore High Court and that also satisfy the conditions prescribed in the Rules of Court.[62] Second, it may hear proceedings relating to international commercial arbitration that the Singapore High Court has jurisdiction to hear, and which also satisfy the conditions laid down in the Rules of Court.

In respect of the first type of matters, the Rules of Court specify three situations in which the SICC may be seised of jurisdiction. First, where there is a written jurisdiction agreement in favour of the SICC, and the parties are not seeking any form of prerogative relief.[63] Second, where the case is

[59] '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>.

[60] For a general understanding of the term 'commercial' under Chinese law, one may seek further guidance from a judicial interpretation document implementing the New York Convention. Decision on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Court Issuance No 5 of 1987) (adopted by the Standing Committee of National People's Congress, 2 December 1986; effective on 22 April 1987) <http://en.pkulaw.cn/display.aspx?cgid=b96476088a462bafbdfb&lib=law>.

[61] See, eg, M Yip, 'Special Reports – Singapore International Commercial Court: A New Model for Transnational Commercial Litigation' (2015) 32 Chinese (Taiwan) Yearbook of International Law and Affairs 155; M Yip, 'The Resolution of Disputes before the Singapore International Commercial Court' (2016) 65 ICLQ 439; A Chong and M Yip, 'Singapore as the Centre for International Commercial Litigation: Party Autonomy to the Fore' (2019) 15 JPIL 97.

[62] See also Rules of Court, Order 110, rule 7.

[63] Rules of Court, Order 110, rule 7.

transferred from the High Court to the SICC.[64] Thirdly, the SICC has jurisdiction to hear an originating summons issued under Order 52 of the Rules of Court for leave to commit a person for contempt in respect of any SICC judgment/order.[65] As the third situation concerns an exceptional set of circumstances, our analysis below focuses on the first two situations.

The second type of matter relates to the SICC's jurisdiction to support international commercial arbitration, and therefore does not form the focal point of our analysis. Briefly, the parliamentary intent behind this recently expanded jurisdiction was to 'increase Singapore's attractiveness as a seat of arbitration', in part through the distinctive appeal of the Singapore bench, which includes foreign judges.[66] The Rules of Court[67] prescribes that the SICC has jurisdiction to hear proceedings relating to international commercial arbitration that the High Court may hear under the International Arbitration Act ('IAA').[68] The term 'international' in this particular context adopts the meaning set out in section 5(2) of the IAA, and the interpretation of 'commercial' is to be guided by the UNCITRAL Model Law on International Commercial Arbitration. IAA proceedings commenced in the High Court may be transferred to the SICC.[69]

### *1. Consensual jurisdiction: written jurisdiction agreement*

Unlike the CICC, a written jurisdiction agreement in favour of the SICC is a sufficient basis for the SICC to be seised of jurisdiction. The dispute need not have any other connection with Singapore. Further, where there is a jurisdiction agreement, the Rules of Court prescribe very restrictive grounds upon which the SICC may decline to assume jurisdiction.[70] The SICC can only do so where 'it is not appropriate' for the case to be heard by it, although the concept of 'appropriateness' to guide the exercise of judicial discretion is not precisely defined.[71] What is made clear, however, is that the SICC cannot refuse jurisdiction on the *sole* basis that the case is 'connected to a jurisdiction other than Singapore'.[72] Connections with Singapore are thus downplayed in the determination of the SICC's international jurisdiction. This is a remarkable departure from the traditional *forum non conveniens* principles under

[64] Rules of Court, Order 110, rule 12.

[65] Rules of Court, Order 110, rule 7(2)(b).

[66] 'Second Reading Speech by Ms Indranee Rajah, Senior Minister of State for Law and Finance, on Supreme Court of Judicature (Amendment) Bill' <https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/second-reading-speech-supreme-court-of-judicature-bill.html>.

[67] Rules of Court, Order 110,

[68] Cap 143A, Rev Ed 2002. These applications include stay of proceedings, interim measures, challenges to arbitrators, challenges to awards, recognition and enforcement of awards, appeals on ruling of jurisdiction and subpoenas

[69] Rules of Court, Order 110, rule 58.

[70] Rules of Court, Order 110, rule 8.

[71] Rules of Court, Order 110, rule 8(3) provides that the SICC shall have regard to the 'international and commercial character' of the dispute in exercising its discretion.

[72] Rules of Court, Order 110, rule 8(2).

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Singapore law concerning the exercise of jurisdiction of the High Court.[73] The traditional principles are intensely focused on comparing the case's connections with Singapore to its connections with a foreign forum—the underlying assumption being that it is more efficient and effective for a forum that is more closely connected with the dispute to resolve it. The philosophy undergirding the SICC regime, in contrast, is that party autonomy is paramount.

As is clear from the jurisdictional regime, the SICC's primary objective is to compete with other fora for dispute resolution business, especially cases that would not otherwise be heard by the Singapore High Court applying its traditional jurisdictional regime. For this reason, the SICC jurisdictional rules are designed to promote active forum shopping by potential users and are not generally concerned with connections to Singapore. Indeed, the SICC regime recognises a concept called the 'offshore case', which is essentially a dispute with 'no substantial connection with Singapore',[74] and this status allows the SICC to apply a more generous approach in procedural flexibility. The point is to promote Singapore as a neutral dispute resolution forum to litigants. This objective also results in the promulgation of rules that are pro-submission to the SICC. Other than setting out restrictive grounds on which the SICC may decline to assume jurisdiction, a choice of court agreement in favour of the SICC is presumed to be exclusive in nature, unless there is wording to the contrary.[75] Further, where parties' choice of court agreement to submit disputes to 'the jurisdiction of the High Court is concluded on or after 1 October 2016', then unless otherwise specified, it shall be construed as including a submission to the SICC.[76]

### *2. Transfer jurisdiction: transfer of proceedings from the High Court to the SICC*

According to Order 110, rule 12(4) of the Rules of Court, generally, a case may be transferred from the High Court to the SICC if:

i. it concerns international and commercial claims;
ii. the parties are not seeking any form of prerogative relief;

[73] Singapore law applies the *forum non conveniens* principles set out in the English case of *Spiliada Maritime Corp v Cansulex, Ltd* [1987] AC 460. For a comparison of the SICC regime and the traditional Singapore High Court regime, see Yip, 'The Resolution of Disputes before the Singapore International Commercial Court' (n 61) 440–4.

[74] Rules of Court, Order 110, rule 1(1). An 'offshore case' does not include proceedings under the IAA commenced by way of originating process and an action *in rem* under the High Court (Admiralty Jurisdiction) Act (Cap 123). See further Rules of Court, Order 110, rule 1(2)(*f*) which defines a case as having no substantial connection to Singapore to mean where Singapore law is not the applicable law of the dispute and the subject matter of the dispute is not subject to Singapore law; or the only connections of the dispute to Singapore are the parties' choice of Signapore law as the applicable law and submission to the SICC's jurisdiction.

[75] SCJA, sections 18F(1)(*a*), 18F(2).

[76] Rules of Court, Order 110, rule 1(2)(*ca*). However, a submission to the SICC will not be construed as including a submission to the High Court (see Order 110, rule 1(2)(*d*)).

iii. it is more appropriate for the case to be heard in the SICC; and
iv. either all parties consent to the transfer or the High court orders the transfer of proceedings on its own motion after hearing the parties.

If the case falls within the Hague Convention on Choice of Court Agreements ('HCCCA') regime (to which Singapore is a party, and which it has implemented by local legislation), Order 110 rule 12(3B) of the Rules of Court prescribes the same requirements for transfer, save that no transfer of proceedings can be made unless *all parties consent to the transfer*, whether the transfer is initiated pursuant to a party's application or on the Singapore High Court's own motion. This difference caters to the requirement under Article 5(3) of the HCCCA that in exercising internal allocation of jurisdiction between the courts of a Contracting State, 'due consideration should be given to the choice of the parties'.[77] Interestingly, Order 110 rule 12(3B)—by requiring all parties' consent—imposes a higher threshold than required under Article 5(3). This higher threshold may be justified by the policy objective of ensuring that SICC judgments will be straightforwardly recognised or enforced in other Contracting States. Its stringency is also mitigated through the operation of deeming provisions in the Rules of Court.[78]

### 3. *SICC's subject-matter jurisdiction*

The SICC hears cases of an 'international' and 'commercial' nature. The definition of 'international' under the SICC regime is multilateral, and not forum-centred as it is under the CICC regime. 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.

Rules 1(2)(*a*)(i)–(iv) are, in essence, concerned with identifying the international character of a claim by reference to the connections with

[77] See also HCCCA, art 8(5); and Chong and Yip (n 61).
[78] See Rules of Court, Order 110, rules 1(2)(*ca*), 12(4A)–(4B).

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different States. Save for (ii), the definition is not framed as examining connections to Singapore.

As for the meaning of 'commercial', Order 110 rule 1(2)(*b*) of the Rules of Court provides that a claim is 'commercial' if it arises from a commercial relationship;[79] relates to an *in personam* intellectual property dispute; or the parties have expressly agreed that the subject matter is so.

The provision for parties' right of self-determination as to the nature of the claim in the first instance for the commencement of a suit in the SICC affirms the prioritisation of party autonomy in the SICC framework. Such an approach is also underlined by pragmatism, as it reduces the inefficiency arising from prescribing cumbersome definitions and proof.

### C. *Reflections*

A comparison of the CICC jurisdictional framework with the SICC jurisdictional framework highlights the CICC's limitations. First, the requirement that the dispute has an 'actual connection' with China unduly restricts the number of international commercial cases that can come before the CICC. It also undermines the CICC's claim and aspiration to be a neutral and leading dispute-resolution forum. Compared with the SICC and other international commercial courts,[80] the CICC's jurisdictional framework appears unduly insular when viewed against the global trend of giving effect to party autonomy. There is no explanation proffered by the SPC as to why a jurisdiction agreement by itself cannot confer jurisdiction on the CICC. The only plausible explanation—and not a particularly convincing one—is that cases unconnected with China should not consume the resources of the CICC.

From a more cynical perspective, when taken together with the requirement that the quantum in dispute must exceed RMB300 million, many of the cases that will come before the CICC on the basis of consensual jurisdiction are likely to involve a State-linked Chinese entity engaged in a State-backed project (eg involving infrastructure).[81] In the initial years of the CICC's establishment, at least, only State-linked/State-backed Chinese entities that are involved in major infrastructure projects are likely to persuade a foreign counterparty to the contract to agree to choose the CICC as the forum for dispute resolution. It is also such projects involving substantial Chinese interests (and probably

[79] For a non-exhaustive list of commercial relationships, see Rules of Court Order 110, Rule rule 1(2)(*b*)(i).

[80] The Qatar Financial Centre Courts and the Dubai International Financial Centre Courts, see Z Al Abdin Sharar and M Al Khulaifi, 'The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis' (2016) 46 HKLJ 529, 545; the Netherlands Commercial Court, see 'Jurisdiction Of The Netherlands Commercial Court' (Netherlands Commercial Court) <https://netherlands-commercial-court.com/jurisdiction-netherlands.html>.

[81] See K Schultz, 'Sri Lanka, Struggling in Debt, Hands a Major Port to China' (*New York Times*, 12 December 2017) <https://www.nytimes.com/2017/12/12/world/asia/sri-lanka-china-port.html>.

financing) that the Chinese government is keen to protect. If so, the unstated political objective behind the creation of the CICC becomes apparent. This harks back to our earlier reflection in Part II on the different objectives of the CICC and the SICC.

Second, in respect of transfer jurisdiction, although both the CICC and SICC models tolerate judicial discretion, the latter ensures greater certainty and respect for party autonomy. Whether falling within the HCCCA regime or not, the rules on transfer of proceedings from the Singapore High Court to the SICC take into account parties' choice. This indirectly addresses potential users' concerns over the overt forum control associated with domestic court litigation. In contrast, under the CICC rules, parties' choice is not explicitly regarded as a relevant factor in the exercise of judicial discretion. That said, China's ratification of the HCCCA in the future will give rise to the need to address the relevance of parties' choice in the exercise of transfer jurisdiction (as an aspect of internal allocation of jurisdiction[82]).

Finally, concerning subject-matter jurisdiction, the CICC's definition of 'international' is rigid and underlined by forum-centricity. The CICC's definition of 'commercial' is in need of more formal and detailed clarification. Importantly, unlike the SICC rules, the CICC definitions do not accord to the parties the right of self-determination. This illustrates the difference in the calibration between forum control and party autonomy under the two models of international commercial courts—a difference that can be explained by reference to their different objectives.

## IV. SALIENT PROCEDURAL FEATURES

In Part IV, we compare the degree of innovation and internationalisation within the procedural frameworks of the CICC and the SICC. We first consider the salient procedure features of the CICC.

### *A. The Procedural Features of the CICC*

#### *1. Judges*

The quality of judges is crucial to the success of an international commercial court.[83] Article 4 of the Judicial Interpretation on CICC provides for the appointment of CICC judges:[84]

> Judges of the CICC will be selected and appointed by the SPC from senior judges who are experienced in trial work, familiar with international treaties and customs and international trade and investment practices, and able to use English as a working language.

[82] HCCCA, arts 5(3) and 8(5).

[83] See R Southwell, 'A Specialist Commercial Court in Singapore' (1995) 2 Singapore Academy of Law Journal 274, 275.

[84] Judicial Interpretation on CICC (n 3) art 4.

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As the CICC judges are to be drawn only from the senior judges of the Chinese People's Courts, foreign jurists are not permitted to be appointed to the CICC. To date, 15 CICC judges have been appointed by the SPC.[85] All of them are SPC-level judges, even though Article 4, on its literal wording, permits the appointment of qualified judges from the lower People's Courts. The appointed CICC judges have, on average, 7.5 years of work experience as SPC judges and among them, 12 have obtained a PhD in law. These are therefore experienced and highly qualified judges. Further, eight out of the 15 judges have studied abroad. This international experience may be evidence also of their ability to use English as a working language and their more international outlook.

Nonetheless, there are several problems with Article 4. First, it merely provides for the basic qualifications of the CICC judges. It does not set out the selection process for evaluating the calibre, experience and actual English language ability of the judges. Appointment appears to lie substantially at the SPC's discretion. Given that foreign jurists cannot be appointed to the CICC, a proper and transparent procedure for appointment of Chinese judges as CICC judges is critical to establishing the credibility of the CICC.

Secondly, despite the requirement of English language ability, it is important to note that English cannot be used as the language of proceedings in the CICC. This is unsatisfactory. English is the language of international business: commercial contracts are frequently drafted in English; and parties from countries with different languages usually communicate with each other in English. As the BRI countries speak a variety of languages, English is therefore their '*lingua franca*'. Requiring CICC judges to be able to use English as a working language would seem to open the way for proceedings before the CICC to be conducted in English. Moreover, if Article 4 is read together with Article 9 of the Judicial Interpretation on CICC—the latter of which provides that, if it is agreed to by the other party, a party may submit evidence in English without the need for Chinese translation—it would not be unreasonable to assume that the CICC would be an English-speaking court. However, the Judicial Interpretation on CICC is circumscribed by Article 262 of the CPL, which states that proceedings of cases involving foreign elements shall be conducted in 'languages commonly used in China', that is, Chinese and the languages native to the 55 officially-recognised ethnic minorities in China.[86] Article 6 of the Law on the Organisation of the People's Courts ('LOPC') imposes a similar requirement.[87] The Judicial Interpretation on CICC cannot override this legislation.[88] An

[85] See the CVs of the CICC judges: <http://cicc.court.gov.cn/html/1/219/index.html>. See also W Cai and A Godwin, 'Challenges and Opportunities for the China International Commercial Court' (2019) 68 ICLQ Section III. [86] CPL (n 44) art 11. [87] LOPC (n 24) art 6.

[88] However, some Chinese scholars argue that English language can be used in CICC proceedings through art 4 and 9. See, eg, J Shi and N Dong, 'The Core Issues of China International Commercial Court' (2019) 3, Journal of Xi'an Jiaotong University (Social Science) 116, 121.

underappreciated consequence of the language of CICC proceedings being Chinese (or any of the other native Chinese languages) is that it renders the possibility of submitting evidence in English without the need for Chinese translation far less feasible in practice. After all, both judges and counsel in CICC proceedings would need to refer to the evidentiary materials in the course of the proceedings—for example, in the cross-examination of witnesses. It is simply impracticable for there to be no Chinese translations of evidence in foreign languages.

Third, Article 4 only permits the appointment of Chinese nationals as CICC judges. The absence of international judges significantly diminishes the appeal of the CICC to foreign parties and severely weakens its competitiveness as a credible international dispute-resolution forum. International judges boost user confidence as to the independence of the judicial process, reducing concerns of forum bias or Chinese-party bias.[89] Moreover, with a panel of international judges, an international judge familiar with a foreign law applicable to the dispute in question can be appointed to hear the case, thereby mitigating the shortcomings associated with the process of proving foreign law.[90] However, Chinese legislation—both the Judges' Law and the LOPC—mandate that the judges of Chinese courts must be Chinese nationals.[91]

### 2. *Expert Committee*

To remedy the non-international composition of the CICC judicial panel, the SPC established an 'International Commercial Law Expert Committee' (the 'Expert Committee'). According to the Judicial Interpretation on CICC and the information provided by the SPC,[92] the SPC would be appointing a number of world-renowned experts in international law, commercial law, and the law of their home country to form the Expert Committee. On 24 August 2018, 32 experts were appointed to the Expert Committee.[93] These experts include retired judges, arbitrators, scholars and practitioners. Among the 32 experts, only eight are from the Chinese Mainland. The other 24 experts

[89] Chief Justice Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution' (Dubai International Financial Centre Courts Lecture Series 2015), Supreme Court of Singapore (19 January 2015) <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf>.

[90] DH Wong, 'The Rise of the International Commercial Court: What Is It and Will It Work?' (2014) 33 CJQ 205, 217.

[91] LOPC (n 24) art 33; Judges Law of the People's Republic of China (2017 Amendment) (adopted by the Standing Committee of National People's Congress, 1 September 2017; effective on 1 January 2018), art 9 <http://en.pkulaw.cn/display.aspx?cgid=301387&lib=law&EncodingName=big5>.

[92] See (n 59).

[93] See also 'The Decision on Appointment of the First Group of Members for the International Commercial Expert Committee' (China International Commercial Court, 24 August 2018) <http://cicc.court.gov.cn/html/1/219/235/245/index.html>.

come from 15 different jurisdictions.[94] It bears mentioning that the foreign experts generally have extensive international experience. Many have worked in more than one jurisdiction.

Under the CICC framework, Expert Committee members may act as mediators or assist the conduct of the CICC proceedings through offering expert opinions on issues of foreign law or international law. In addition, they may provide advice and suggestions on the development of the CICC and on the formulation of judicial interpretations and judicial policies of the SPC.[95] The Expert Committee is, in its conception, a concession by China to allow limited international influence on CICC processes. If it works well, this innovation could provide a formal avenue for bringing international input into the work of the CICC. It may also, to some extent, make up for the absence of foreign judges on the CICC panel. At present, it is difficult to speculate on the practical utility of the Expert Committee, and much depends on the actual role these foreign experts are able to assume in practice.

### 3. *Lack of foreign lawyer representation*

Under current Chinese law, foreign lawyers do not have a right of audience before the Chinese People's courts. Accordingly, parties to CICC proceedings cannot be represented by foreign lawyers, even though foreign lawyer representation is likely to be desired by litigants of foreign nationalities or where the legal issues in dispute are governed by foreign law. The prohibition of foreign representation also means that foreign law will need to be ascertained before the CICC, as opposed to being determined directly by way of submissions, as is common in arbitration. The role of foreign lawyers in CICC litigation is thus limited to indirect participation, such as supporting Chinese counsel in the proceedings. In any event, given that CICC judges are Chinese judges and the language of proceedings is restricted to Chinese or other recognised native languages used in China, then setting aside the legal prohibition on foreign lawyer representation, engaging experienced Chinese counsel is in practice the only sensible course of action for litigants in CICC proceedings.

### 4. *Ascertainment of foreign law*

Determining the content of foreign laws is an important yet difficult task in international commercial litigation. As a result of the political, economic, cultural and historical differences among the BRI countries, their legal

[94] For the experts' profiles, see <http://cicc.court.gov.cn/html/1//219/235/237/index.html>.

[95] Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For trial implementation) (Notice of the General Office of the Supreme People's Court, 30 Novermber 2018) <http://cicc.court.gov.cn/html/1/219/208/210/1146.html>.

systems vary greatly. Therefore, the efficiency and reliability of the CICC will depend to a considerable degree upon the proper identification, interpretation and application of foreign law.

According to Article 8 of the Judicial Interpretation on CICC, the content of foreign law may be ascertained in the following ways: (1) by the parties; (2) by Chinese and foreign legal experts; (3) by institutions offering foreign law ascertainment services; (4) by the experts of the Expert Committee; (5) by the central authority of the foreign country, which has entered into a judicial assistance treaty with China; (6) by the Chinese embassy or consulate in the foreign country; (7) by the embassy of the foreign country in China; or (8) by any other reasonable means. The materials and expert opinions on foreign law provided in one or more of these ways should be presented during the CICC hearing, and the parties are to be given an opportunity to be heard.[96]

In this respect, Article 8 has expanded beyond the pre-CICC methods of ascertaining the content of foreign law in Chinese litigation:[97] methods (3), (4) and (8) are new inclusions. The 'other reasonable means' addition (method (8)) presumably includes ascertainment of foreign law through a BRI online law database that the SPC plans to establish in the future.[98] While the augmentation of methods to ascertain foreign law is a helpful development, three issues concerning Article 8 require clarification. First, it is unclear what kind of institutions providing foreign law ascertainment services may fall within the ambit of Article 8. Currently, the official CICC website lists four such institutions.[99] There is, however, no further guidance on how an institution may obtain authorisation to submit expert opinions on foreign law in CICC litigation; or what the authorisation criteria are. Secondly, it is unclear if there is a hierarchical order between the opinions by the different experts/institutions. In other words, does the opinion of some experts (for example, the experts of the Expert Committee) carry more weight as compared with the opinions of others? Parties may take the issue of weight into consideration in sourcing an opinion on the content of foreign law. As parties before the CICC are not entitled to a right of appeal,[100] 'getting it right' is important, because there is no second chance. Further, if a member of the Expert Committee—an institution formally organised by the CICC—has misstated the content of foreign law, do the parties have any recourse—for example, the chance of a hearing *de novo*?

[96] Judicial Interpretation on CICC (n 3) art 8.

[97] See Private International Law Act (n 58) art 10; Judicial Interpretation I (n 55) arts 17–18.

[98] 'Press Conference by the Supreme People's Court on Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions' (China International Commercial Court, 28 June 2018) <http://cicc.court.gov.cn/html/1/218/149/192/550.html>.

[99] See 'Foreign Law Ascertainment' (China International Commercial Court, 29 June 2018) <cicc.court.gov.cn/html/1/219/206/207/index.html>.

[100] See discussion below at subsection (6).

Finally, it is important to note that Article 8 of the Judicial Interpretation on CICC operates within the existing Chinese legislative framework, which is underlined by a strong 'homeward trend' in application.[101] Under Article 10 of the Private International Law Act, Chinese law applies by default where foreign law cannot be ascertained or where there is no relevant rule of law after conducting the ascertainment process. In practice, Article 10 has been manipulated by Chinese judges to expand the application of the *lex fori*.[102] This dangerous 'homeward trend', if it is allowed to continue, is likely to undermine the CICC's credibility as a neutral and trustworthy forum. In addition, this problem cannot be remedied by Article 8 of the Judicial Interpretation on CICC, which merely augments the means of ascertaining foreign law. To reduce the risk of judicial manipulation, more concrete rules need to be enacted to guide the CICC judges' application of Article 10 of the Private International Law Act.

### 5. *Coram and judgments*

Article 5 of the Judicial Interpretation on CICC provides that the CICC shall appoint a 'collegial panel' for every CICC dispute. For each dispute, a panel of three judges will be constituted. The judgment of the CICC is to be reached by majority decision. Any dissenting opinion may be incorporated into the judgment.[103] The wording of Article 5 expressly indicates that people's assessors—a common feature of Chinese proceedings—may not be appointed to the collegiate panels within the CICC. As international commercial disputes heard by the CICC are usually far more complex than ordinary civil disputes before other Chinese courts, the provision for a professional and legally trained bench is sensible.

Remarkably, Article 5 changes the tradition of civil law countries (including China), which treats each court judgment as the collective decision of the tribunal, by allowing the publication of a dissenting opinion.[104] This is an innovation inspired by the experience of common law jurisdictions and is to be welcomed. It promotes the independence of judges and enhances judicial transparency, thereby improving the credibility of the CICC. However, it remains to be seen whether Chinese judges can adapt to the new practice of issuing dissenting opinions. Further, as there is no right of appeal in the CICC litigation framework, the practical value of a dissenting opinion to the litigants of the relevant dispute is limited; but it is useful for parties in similar disputes that are going through the CICC system.

[101] Z Huo, 'Proof of Foreign Law under the Background of the Belt and Road Initiative' in Sooksripaisarnkit (n 18) 136.

[102] See Q Xu, 'The Codification of Conflicts Law in China: A Long Way to Go' (2017) 65 AJCL 919, 938–40.

[103] Judicial Interpretation on CICC (n 3) art 5.

[104] Z Zhang, 'An Analysis on the Pros and Cons of Publishing Dissenting Opinion' (2006) 3 China Legal Science 182, 183–6.

*6. No appeal mechanism*

CICC judgments are final and conclusive, and not subject to appeal. The reason is self-evident: because the CICC is a constituent part of the SPC, its judgment is a judgment issued by the SPC, the apex court of China.[105]

The absence of an appeal mechanism, as is the case for international commercial arbitration, may be attractive to commercial parties who desire finality and speed in dispute resolution. Moreover, the proposed Brussels International Business Court similarly does not provide for a right of appeal.[106] The absence of an appeal mechanism is thus not by itself a fatal flaw. But this limitation within the conservatively designed CICC may exacerbate foreign litigants' concern over the quality of justice that can be obtained in the CICC.

Moreover, the deprivation of the parties' right to appeal may spark a constitutional challenge. Under Chinese law, the right to appeal is guaranteed by Chinese legislation, including the CPL and the LOPC.[107] When the CICC takes its jurisdiction based on party agreement to submit their disputes to the CICC, it may be said that the parties, being cognisant of this aspect, have by implication agreed to exclude a right of appeal. When the CICC takes its jurisdiction on a non-consensual basis, however, this argument has no weight. In CICC's initial years of operation, its docket is likely to mainly comprise transfer cases.

*7. Evidence*

Article 9 of the Judicial Interpretation on CICC sets out the rules of evidence. First, CICC proceedings do not require Chinese translation of evidence into the English language, if the parties so agree. However, as discussed above,[108] this procedural innovation is unlikely to be significant in practice. Secondly, CICC proceedings do not require the notarisation and legalisation of evidence.[109] China is presently not a party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. In conventional Chinese litigation, evidence that is obtained in a foreign jurisdiction is generally required to be notarised and legalised. As translation, notarisation and legalisation are all costly, cumbersome and time-consuming processes, such a procedural reform within the CICC framework will greatly improve CICC's efficiency and enhance its attractiveness to users.

[105] For more details, see Cai and Godwin (n 85) Section IV.E.

[106] G Croisant, *The Belgian Government Unveils Its Plan for the Brussels International Business Court (BIBC)*, (Conflict of Laws.net, 22 May 2018) <http://conflictoflaws.net/2018/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc>.

[107] CPL (n 44) arts 10 and 49; LOPC (n 24) art 11.

[108] See text to and around (nn 86–88).

[109] Judicial Interpretation on CICC (n 3) art 9.

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*8. Establishing a one-stop shop for dispute resolution*

Article 11 of the Judicial Interpretation on CICC provides that by setting up the Expert Committee and selecting certain international mediation and arbitration institutions to work alongside the CICC, the SPC shall provide parties with a choice between mediation, arbitration and litigation. Article 12 states that within seven days of accepting the dispute, and upon agreement by the parties, the CICC may appoint members of the Expert Committee or authorise an international mediation institution to mediate the dispute. If the parties have reached a mediation agreement, the CICC can issue a conciliation decision or, at the parties' request, convert the mediation agreement into a court order, to facilitate its recognition/enforcement abroad.[110]

Alternatively, if the parties choose to resolve the dispute by arbitration within the CICC one-stop shop, the dispute will be referred to an international arbitration body. In such cases, the parties may apply to the CICC, either prior to the commencement of or during the arbitration proceedings, for judicial assistance, such as the grant of a freezing order or other injunctions. Following the issuance of an arbitral award, parties may apply to the CICC for the setting aside or enforcement of the award.[111]

However, the involvement of *international* mediation and arbitration institutions in the CICC one-stop shop is limited. At first sight, the label of 'international' in Article 11 suggests that both Chinese institutions that accept international commercial disputes (most notably, CIETAC) and foreign international arbitration institutions (such as ICC or SIAC) may be involved. However, the actual meaning of 'international' is far more restricted—it refers only to Chinese 'international' institutions. Foreign institutions are barred from joining the CICC one-stop shop. This is because the General Agreement on Trade in Services takes a positive list approach to trade in services, which should include arbitration. A treaty party is required to explicitly (positively) list the sectors and subsectors in which it undertakes market access and national treatment commitments; to date, the Chinese government has not explicitly listed arbitration in its positive list. The Chinese arbitral market is thus presently closed to foreign arbitral institutions. Against this background, it is unsurprising that the first group of CICC international mediation and arbitration institutions appointed by the SPC are all 'Chinese' institutions handling foreign-related matters.[112] This prohibition, arising from constraints in the wide Chinese

[110] Judicial Interpretation on CICC (n 3) arts 11–13. [111] ibid art 14.

[112] These institutions are: (1) China International Economic and Trade Arbitration Commission (CIETAC); (2) Shanghai International Economic and Trade Arbitration Commission; (3) the Shenzhen Court of International Arbitration (SCIA); (4) Beijing Arbitration Commission; (5) China Maritime Arbitration Commission; (6) Mediation Center of China Council for the Promotion of International Trade (CCPIT); and (7) Shanghai Commercial Mediation Center. See Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the 'One-stop' Diversified International

legal framework, however, severely diminishes the 'international' character of the CICC one-stop shop.

Relevantly, amid the recent, escalating trade war with the United States, Xi has renewed a pledge to further liberalise China's markets for trade and investment.[113] Against this legal-political backdrop, liberalisation of the Chinese arbitration market appears a possibility. Whether foreign arbitration institutions will be allowed to participate in the CICC dispute resolution ecosystem is likely to depend, at the very least, on that possibility materialising.

### *B. The Salient Procedural Features of the SICC*

As the comparison with the SICC is intended to facilitate a more in-depth understanding of the objective, operation and limitations of the CICC, the following discussion will, where relevant, consider the same procedural features that have been analysed with respect to the CICC framework.

#### *1. Foreign judges*

A distinctive advantage of the SICC over the CICC is that the former's judicial panel comprises both local and foreign judges.[114] The foreign judges do not enjoy tenure and are appointed as 'International Judges' for a term to hear cases as the Chief Justice specifies.[115] To date, 16 International Judges, drawn from both civil and common law jurisdictions, have been appointed: one from Austria;[116] four from Australia; one from Canada; one from France; one from Hong Kong; one from Japan; six from the United Kingdom and one from the USA. There are no explicit requirements for the nationality composition of the panel of International Judges, nor are there guidelines for the qualifications of International Judges. Although the formal power of appointment lies with the President of Singapore, he/she is to act on the advice of the Prime Minister, who in turn consults the Chief Justice of Singapore.[117] As such, appointments are made on the Chief Justice's recommendations. Of the 16 International Judges, 15 are former/current judges; and one (the Japanese International Judge) is a renowned academic and former Chairperson of the appellate body of the World Trade Organisation.

Commercial Dispute Resolution Mechanism (promulgated by the General Office of Supreme People's Court, 13 November 2018) <http://cicc.court.gov.cn/html/1/219/208/210/1144.html>.

[113] S Denyer, 'Facing Trade War with US, China's Xi Renews Vow to Open Markets, Import More' (*Washington Post*, 10 April 2018) <https://www.washingtonpost.com/world/chinas-president-pledges-to-reduce-investment-restrictions-tariffs-on-auto-industry/2018/04/09/e3012ffa-3c39-11e8-955b-7d2e19b79966_story.html>.

[114] See <https://www.sicc.gov.sg/about-the-sicc/judges>.

[115] Constitution of the Republic of Singapore (1965), sections 95(8)–(9) [*The Singapore Constitution*].

[116] Irmgard Griss' appointment was not renewed after her three-year term, as she was elected to the Austrian Parliament.

[117] The Singapore Constitution, arts 95(4) and (5)

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In *Rappo, Tania v Accent Delight International Ltd*, Chief Justice Sundaresh Menon commented that when a dispute is governed by foreign law, this should carry less weight when determining the Singapore court's international jurisdiction by reference to the *forum non conveniens* analysis, 'if the Singapore courts, through their International Judges in the SICC, are familiar with and adept at applying that foreign law'.[118] The point is this: the availability of foreign judges trained in the foreign law that applies to a relevant dispute neutralises the advantage of having the case heard in a foreign domestic court or even arbitration. The force of this point is enhanced when the matter is considered against the broader picture that in SICC proceedings, it is possible for foreign law to be determined directly by submissions and for parties to be represented by foreign lawyers.

### 2. *Representation by foreign lawyers*

The traditional requirements for granting foreign lawyers rights of audience before the Singapore High Court on an *ad hoc* basis are extremely stringent.[119] In contrast, to complement the advantage of having International Judges decide SICC cases, there is greater latitude for foreign representation in SICC proceedings.[120] In this connection, that a dispute is an 'offshore' case is significant: this is the main category of cases where parties may be represented by foreign lawyers.[121] The intention underlying this aspect of liberalisation of the Singapore legal profession is crystal clear: to attract litigants who would not otherwise choose litigation in a national court. There is one exception: only Singapore qualified lawyers are allowed to represent parties in IAA applications brought before the SICC. The exclusion of foreign representation in IAA applications has been justified on the basis that IAA is Singapore legislation and the local lawyers are well versed in the IAA jurisprudence.[122] There is therefore little or no need for foreign legal expertise.

For a foreign lawyer to represent parties for any purpose in SICC disputes, he or she must be registered under the Legal Profession Act ('LPA'). The SICC regime differentiates between foreign lawyers who are granted full registration and foreign lawyers who are granted restricted registration. The

[118] [2017] SGCA 27, [2017] 2 SLR 265, [122].

[119] See Legal Profession Act (Cap 161, 2009) section 15; *Re Andrews Geraldine Mary QC* [2013] 1 SLR 872, [66].

[120] See Singapore International Commercial Court Practice Directions, para 26 <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions---amended-version-(final)77b73133f22f6eceb9b0ff0000fcc945.pdf>.

[121] SCJA, section 18M. See Singapore International Commercial Court User Guides, Note 3 (Foreign Representation) <https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-user-guides-31jan19.pdf>.

[122] 'Second Reading Speech by Ms Indranee Rajah, Senior Minister of State for Law and Finance, on Supreme Court of Judicature (Amendment) Bill' (n 66).

type of registration determines the requisite qualifications of the foreign lawyer and the scope of work that the foreign lawyer may undertake.[123] Only a foreign lawyer who is granted full registration may represent parties in SICC and appeal proceedings. A foreign lawyer who is granted restricted registration, by contrast, may only represent parties for the purposes of making submissions on matters of foreign law as permitted by the SICC or the Singapore Court of Appeal.

At the time of writing, the register of foreign lawyers shows that 85 foreign lawyers from different jurisdictions have been granted full registration and two English lawyers have been granted restricted registration.[124]

### 3. *Ascertainment of foreign law*

As Singapore is a common law country, the traditional mode of determining the content of foreign law is to plead foreign law as facts, which can then be proved by expert evidence.[125] Although this traditional mode of proof is retained under the SICC regime, the SICC may order that any question of foreign law be determined on the basis of submissions instead of proof.[126] Before making this order for submissions, the SICC must be satisfied that all parties are or will be represented by a foreign lawyer with full/restricted registration, or a registered legal expert[127] 'who is suitable and competent to submit on the relevant questions of foreign law'.[128]

The appointment of International Judges and the greater latitude of foreign representation in SICC proceedings are not only designed to boost the international image of the SICC. These salient features also facilitate the more efficient mode of determining foreign law by direct submissions.[129]

### 4. *Quorum and judgments*

SICC proceedings are generally to be heard by a single judge or a quorum of three judges.[130] Exceptionally, a dispute may be heard by two judges.[131] To date, International Judges have been assigned to hear disputes, either as a single

[123] See Sections 36P(1) and (2) LPA.

[124] See <https://www.sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyers>. The type of registration determines the requisite qualifications and scope of work which the foreign lawyer may undertake: see LPA, sections 36P(1) and (2).

[125] D Foxton QC, 'Foreign Law in Domestic Courts' (2017) 29 Singapore Academy of Law Journal 194.

[126] SCJA, section 18K; Rules of Court, Order 110, rule 25(1).

[127] Rules of Court, Order 110, rule 1(1)—'registered law expert' refers to a law expert registered under section 36PA of the LPA. A registered law expert may appear in SICC proceedings (including appeals) and give advice and prepare documents 'solely for the purposes of making submissions' on matters of foreign law as permitted by the SICC.

[128] See Rules of Court, Order 110, rule 25(2). On showing 'suitability' of the foreign jurist, see Order 110, rule 25(2A) Rules of Court. The SICC may require evidence of good standing.

[129] SICC Committee Report (n 31) 17.

[130] SCJA, section 18G.

[131] SCJA, section 18(H)(5).

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judge or as a member of a three-judge panel.[132] As Singapore is a common law jurisdiction, dissenting opinions are included in the published judgments. All SICC judgments, as with Singapore judgments in general, are in English.

Interestingly, International Judges have been assigned to hear SICC cases,[133] including as a single judge, when the claims are governed by Singapore law.[134] It may thus be said that the Singapore judiciary invites the International Judges to not only participate but also take the lead in the development of Singapore commercial law. The CICC's judicial composition, on the other hand, preempts direct foreign influence.

### 5. *Evidence*

In SICC proceedings, parties may apply for the disapplication of (all or some of) the Singapore rules of evidence and for the application of other rules of evidence,[135] including rules of evidence that may not constitute part of foreign law.[136] Of course, the SICC has discretion, for the 'just, expeditious and economical disposal' of the case, to modify (with the parties' consent) the parties' agreement or stipulate further supplementary conditions.[137] Hence, parties may agree to apply the IBA Rules on the Taking of Evidence in International Arbitration, with appropriate adaptation, to their action.[138] The Singapore procedural liberalisation in this regard is far bolder than the procedural reform relating to evidence under the CICC, which merely dispenses with the need for Chinese translations of evidence in English. It also demonstrates the Singapore judiciary's level of comfort with foregoing a greater degree of forum control.

### 6. *Right to appeal*

Any appeal from an SICC judgment is heard by the Singapore Court of Appeal.[139] However, unlike the High Court, parties to an SICC dispute may by written agreement waive, limit or vary their rights of appeal.[140] The right

[132] See <https://www.sicc.gov.sg/hearings-judgments/judgments>. See further analysis in M Yip, 'The Singapore International Commercial Court: The Future of Litigation?' (2019) Erasmus Law Review (forthcoming).

[133] Including procedural/interlocutory matters.

[134] This includes cases where the foreign law is presumed to be the same as Singapore law because parties did not prove the content of foreign law. See, eg, *Telemedia Pacific Group, Ltd. v Yuanta Asset Management International Ltd* [2016] SGHC(I) 3 (Patricia Bergin IJ).

[135] Traditionally, rules of evidence are considered procedural matters to be governed by *lex fori*.

[136] Rules of Court, Order 110, rule 23.

[137] Rules of Court, Order 110, rule 23(3).

[138] Singapore International Commercial Court User Guides, Note 4 (Disapplication of Singapore Evidence Law) para 23 <https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-user-guides-31jan19.pdf>.

[139] The appellate bench shall be appointed by the Chief Justice and it can comprise International Judges.

[140] 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>.

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to self-determination in this regard helps parties to control costs exposure and delay in obtaining finality of outcome.

### 7. *Confidentiality orders*

In SICC proceedings, the default position is open court hearings and the publication of its judgments. This is to give effect to the public interest rationale for setting up the SICC: to enable open and coherent development of commercial law. However, unlike in traditional litigation, a party to SICC proceedings may apply for a confidentiality order: to conduct the hearing in camera; to prohibit the publication of information or documents relating to the case; or for the sealing of the court order. In exercising its discretion, the SICC takes a more generous approach in 'offshore' cases and cases where parties have agreed to making such an order.[141]

## C. *Reflections*

In sum, the CICC framework only permits a very limited extent of foreign participation, through the work of the Expert Committee. It resists more overt forms of foreign influence on the CICC dispute-resolution processes, such as appointment of foreign judges, representation by foreign lawyers, and permission for foreign international arbitration centres and mediation centres to participate in the CICC one-stop shop. Its limited degree of internationalisation indicates a desire to retain strong forum control. Similarly, procedural innovations within the CICC litigation framework are limited and not particularly striking. Nor are they coherently structured to enhance the effectiveness of the framework—as is amply illustrated by the inconsistency between the language of proceedings being restricted to 'languages commonly used in China' and the dispensation allowing evidence to be furnished in English without Chinese translation. Of course, as explained earlier, these limitations are generally attributable to the constitutional origins of the CICC and existing legal conditions. But the more pointed question to ask is this: can the CICC become a truly *international* commercial court in the future, as its framework continues to develop? Technical defects may be cured, but mindset and ideologies are generally more difficult to change.

By comparison, the SICC procedural framework is far more internationalised. It embraces the participation of foreign judges, foreign lawyers and foreign legal experts in its litigation process and judicial law-making. Its signature internationalised framework assures users of the impartiality, competence and independence of the judicial process. Its procedural innovations are also more striking, coherent and comprehensive.

[141] Rules of Court, Order 110, rule 30(2).

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The framework, given its enhanced scope for party choice in various aspects, has a strong flavour of international commercial arbitration practice. However, the SICC differs from arbitral practice in that parties' choices are generally subject to judicial approval. This strategic approach is intended to increase SICC's appeal to potential users, who may prefer litigation for its greater transparency and accountability but are more comfortable with arbitration by reason of its neutrality and flexibility. The SICC has been thus described as 'a careful marriage between litigation and arbitration'.[142]

Accordingly, based on user appeal alone, the SICC is the stronger contender for international commercial disputes than the CICC. The SICC operates as a business, with an intense focus on attracting disputes to Singapore. In contrast, the design of the CICC is conservative and insular in many respects, because it operates as a safeguard for the BRI and Chinese interests in it. It is not designed to compete for adjudication business.

Having gained an in-depth understanding of the CICC's objective, operations and limitations through a comprehensive comparison with the SICC, we now turn to a discussion of the main challenges confronting the CICC and our proposals for change. In this connection, there is much to be learnt from the SICC's experience.

## V. THE CICC'S CHALLENGES AND PROPOSALS FOR CHANGE

### *A. Challenges Confronting the CICC*

#### *1. Enforceability of CICC judgments in China and abroad*

The enforceability of judgments across borders is a paramount consideration for litigants in international commercial disputes, as parties are likely to come from different jurisdictions and their assets may be located in several jurisdictions. For this reason, since the launch of the SICC, Singapore has worked relentlessly, through a combination of formal and informal avenues, to increase the international enforceability of its judgments. It signed and ratified the HCCCA in 2016. The Supreme Court of Singapore entered on 19 January 2015 into a non-binding 'Memorandum of Guidance' with the DIFC Courts concerning the reciprocal enforcement of money judgments.[143] On 31

[142] S Chong, 'The Singapore International Commercial Court: *A New Opening in a Forked Path*' (21 October 2015) at [5.2] <http://www.supremecourt.gov.sg/Data/Editor/Documents/J%20Steven%20Chong%20Speeches/The%20SICC%20-%20A%20New%20Opening%20in%20a%20Forked%20Parth%20-%20London%20(21.10.15).pdf>.

[143] See Supreme Court of Singapore and DIFC Courts, 'Memorandum of Guidance as to Enforcement Between the Supreme Court of Singapore and the Dubai International Financial Centre Courts', 2015 <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/dubai-mog-2015-cj-menon-and-cj-of-difc-(memorandum-of-guidance)4bb63033f22f6eceb9b0ff0000fcc945.pdf>.

August 2018, the Supreme Court of Singapore entered into a Memorandum of Guidance with the SPC on the recognition and enforcement of money judgments in commercial cases.[144] To foster trust and collaboration between the courts of different Asian countries, the Asian Business Law Institute is now undertaking a project to harmonise the rules for the recognition and enforcement of foreign judgments in Asia.

Similarly, the international enforceability of CICC judgments is imperative for its success and its biggest challenge. To be clear, the enforceability of CICC within China is assured by the provisions of the Judicial Interpretation on CICC, which states that all judgments and rulings issued by the CICC are legally effective. It also provides that a conciliation decision issued by the CICC and signed by the parties shall have the same legal effect as a court judgment. The parties may apply to the CICC for the enforcement of these judgments, rulings, and conciliation statements.[145]

The international portability of CICC judgments is, however, limited. By August 2018, China had signed bilateral judicial assistance treaties in civil and commercial matters with only 39 countries. Of these bilateral treaties, 37 have taken effect to date[146] provide for the reciprocal recognition and enforcement of judgments. As for multilateral arrangements, China has not ratified any multilateral convention on the recognition and enforcement of civil and commercial judgments. At the time of writing, China has signed but not ratified the Hague Convention on Choice of Court Agreements ('HCCCA').[147] As expediting the ratification of the HCCCA would undoubtedly improve the international enforceability of Chinese judgments (including CICC judgments), it can be expected that China will ratify the HCCCA in the near future.

Currently, a practical way of overcoming limitations in the recognition and enforcement of CICC judgments abroad, without affecting the business of the CICC one-stop shop, is to promote the use of CICC arbitration services. An arbitral award may be enforced in more than 150 countries under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the New York Convention), to which China is a Contracting State.

[144] See H Baharudin, 'Singapore and China Courts Agree on Guide for Money Judgement in Commercial Cases to Be Recognised in Each Other's Country' (*The Straits Times*, 3 September 2018) <https://www.straitstimes.com/singapore/singapore-and-china-courts-agree-on-guide-for-money-judgment-in-commercial-cases-to-be>.

[145] Judicial Interpretation on CICC (n 3) art 17.

[146] D Luo, 'Absorbing all Useful Ideas and Pushing Development by Collective Efforts: A Keynote Speech by Luo Dongchuan at the First Seminar of the International Commercial Expert Committee' (China International Commercial Court, 26 June 2018) <http://cicc.court.gov.cn/html/1/218/62/164/1061.html>.

[147] See <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>.

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*2. Building a case stream for the CICC*

To date, almost all SICC cases have been transfer cases. The first case to be filed directly in the SICC occurred in February 2018, four years after its launch. This reveals the challenge of persuading the business community to *choose* the SICC, a new mechanism, as the forum for dispute resolution. A newly launched and untested court is after all a source of uncertainty for commercial parties and their legal advisors. The SICC's initial track record is thus built on transfer cases. However, given its objective, the SICC's success will remain limited and superficial if its docket largely comprises transfer cases. Generating a steady stream of cases based on consensual jurisdiction is therefore another challenge for the SICC, especially given the availability of international commercial arbitration.

The CICC is confronted with the same challenge, if not a greater one, given its more conservative design and stringent jurisdictional requirements. Foreign commercial parties and their legal advisors are likely to be even more hesitant in choosing the CICC as the forum for dispute resolution. The general difficulty of enforcing foreign judgments in China[148] may to some degree increase the appeal of choosing the CICC, if the defendant to the potential litigation has substantial assets in China. However, as in the case of the SICC, parties are likely to choose international commercial arbitration instead.

Adopting the SICC's initial strategy, the CICC similarly accepted some transfer cases by the end of 2018[149] to launch the operation of its judicial machinery. Its track record in deciding these transfer cases will be critical to convincing commercial parties of the CICC's credibility. However, given the CICC's objective, it may be that boasting of a large case load is not its primary goal. Even so, proving to the international community that the CICC works is important for the CPC and its goal of safeguarding the BRI and Chinese interests. In this connection, some improvements to the CICC may

[148] Unless there are treaty arrangements for the enforcement of foreign judgments, the enforcement of foreign judgments under Chinese domestic rules relies principally on the principle of reciprocity. Enforcement pursuant to domestic rules is far from straightforward and invoked infrequently (see Tang *et al.* (n 52) 148 and 172). only three foreign judgments have been recognised in recent years pursuant to the domestic rule channel (See W Zhang, 'Sino–Foreign Recognition and Enforcement of Judgments: A Promising "Follow-Suit" Model?' (2017) 16 ChineseJIL 515, 521).

[149] The cases which the CICC has accepted by the end of 2018 were based on exercise of transfer jurisdiction, as the SPC announced that the CICC has accepted these cases pursuant to Articles 20 and 38 of the CPL. Article 20 of the CPL provides for the trial jurisdiction of the SPC as noted above, and Article 38 provides that People's Courts at higher levels shall have the authority to try civil cases over which People's Courts at lower levels have jurisdiction as courts of first instance. Therefore, although the SPC did not highlight that the CICC cases accepted to date are transfer cases, such a surmise may be made. See 'The China International Commercial Court of the Supreme People's Court of China has accepted a Number of Cases concerning International Commercial Disputes' <http://cicc.court.gov.cn/html/1/219/208/210/1152.html>. The CICC had its first hearing (a shareholder dispute) in May 2019: <http://cicc.court.gov.cn/html/1/219/208/210/1237.html>.

be made to increase user confidence. It is to this forward-looking aspect of our analysis we now turn.

### B. Proposals for Change

Having provided a critical review of the CICC and identified its major challenges through a comparative approach, we now propose key improvements to its framework. As it is unrealistic to propose changes to the CICC based on a completely different objective, our suggestions are premised on the *objective of* the CICC and the general conditions of the current Chinese political and legal system.

#### 1. Legislative legitimisation

As we have pointed out, many of the constraints in the CICC framework arise from the fact that the CICC was created and legitimised through a judicial interpretation document, as opposed to a proper legislative process. We thus consider remedying this defect a priority, to pave the way for other necessary changes. In view of the fact that China's ratification of the HCCCA would require a legislative exercise, not only to implement the HCCCA provisions but also to work out the consequent changes to existing regimes of jurisdiction and recognition/enforcement of foreign judgments, initiating a legislative exercise to legitimise the creation of the CICC is timely and could take place in tandem with the HCCCA exercise. Ideally, a stand-alone piece of legislation for the CICC should be enacted to provide for its jurisdiction, procedures, and an explicit recognition that the provisions in this new legislation will take precedence to the extent that they are contrary to other Chinese legislations.

Of course, we recognise that remedying the legitimisation defect alone does not mean that the CICC will or can then adopt every desirable feature of a credible international commercial court. The permissible degree of internationalisation is undergirded by a more deep-seated policy concern to retain forum control. However, removing the technical constraints would help to directly and more constructively tackle this policy concern.

#### 2. Party autonomy

Although the CICC is intended to operate as a judicial safeguard of the BRI, this does not mean that the CICC's jurisdictional scope need be as narrowly circumscribed or forum-centric in design as it currently is. The CICC's jurisdictional scope may encompass other aims that complement or advance that objective. We suggest that building a positive image of the CICC within the international community and fostering Chinese thought leadership in dispute resolution would encourage greater usership of the CICC (including its arbitration and mediation services). Greater usership of the CICC would

strengthen the legal safeguarding function of the CICC. It would also indirectly encourage increased legal cooperation between China and BRI countries. We thus propose that there be greater latitude allowed for party autonomy in determining the CICC's jurisdiction.

In particular, in relation to the CICC's consensual jurisdiction, parties should be allowed to submit disputes to the CICC by way of a written jurisdiction agreement, without the further requirement of actual connection to the chosen Chinese court. If the CICC is concerned about exhausting Chinese resources on dealing with too many disputes, the threshold criterion for the amount in dispute (RMB300 million) should more than ensure that only cases of substantial economic significance are brought before the CICC. Another way of addressing the concern is to prescribe a higher scale of fees for using the CICC, such that the dispute resolution service is funded by the users.

### 3. *Internationalisation*

As Professor Anselmo Reyes, International Judge of SICC and a member of the CICC Expert Committee, has observed, litigants go to an international commercial court because it offers a simplified legal procedure 'for the whole world: common law and civil law jurisdictions'.[150] As such, we suggest that the CICC framework be further internationalised in the near future and in ways that would not provoke acute concerns about the compromise of Chinese sovereignty. First, the CICC should recognise English as one of the permitted languages of proceedings. Specifically, if all the parties to the proceedings so consent, the CICC proceedings may be conducted in English. This complements the procedural possibility of submitting evidence in English without the need for Chinese translation. Moreover, it would showcase the CICC judges' ability to conduct court proceedings in English. This will enhance the CICC's reputation.

Secondly, the meaning of 'international' for the purpose of the CICC's subject-matter jurisdiction should be amended. A more conservative amendment is to adopt the liberalised 'three-element-test' currently applied by other Chinese courts. However, we would respectfully advise the formulation of a multilateral and broadly defined meaning of 'international' for the CICC.

Thirdly, the CICC should make full use of its Expert Committee. There is scope to consider appointing these experts as Expert People's Assessors and to sit with the CICC judges in a collegial panel on an *ad hoc* basis. These foreign experts can provide valuable input in cases requiring very niche expertise. Although they would advise the CICC judges, it would remain the CICC judges' responsibility to decide the outcome and write the judgment.

[150] A Reyes, 'The Necessity of Establishing China's International Commercial Courts and their Prospect' Keynote Speech at the Summit Forum for International Commercial Disputes under the Background of the Belt and Road Initiative Seminar of the International Commercial Expert Committee <http://www.sohu.com/a/270167938_159412>.

### 4. Clarification

In Parts III and IV we identified numerous areas in the CICC rules that require clarification to provide greater certainty to potential users. These areas include the meaning of 'commercial' (subject-matter jurisdiction), the principles governing the transfer of cases from other Chinese courts to the CICC, the selection of CICC judges, uncertainty relating to the ascertainment of foreign law, and ambiguous language in the Judicial Interpretation on CICC.

## VI. CONCLUSION

Our comparative study of the CICC and the SICC, with reference to the wider legal-political contexts of their jurisdictions and their specific rules, has illuminated the objective, operation and limitations of the CICC. We have also set out suggestions for the refinement and improvement of the CICC framework in a way that is consistent with the Chinese objective but which will bring the CICC framework closer to international norms and thereby enhance its attractiveness. This is undoubtedly the main focus of our research.

At the same time, our research also paves the way for more in-depth thinking on the design of international commercial courts in general and future trends in dispute resolution. A number of themes from different perspectives emerge clearly from our discussion. In the design of an international commercial court, two lines of tension are relevant: first, the calibration between forum control and party autonomy; and second, the calibration between forum control and foreign influence. The frameworks of the CICC and the SICC demonstrate that there is no standard template for where the balance should lie. Their success and popularity in the long run will most certainly reveal what a good balance on these matters should look like.

Concerning future trends in dispute resolution, Bookman has helpfully pointed out that the proliferation of international commercial courts *undermines* three conventional narratives.[151] The first conventional narrative is that there is a 'race to the top' for the most efficient dispute resolution mechanism; second, litigation and arbitration are alternative mechanisms; and finally, parties prefer arbitration to litigation in international commercial disputes. Our comparative study is, to a certain extent, consistent with Bookman's thesis. We have shown that litigation is offered alongside arbitration and mediation, whether in the CICC one-stop shop or in the case of the SICC situated in the Singapore legal landscape. It is now a 'race to the top' to be the most efficient and attractive dispute resolution centre, which necessarily divides the dispute resolution landscape by jurisdiction,[152] instead

[151] PK Bookman, 'The Adjudication Business' Vanderbilt Law Review (forthcoming).

[152] Similarly, in respect of the emergence of international commercial courts in Europe, Bookman observes that 'balkanization of the market is the goal or is desirable in its own right', ibid, 41.

of division by the kind of dispute resolution mechanism. Ironically, the label 'international commercial court' and the framework design of these courts (SICC in particular) seek to neutralise jurisdictional marking. The SICC arbitral-esque framework also indicates that one possible trend is innovation through hybridisation. This is not a strikingly new phenomenon, as the twinning of arbitration and mediation in arb-med mechanisms has already occurred. Importantly, the mix of the two mechanisms does not translate into the sum of their respective advantages. Finally, quite apart from Bookman's thesis, we predict that litigation in future will likely operate within an increasingly internationalised framework. It will be a phenomenon driven by the proliferation of international commercial courts, and being the result of increasing cross-border interactions. Even the more conservatively designed CICC admits a limited degree of international participation, and we think that it will come under increased pressure to become more internationalised over time.